No. 13-1080

IN THE

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

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

BRIEF OF *AMICUS CURIAE* PROFESSOR ALEXANDER VOLOKH IN SUPPORT OF RESPONDENT

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

QUESTIONS PRESENTED

The question presented by the Government is as follows:

1. Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak "jointly * * * develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by 49 U.S.C. 24308(c) (Supp. V 2011). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917. The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

Amicus proposes that the following question be added:

2. Whether Congress's grant of regulatory authority to Amtrak should be analyzed under the Fifth Amendment's Due Process Clause, rather than under a private delegation doctrine having no basis in this Court's precedent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTERESTS OF THE *AMICUS CURIAE*[1]

Alexander "Sasha" Volokh is an associate professor at the Emory University School of Law. He teaches, writes, and blogs about constitutional law, administrative law, and legal issues related to privatization, and he has an interest in the sound development of these fields. He has critiqued the D.C. Circuit's reasoning in this case in a recent article. Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931 (2014).

SUMMARY OF THE ARGUMENT

In the case below, the D.C. Circuit held that federal lawmakers could not delegate regulatory authority in any form to private entities. In doing so, it created a private delegation doctrine with no basis in this Court's precedent, muddled the constitutional private–public distinction, and left unanswered an important due process question. This Court should

---

[1] Pursuant to Rule 37.6 *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

The parties' letters consenting to the filing of this brief have been filed with the Clerk's office in conjunction with the certificate of service.

either affirm the decision below on due process grounds or vacate it and remand with instructions to consider Respondent's Due Process Clause argument.

By holding that even the provision of an intelligible principle was insufficient to sustain Congress's grant of authority to Amtrak, the D.C. Circuit misstated this Court's holdings in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), *Currin v. Wallace*, 306 U.S. 1 (1939), and *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533 (1939).

Rather than adopting a per se rule against delegation to private parties via the non-delegation doctrine, this Court has analyzed Congress's grants of authority to private entities under "the due process clause of the Fifth Amendment." *Carter Coal*, 298 U.S. at 311.

This Court has determined that Amtrak is a state actor for constitutional purposes, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), which implies that it is bound by the Due Process Clause. Even if *Lebron* did not control this case, Amtrak's actions under section 207 of the Passenger Railroad Investment and Improvement Act of 2008 are quintessential examples of state action. The D.C. Circuit's holding, that Amtrak can be private for non-delegation purposes but a state actor for First Amendment purposes, *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013), needlessly creates a second test for the constitutional private–public distinction.

Analyzing grants of regulatory authority to private entities under the Due Process Clause better protects accountability for two reasons. First, the Due Process Clause is naturally suited to issues of fairness and impartiality, which better corresponds to the concerns that one might have regarding private delegations. Second, it is incorporated against the states through the Fourteenth Amendment. Third, it preserves the availability of a damages action for injured parties.

ARGUMENT

I. The D.C. Circuit's Private Delegation Theory is Contrary to Supreme Court Precedent.

The D.C. Circuit's private delegation theory is contrary to Supreme Court precedent because: (1) this Court has previously upheld delegation of authority to private parties; and (2) this Court has not previously found delegation to private parties to be more suspicious under the non-delegation doctrine than delegation to public parties. *Carter Coal*, which the D.C. Circuit relied on for its private non-delegation holding, is more properly understood not as a non-delegation case at all, but as a due process case. This Court should resolve the confusion among lower courts, which have mixed due process restrictions with delegation principles.

A. This Court has Repeatedly Upheld a Delegation of Authority to Private Parties.

This Court upheld a delegation to private parties in *Currin v. Wallace*, 306 U.S. 1 (1939) and *United States v. Rock Royal Coop.*, 307 U.S. 533, 577 (1939).

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. Such a power has often been 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); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935). In *Currin*, this Court upheld the delegation to the industry members and did not distinguish the delegation from the delegation to the President upheld in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). *See Currin*, 306 U.S. at 15. Therefore, the delegation of power did "not involve any delegation of legislative authority." *Id.*

The fact that this Court has upheld a delegation to private parties by analogy to a similar delegation to the President—without expressing any reservations based on the private nature of the delegates—proves that the non-delegation doctrine does not distinguish between public and private parties.

Rock Royal concerned a challenge to the Agricultural Marketing Agreement Act of 1937, a statute aimed at assisting in the marketing of agricultural commodities. *Rock Royal Coop.*, 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 (by number or volume and if the Secretary of Agriculture, with approval of the President, once determined that the failure to consent by the handlers obstructed the declared policy of the act). *Id.* at 547. This 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. This Court reasoned that because Congress could place the order into effect without any vote, it was permissible for it to "provide for approval or disapproval in such way or manner as it may choose." *Id.* at 578. This Court recognized "the delegation of authority to producers to approve a marketing order without an agreement of handlers." *Id.* at 574, 577. Notably absent from the analysis is any mention of the public or private nature of the holders of their delegated powers.

B. Private Delegations Are Not More Suspicious Than Public Ones

It is true that *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), has language questioning the legitimacy of private delegations:

> [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? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

Id. at 537. But this discussion was dictum. Moreover, this Court went on to find the delegation invalid because the statute insufficiently constrained the President; the constraints on the President were, this Court found, likewise insubstantial. Thus, *Schechter* had no occasion to opine on whether the non-delegation doctrine constrained delegations to private parties more than it to public parties.

C. *Carter Coal* is Most Properly Seen as a Due Process Case, Not a Non-Delegation Case.

The D.C Circuit chiefly relied on *Carter Coal* in disapproving of private delegation. *See Ass'n of Am. R.Rs.*, 721 F.3d at 670–71. But, while *Carter Coal* did disapprove of a private delegation, its holding was not based on the non-delegation doctrine.

In *Carter Coal*, this Court disapproved a delegation of power to some members of industry to impose regulations on other members of industry, finding it 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 imply an invocation of the non-delegation doctrine. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) (holding that "delegating a governmental power to religious institutions" implicates the Establishment Clause).

In fact, *Carter Coal* specifically states which part of the Constitution 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; *see also* U.S. CONST. amend. V.

This Court has repeatedly recognized that *Carter Coal* is a due process case, not a non-delegation doctrine case. *See Mistretta v. United States*, 488 U.S. 361, 373 (1989) (listing *Panama* and *Schechter* as the only two cases to strike down statutes under the non-delegation doctrine, and omitting *Carter Coal*); *accord Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474 (2001); *see also 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) (panel decision of three judges, including then-Judge Scalia, stating that, although *Carter Coal* "discussed" the delegation doctrine, its holding seems to rest primarily on the Due Process Clause).

A delegation of regulatory power to a financially interested party may violate the Due Process Clause; however, it does not violate the non-delegation doctrine, provided an intelligible principle is present. In this case, Amtrak's statutory intelligible principle is that it "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a). This principle is intelligible enough to save the Congressional delegation from invalidity.

In contrast to the non-delegation approach, the due process approach finds support in many of this Court's cases.

In *Eubank v. City of Richmond*, 226 U.S. 137 (1912), this Court examined a city ordinance allowing the owners of two-thirds of the property abutting a street to establish a "building line" beyond which construction would be illegal. This Court held that this ordinance violated due process:

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. . . .
>
> This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

Id. at 143–44. In other words, there was no protection against the property holders' using their coercive power arbitrarily or to serve their own purposes.

In *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), a city ordinance allowed the construction of a "philanthropic home for children or for old people" in a particular residential district with the written consent of the owners of two-thirds of the property within 400 feet. *Id.* at 118. In language reminiscent of *Eubank*, this Court wrote that it violated due process to give coercive power over the property owner to a minority of property owners who could dissent or abstain "for selfish reasons or arbitrarily," "uncontrolled by any standard or rule prescribed by legislative action" and without any "provision for review." *Id.* at 122; *see generally* Volokh, *supra*, at 941–42.

Against this background, it is clear that *Carter Coal*—with its paean to disinterestedness and its reference to the uncontrolled self-interest of private parties—fits comfortably into the due process line of cases. The *Eubank–Roberge–Carter Coal* rule is still good law. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (prohibiting an optometry board from conducting delicensing proceedings against an optometrist employed by a corporation, because the board members were all private, self-employed optometrists who had a "substantial pecuniary interest" in the proceeding). The private non-delegation approach, however, is not supported by a single case from this Court. And it is the non-delegation approach that the D.C. Circuit explicitly embraced. *Ass'n of Am. R.Rs.*, 721 F.3d at 670, 677 (refusing to consider Respondent's due process argument). Thus, the D.C. Circuit decision is contrary to Supreme Court precedent.

D. This Area of Law Should Be Clarified Because Lower Courts Have Persistently Been Confused

This Court should clarify this area of law because lower courts have intermingled or otherwise confused due process and non-delegation doctrine restrictions on delegation. *See Pittston Co. v. United States*, 368 F.3d 385, 398 (4th Cir. 2004) (intermingling due process concerns with non-delegation concerns); *see also Cospito v. Heckler*, 742 F.2d 72, 87 n.25 (3d Cir. 1984) (intermingling *Schechter* and *Roberge*); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (describing non-delegation problems as greater when allocated to private individuals); *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973), *rev'd on other grounds*, 419 U.S. 544, 557 (1975) ("Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located.").

II. Policing Private Delegations Through the Due Process Clause Makes Greater Jurisprudential Sense.

A. Non-Delegation and Due Process Concerns are Analytically Distinct

The non-delegation doctrine and the Due Process Clause are analytically distinct and serve two different purposes. The non-delegation doctrine is derived from the Vesting Clause of Article I, Section 1 of the U.S. Constitution. *Mistretta v. United States*, 488 U.S. 361, 373 (1989); *see also* U.S. CONST. art. I, § 1. The doctrine is rooted in separation of powers principles and prohibits Congress from delegating its legislative power—thus, it applies only to federal delegations. *See Mistretta*, 488 U.S. at 371–72. To prevent the delegation of power from becoming a forbidden delegation of *legislative* power, Congress must provide an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* at 372.

The Due Process Clause, however, applies to both federal and state action, and it protects concepts of fundamental fairness. *Hurtado v. California*, 110 U.S. 516, 535–36 (1884). A delegation of regulatory power to a financially interested party implicates the Due Process Clause if the party is a state actor. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The financial interest prevents the party from acting impartially, which is an affront to fundamental fairness. *Id.* at 535.

Contrary to the D.C. Circuit's view, these are separate issues. *See Ass'n of American Railroads*, 721 F.3d at 671 n.3. For example, a very specific statute that rewards judges based on the number of convictions would violate due process but not the non-delegation doctrine. Conversely, a hypothetical statute lacking an intelligible principle would not violate due process if the agency implemented the statute with scrupulously fair regulations, but it would violate the non-delegation doctrine because an agency cannot cure Congress's failure to supply an intelligible principle. *See Am. Trucking Ass'n*, 531 U.S. at 472–73.

B. The Fairness Concerns That Drive Hostility to Private Delegation Fit Most Naturally Into a Due Process Framework.

Where bias or fairness is the issue, this Court has consistently provided analysis under a due process framework. In examining bias, this Court will particularly scrutinize a state actor "occup[ying] two practically and seriously inconsistent positions," one of which is subject to bias—particularly financial bias—and the other of which is regulatory. *Ward v. Village of Monroeville*, 409 U.S. 58, 60 (1972).

Part I.C above listed due process cases where the state actor was private, but there is no separate due process doctrine where private actors are involved: indeed, the main cases in this line of doctrine concern government employees. As a general matter, government employees are presumed to be impartial in the execution of their authority; however, when a state actor has a "direct, personal, substantial pecuniary interest" in the result, he has a motivation to act in his own interest. *Id.* (quoting *Tumey*, 273 U.S. at 523). Thus, when there is a substantial pecuniary interest at stake, there is a high likelihood that the delegation will be found unconstitutional under due process.

For example, during Prohibition in the 1920s, an Ohio statute stated that in cases involving violations of the prohibition law, judges would receive a portion of any resulting fines. *Tumey*, 273 U.S. at 516–20. One Ohio mayor served as a judge, and the only way for the mayor and other official parties involved in the arrest to receive their portion of the fine was if the accused were found guilty. *Id.* at 521–23. Due process was violated because a criminal defendant's liberty and property was subjected to a court where the judge had a "direct, personal, substantial pecuniary interest" in a particular outcome. *Id.* at 523.

In a similar case, a substantial part of the income of the village of Monroeville, Ohio, was derived from fines obtained from violations of certain ordinances and traffic offenses. *Ward*, 409 U.S. at 58. The Mayor of Monroeville acted as a judge in this case as well, and although the mayor did not benefit financially from the resulting fines, this Court held that the situation still introduced a substantial pecuniary interest that prevented the mayor from acting as an impartial judge. *Id.* at 60. This Court in *Ward* suggested that the test for bias in these cases is whether the situation "is one which would offer a possible temptation to the average man . . . which might lead him not to hold the balance nice, clear, and true" between the competing interests. *Id.* (internal quotation marks and citations omitted). In both *Tumey* and *Ward*, this Court could not have reached the same result under a non-delegation analysis. Most obviously, a state statute was involved, so the non-delegation doctrine could not possibly have been implicated. Moreover, the delegation of power did not lack an "intelligible principle," but rather, the delegation of power lacked the fundamental guarantee of an impartial judge. When a party has a financial interest in a particular outcome, the likelihood is high that the party cannot be impartial, thus violating due process.

In *Aetna Life Ins. Co. v. Lavoie*, an Alabama Supreme Court justice was the deciding vote on a 5–4 decision regarding punitive damages on a bad-faith claim against Blue Cross-Blue Shield of Alabama. 475 U.S. 813, 816–17 (1986). The justice was also a party in a pending lawsuit against Blue Cross-Blue Shield of Alabama, and the decision of the Alabama Supreme Court would be binding in that case. *Id.* at 817. The decision "had the clear and immediate effect of enhancing both the legal status and the settlement value of [the justice's] own case," and this Court found clear bias and a violation of due process. *Id.* at 823–25.

Under a due process analysis, bias is the issue. Private parties wielding power can often be shown to be biased, to the extent that they can be tempted to use their power one way rather than another because of their self-interest—as in *Eubank*, *Roberge*, and *Gibson*. But this is not always the case. *See Schweiker v. McClure*, 456 U.S. 188 (1982) (upholding delegation of authority to administer Part B Medicare payments, and adjudicate disputed claims, to private insurance companies like Blue Shield of California, finding no bias because hearing officer salaries and medical claims were paid by the federal government, not by corporations). Similarly, one might often presume public parties wielding power to be disinterested, but *Tumey* and *Ward* show that this presumption can be overcome with details of compensation arrangements. The private–public distinction as such is not significant. What is significant is the extent to which one can show a likelihood of bias.

C. Resting the Decision on Due Process Grounds Would Properly Cover State as well as Federal Delegations and Hold Open the Potential for Damages.

The D.C. Circuit suggested that the choice between the non-delegation doctrine and the Due Process Clause was merely a "change in the label" that would not effect a change in the inquiry. *See Ass'n of Am. R.Rs.*, 721 F.3d at 671 n.3. But these doctrines are distinct in several ways. In the first place, the non-delegation doctrine, with its grounding in the Article I Vesting Clause, only applies to delegations by Congress and has no applicability to state delegations. This case admittedly involves a federal statute, but in general, it makes sense to ground the holding in a doctrine—like due process—that is equally applicable to federal and state governments. The primary problem here is the same as in *Eubank*, *Roberge*, and *Gibson*—all cases where state governments granted power to self-interested parties.

Moreover, when the Due Process Clause is at issue, 42 U.S.C. § 1983 or *Bivens* provide actions for money damages. *See Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[2] But no money damages are available for violations of the non-delegation doctrine. Resting this holding on

---

[2] The *Bivens* remedy was expressly extended to due process violations in *Davis v. Passman*, 442 U.S. 228 (1979).

the Due Process Clause makes sense when bias and unfairness are at issue, since it is well accepted that plaintiffs are entitled to money damages for injuries they cause.

D. A Due Process Holding Would Incorporate the Existing State Action Inquiry Rather than the D.C. Circuit's Newly Invented Public–Private Distinction.

It is clear that Amtrak is a state actor. This Court concluded as much in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995):

> We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. at 399–400. Because this Court concluded that Amtrak, as a corporation, was "part of the Government" on account of its foundation and structure, everything that Amtrak does, much like everything a government employee does in the scope of his employment, is state action. *Lebron* arose in a First Amendment context, but the state-action doctrine applies in the due process context exactly the same way. The application of the Due Process Clause to Amtrak thus poses no problems.

Even if *Lebron* did not apply here and Amtrak were considered private, one would have little trouble concluding that Amtrak is a state actor. Amtrak's actions in this case are even more consistent with those actions generally reserved for the government than those it took in *Lebron*. The Passenger Rail Investment and Improvement Act of 2008 gives Amtrak equal authority with the Federal Railroad Administration to develop performance standards and metrics for quality of passenger train operations. 49 U.S.C. § 24101. The creation of regulatory standards is state action typically reserved for government agencies. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (acknowledging that the government created regulatory standards over public utilities and that this Court has found state action "present in the exercise by a private entity of powers traditionally exclusively reserved to the State").

Amtrak's proposed standards surely qualify as regulation for purposes of the "public function" test for two reasons: (1) They were published for public comment, and criticism was reflected in the final version of the metrics and standards—similarly to how federal agencies regulate through a notice and comment process; and (2) the Surface Transportation Board may impose fines based on failure to comply with specific regulations imposed by Amtrak. Amtrak's equal status with the FRA in imposing national regulations shows that Amtrak is a state actor for due process purposes.

However, while the state-action doctrine establishes that Amtrak is "public enough" that it needs to respect constitutional rights, the D.C. Circuit's anti-private-delegation approach relies on establishing, on the contrary, that Amtrak is "private enough" that it cannot be delegated regulatory power from Congress. To thread this needle, the D.C. Circuit was forced to create a separate, ad hoc private–public distinction relying on Amtrak's degree of accountability and degree of self-interestedness. *Ass'n of Am. R.Rs.*, 721 F.3d at 675–76. As noted before, this inquiry has no support in this Court's case law, and the proliferation of public–private tests is confusing and unnecessary where a perfectly serviceable due process inquiry with substantial support in case law exists.

E. The Amtrak Delegation Plausibly Violates Due Process, and the Due Process Argument Was Preserved and Not Reached Below.

As noted in Part II.B above, a due process analysis looks to whether bias is present, regardless of whether the actor is private (as in *Eubank*, *Roberge*, and *Carter Coal*) or public (as in *Tumey*, *Ward*, and *Lavoie*). Whether Amtrak is actually part of the government, or is merely considered so for constitutional purposes, is irrelevant. The central question is whether Amtrak is biased. In this case, Amtrak is motivated by self-interest—a motive statutorily endorsed by Congress.

The likelihood of bias is clear. Amtrak is a corporation, and directors of corporations have a duty to shareholders to maximize the corporation's profit. A corporation could advance its profit goals by creating industry regulations that harm its competitors and increase its own profits. Such presumptively biased regulation, made by a private party whose interest is adverse to its industry competitors, is exactly what *Carter Coal* sought to prohibit. *Cf. L.A. Gas & Elec. Corp. v. R.R. Comm'n of Cal.*, 289 U.S. 287, 311 (1933). The presence of bias is confirmed by the very statute creating Amtrak. Congress not only gave Amtrak the ability to "make agreements with the private sector and undertake initiatives . . . designed to maximize its revenues," 49 U.S.C. § 24101(d), but also *mandated* that Amtrak act as a for-profit corporation. *Id.* § 24301(a). Congress not only gave Amtrak the power to regulate its own industry, but also effectively mandated that Amtrak undermine its competitors when doing so.

Congress's delegation to Amtrak allows Amtrak to regulate the freight rail industry, including Amtrak's competitors, according to its own self-interest, which is the "vice of the ordinance." *Eubank*, 266 U.S. at 144. Amtrak's competitors have no protection from Amtrak using its coercive power to maximize profits at the competitors' expense. Legislative delegation that allows the delegate to regulate "for selfish reasons or arbitrarily. . . is repugnant to the due process clause of the Fourteenth Amendment." *Roberge*, 278 U.S. at 122. Because the likelihood of bias is so great, the power delegated to Amtrak is a clear violation of the Due Process Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed on the alternative ground that the delegation to Amtrak violates the Due Process Clause. Alternatively, the case should be remanded for due process analysis.

Respectfully submitted,

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

September 29, 2014