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 *AMICI CURIAE* THE CATO INSTITUTE AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual Cato Supreme Court Review.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing 350,000 member businesses in Washington, D.C., and all fifty states. Founded in 1943, as a nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the legal voice for small businesses.

This case is of significant concern to *amici* because it implicates an important structural limitation on the exercise of lawmaking power. *Amici* believe the court below correctly held that,

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[1] All parties have consented to the filing of this brief, and correspondence confirming such consent accompany this brief. 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 the preparation or submission of this brief.

under this Court's precedents, private entities must be "limited to an advisory or subordinate role in the regulatory process." Pet. App. 14a. *Amici* believe that weakening the rule against private-party delegations would particularly threaten economic liberty by empowering state-favored market incumbents, with interests "adverse to the interests of others in the same business," to regulate their own industry. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," ART., I § 1, and "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The theory underlying this restriction is that legislative powers, "being derived from the people by a positive voluntary grant," may be exercised only "by such men, and in such forms" as the people have authorized. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, ch. 11 § 141 (1690).

The nondelegation doctrine rests not on idle formalism, but on a recognition that the exercise of lawmaking power outside the Constitution's procedures and institutional design endangers the democratic interests that those forms secure. Elected legislators' dependence on the people promotes democratic accountability; unelected administrators answer to no voter. Equal representation of states in one house is meant to safeguard federalism; bureaucracies housed in Washington, D.C., have no such intrinsic allegiance. Bicameralism, staggered terms of office, and varied constituencies imbue lawmaking with distinctive deliberative qualities; the federal regulatory process thrives instead on centralization.

Private-party delegation is "legislative delegation in its most obnoxious form," *Carter Coal*, 298 U.S. at 311, because it operates entirely outside our constitutional architecture and the republican values it protects. Private entities take no oath, hold no office of public trust, answer to no voter, and are not

subject to the same checks and balances that control and limit the exercise of power by constitutional actors. Placing regulatory power directly in private hands raises a particularly acute risk that "special interests could be favored at the expense of public needs," *INS v. Chadha*, 462 U.S. 919, 950 (1983); *see also Carter Coal*, 298 U.S. at 311.

It is widely recognized that this Court has taken a permissive approach to reviewing the scope of legislative delegations to administrative agencies. But far from justifying a lax approach to delegations of regulatory power to private actors, the reasons for and consequences of the Court's underenforcement of the conventional nondelegation doctrine underscores the need for robust enforcement of the rule against private-party delegations.

Three prudential considerations explain this Court's toleration of broad delegations to federal regulatory agencies. First, the conventional nondelegation doctrine presents judicial administrability problems. Because "'a certain degree of discretion, and thus of lawmaking, inheres in most executive . . . action,'" it is difficult to say when a statute crosses the line between authorizing valid use of executive discretion and impermissibly delegating legislative power. *Whitman*, 531 U.S. at 475 (citation omitted). Second, the Court and commentators have suggested that the President's political accountability can serve as a second-order substitute for diminished congressional accountability. Third, the Court has suggested that "Congress simply cannot do its job absent an ability

to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Whatever the strength of these considerations as a basis for indulging broad delegations to executive agencies, all three factors favor unflinching application of the rule against delegating regulatory authority to private parties. Evaluating the validity of private delegations does not present a judicial line-drawing challenge; when Congress delegates regulatory power to private parties, there is no need to make fine distinctions between executive and legislative power because private parties possess neither. Considerations of political accountability also favor strict policing of private delegations because private entities, by definition, do not answer to popular will. And as for the demands of necessity, if Congress is unable to fulfill its regulatory ambitions, it can direct a sizeable federal bureaucracy to do the job. There is no credible argument that workable government requires appointing private entities as co-regulators on an "equal footing" with federal agencies, as Congress did in the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). Pet. App. 14a.

Judicial underenforcement of the nondelegation doctrine puts all the pressure on the structural protections against excessive delegation built into the Constitution's design. Accordingly, while deferring on substantive questions of degree, this Court has vigorously enforced the Constitution's procedural rules governing how and by whom law is made. The Court has invalidated attempts by Congress to legislate even to a minor degree outside bicameralism

and presentment procedures, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Chadha*, 462 U.S. 919; to delegate to agents of Congress a hand in execution of the law, *Bowsher v. Synar*, 478 U.S. 714 (1986); or to delegate to the President a power to effectively repeal or amend statutes by unilateral action, *Clinton v. City of N.Y.*, 524 U.S. 417 (1998). In these instances, the Court has struck down statutory delegations that place the wrong kind of power in the wrong institutional hands.

The Court should do the same here by reaffirming that a private party's role in regulation must "function subordinately" to the Executive Branch. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). As the court below correctly held, section 207 of PRIIA violates that rule by permitting a private entity to "coauthor" regulations with a federal agency. Pet. App. 47a. The Court should affirm.

ARGUMENT

Petitioners are quick to remind us that this Court has not struck down a statute under the conventional nondelegation doctrine since 1935. Pet. Br. 20. Their hope, it seems, is that the rule against private-party delegations has suffered a "death by association," JOHN HART ELY, DEMOCRACY AND DISTRUST 133 (1980), despite the absence of any federal case "embracing the position that a private entity may jointly exercise regulatory power on equal footing with an administrative agency." Pet. App. 14a. Judicial forbearance with respect to the *scope* of permissible delegations, however, underscores the

need for scrupulous enforcement of *structural* limitations on delegation of lawmaking power—particularly the rule against private delegations.

I. The Prudential Reasons Invoked To Justify Underenforcing The Nondelegation Principle Counsel In Favor Of Robust Enforcement In This Case.

The Court has long and repeatedly recognized that "Congress generally cannot delegate its legislative power." *Mistretta*, 488 U.S. at 371–72. Despite its foundational importance in principle, however, the nondelegation doctrine has been honored "almost always in the breach." David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201 (2002). The nondelegation doctrine continues to inform the interpretation of regulatory statutes, *see Mistretta*, 488 U.S. at 374 n.7; *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000), but the doctrine's direct enforcement turns on a test that even the most breezy grants of regulatory authority have survived. *See, e.g.*, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation to regulate broadcast licensing as "public interest, convenience, or necessity" require); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240 (1994). In view of this gap between constitutional principle and judicial practice, the nondelegation doctrine may be the most "famously underenforced" doctrine in constitutional law. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2358 (2006).

But the nondelegation doctrine has been underenforced largely for *prudential* reasons: doubts about judicial administrability, adequate trust in political accountability of executive agencies, and accommodation of the perceived necessities of the modern administrative state. Whatever bearing those prudential considerations have on delegations to Executive Branch agencies, they decisively counsel in *favor* of robust enforcement of the long-settled rule against delegations to private entities.

A. Judicial Administrability

The most prominent explanation for underenforcement of the nondelegation doctrine is that courts are ill-equipped to address the problem. This Court has noted that it has "not been notably successful in describing" the "line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority." *Printz v. United States*, 521 U.S. 898, 927 (1997). "[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). Because "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action," *id.* at 417, it is exceedingly difficult to determine when a statutory delegation crosses the line between authorizing use of executive power (which administrative agencies may exercise) and legislative power (which resides exclusively in Congress).

Accordingly, this Court has "almost never felt qualified to second-guess Congress regarding the

permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 416; *see also Whitman*, 531 U.S. at 474. Scholarly commentary echoes this concern: "Although some constitutional line surely separates permissible and impermissible delegations, the need to identify that line assigns the judiciary a terrible task." John F. Manning, *Textualism As A Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 727 (1997); *see also, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326–27 (2000) ("How much executive discretion is too much to count as 'executive'? No metric is easily available to answer that question.").

Considerations of judicial administrability decisively favor resolute enforcement of the rule against private delegations. That rule presents no line-drawing challenges for a simple reason: Private actors possess *neither* executive power nor legislative power under the Constitution. While lawmaking by administrative agencies can be viewed as ancillary to their (legitimate) executive functions, delegation of regulatory authority to a private entity rests on no similar foundation. Congress's delegation of *any* policymaking authority to a private party is therefore either a naked delegation of legislative power or an unconstitutional transfer of executive power from the President to a private person. But either way, the delegation cannot be reconciled with the Constitution. That is one reason this Court has held that a private party cannot play a regulatory role unless it "function[s] subordinately" to an Executive Branch agency. *Sunshine Anthracite*, 310 U.S. at 399. That test does not turn on close judgment calls or questions of degree.

The only judicially unmanageable task in this case is the one that the government asks this Court to undertake. Petitioners propose that courts should ask whether the federal government "retained sufficient control" over the private regulatory activity. Pet. Br. 15, 19. "[S]ufficient control" does not mean that the private party must be subordinate to a government agency; the government does not even attempt to defend PRIIA based on that formulation. Instead the new sufficient-control test turns on multiple "factors" bearing on the relationship between the private party and the government, including an administrative agency's "active participation" in devising the regulation; an agency's "independent assent" to the regulation *or* an arbitrator's approval of a compromise regulation hewn from the private party's and agency's divergent positions; required "consultation with [other] stakeholders"; and presumably any other factors that affect the degree of government control exercised over the private co-regulator. Pet. Br. 15–16. The government is sure it will know "sufficient control" when it sees it—and unsurprisingly it has announced that PRIIA satisfies that test. But the government's approach will only confound future judicial enforcement of the private-party nondelegation rule by replacing a relatively clear test (private parties cannot engage in regulatory activity unless they function subordinately to a federal agency) with a malleable inquiry into how much governmental control is enough to allay constitutional concerns.

B. Political Accountability

The nondelegation doctrine ensures that important policy choices are "made by Congress, the branch of our Government most responsive to popular will." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring). But the Court and commentators have suggested that the political accountability of executive agencies can mitigate the erosion of "democratic values" threatened by excessive delegations. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2368–69 (2001) (arguing that administrative actions "taken pursuant to a delegation to an agency official, but clothed with the imprimatur and authority of the president, should receive maximum protection against a nondelegation challenge").

This consideration helps to explain judicial deference to interstitial lawmaking by federal agencies. As the Court observed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency." *Id.* at 865–66. But there are limitations to the notion that presidential accountability for administrative lawmaking can substitute for legislative accountability for real lawmaking contemplated by the Constitution. Its most apparent weakness is that

the Framers did not devise a lawmaking process linked to just any sort of accountability, but rather a "single, finely wrought and exhaustively considered procedure" that promotes a singular kind of responsiveness and deliberation. *Chadha*, 462 U.S. at 951. Confidence in political accountability of executive agencies nevertheless helps account for judicial leniency toward traditional delegations.

By contrast, considerations of political accountability counsel in favor of scrupulous policing of the rule against private delegations. Unlike Congress, administrative agencies, and the courts, private entities have neither the "direct" nor "indirect" link to popular will that the Framers understood to be essential to republican government. *See* THE FEDERALIST NO. 39, at 237 (C. Rossiter ed., 1961) ("[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."). For that reason, a private party's exercise of co-equal regulatory power is antithetical to the republican form of government in a way that delegations to executive agencies are not. Indeed, unlike other statutory delegations, private delegations entrust power to a *person*—in this case, a corporate person—rather than to an *office* of public trust.

Nothing about Amtrak's peculiar legal status alters this analysis. The government makes much of the federal subsidies that Amtrak receives and the presidential appointment of most of its board

members. Pet. Br. 42–46. But accountability requires more than functional dependence on or "subservience to" the federal government, *id.* at 45–46, or else a good many private entities in heavily regulated industries qualify to serve as regulators. Fundamentally, political accountability requires knowing who to blame or credit—a fixed, "visible" connection that the public can trace from the immediate decisionmaker to the responsible elected official(s). Kagan, 114 HARV. L. REV. at 2337 (explaining "the connection between transparency and responsiveness"); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance."). That fixed line of accountability is particularly necessary given government actors' ability to "shift[] [blame] from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author." THE FEDERALIST NO. 70, at 426.

In this case, Congress and the President have emphatically distanced themselves from Amtrak's actions and made clear that Amtrak is "a for-profit corporation," "not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(2) & (3). Whether that is greater part aspiration or reality is beside the point. The government should not be permitted to shield an unconstitutional delegation based on a connection that Congress and the President have, by statute, clearly forsworn.

C. Necessity

The Court's tolerance of broad delegations is also a concession to the perceived "inherent necessities" of the modern regulatory state. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). On this account, workable regulation requires confiding wide discretion in corps of administrators who possess the expertise and resources that Congress lacks. The Court's nondelegation "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372; *see also Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Division of Dep't of Labor*, 312 U.S. 126, 145 (1941) ("Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.").

This practical justification is not without critics. Scholars have argued that vast statutory delegations are best explained not by Congress's institutional incapacity, but by its strong institutional interest in evading responsibility. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 3–21 (1993). With no meaningful limit on the scope of delegation, legislators are able to claim credit for enacting aspirationally-worded statutes while assigning the hard choices (and later, the blame) to bureaucrats. *See id.*

But if lack of information or decisional capacity is a reason to countenance open-ended delegations to

administrative agencies, it cannot excuse delegations of joint regulatory power to private parties. There is no credible argument that the smooth functioning of a federal regulatory apparatus that now employs more than a quarter-million people and spends $58 billion annually requires deputizing private entities to act as co-regulators. *See* Susan Dudley & Melinda Warren, *2015 Regulator's Budget*, Report of the George Washington University Regulatory Studies Center (July 2014) (analyzing federal spending and personnel "devoted to developing and enforcing federal regulations").[2] To be sure, regulation should be informed by the expertise and experience of the private sector. The Administrative Procedure Act creates a notice-and-comment process to meet that need, 5 U.S.C. § 553(c), and *amici* favor greater private-sector participation and transparency in the regulatory process. But a well-functioning regulatory state does not require handing over the drafting pen to a preferred private entity doing business in the regulated industry, as Congress did in PRIIA.

The facts of this case underscore this broader point. PRIIA confers joint rulemaking authority on Amtrak and a federal agency. Necessity is not the mother of this invention. Petitioners cannot and do not dispute that Congress could have achieved the ends of PRIIA just as effectively by authorizing the Department of Transportation to devise the metrics and standards, based on recommendations submitted by Amtrak and other interested parties. That is

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[2] *Available at* http:// http://regulatorystudies.columbian.gwu.edu/2015-regulators-budget-economic-forms-regulation-rise.

precisely how Congress has involved Amtrak in regulation in the past, *see* National and Community Service Act of 1990, Pub. L. No. 101-610, Title VI, § 601(d), 104 Stat. 3127, 3186 (directing the Secretary of Transportation to consult with Amtrak in issuing regulations), and PRIIA takes a similar approach to soliciting input from the freight railroads, *see* 49 U.S.C. § 24101 note (PRIIA § 207(a)) (requiring "consultation with [other] stakeholders" including freight railroads). Such a process for devising the metrics and standards may have been less skewed in Amtrak's favor, but it would have been no more taxing on Congress's decisional capacities.

II. The Court Has Vigilantly Enforced The Constitution's Structural Limitations On Delegation And Should Do So In This Case.

Permissive judicial review of the *scope* of statutory delegations heightens the need to uphold the Constitution's *structural* limitations on the exercise of legislative power. That understanding accords with this Court's separation of powers jurisprudence.

Private delegation is "legislative delegation in its most obnoxious form," *Carter Coal*, 298 U.S. at 311, because it operates outside the Constitution's procedural and institutional framework and the republican values it secures. Every constitutional actor is subject to checks and balances ensuring that no matter what mischief any branch attempts with the power it comes into, other branches have powerful tools to counter it. And the Constitution's

modes of selecting those who populate the branches of government—both election and presidential appointment with Senate confirmation—ensures that the voters, too, have some oversight role. These procedural and structural rules thus serve as a failsafe against the breach of substantive limitations that are more difficult to enforce. Abandoning these strictures endangers the constitutional interests that they are designed protect, including democratic accountability, individual liberty, and minority rights.

1. Even while affording Congress broad substantive latitude on delegations, the Court has scrutinized "whether the Legislature has followed a constitutionally acceptable procedure in delegating decisionmaking authority." *Metro. Wash. Airports Auth.*, 501 U.S. at 272. The Court has not hesitated to strike down delegations of power that deviate from the Framer's institutional design and procedures governing how and by whom law is made. *See id.* (invalidating a statute that gave members of Congress a policymaking role outside the confines of bicameralism and presentment); *see also Chadha*, 462 U.S. 919 (invalidating one-house legislative veto as evasion of bicameralism and presentment); *Bowsher*, 478 U.S. 714 (invalidating statute that lodged executive authority in an agent of Congress); *City of New York*, 524 U.S. 417 (invalidating the Line Item Veto Act).

In *Metropolitan Washington Airports Authority*, the Court considered the constitutionality of a statute that created a review board, composed of nine members of Congress, with the power to disapprove

certain decisions by the Washington, D.C.-area airport authority. There was no question Congress had the substantive power to govern the airports' operations, including by "enact[ing] general standards and assign[ing] to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards." 501 U.S. at 272. But the "structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches . . . placing both substantive and procedural limitations on each." *Id.* The Court concluded that that the review board's structure breached those procedural limitations, regardless of whether its functions were essentially executive or legislative. "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." *Id.* at 276. Whether the statute was understood to place executive power in the wrong institutional hands, or to authorize legislative action through the wrong procedure, it was unconstitutional.

The Court anticipated the objection that the review board was only a minor "practical accommodation . . . that should be permitted in a 'workable government.'" *Id.* But even this seemingly harmless constitutional foot-fault was unacceptable because "the statutory scheme challenged . . . provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role." *Id.* The Court thus understood that, given the lack of judicially enforced limits on the *scope* of

delegated powers, all of the doctrinal pressure rested on scrupulous enforcement of constitutional procedure and institutional design.

Similarly, in *Chadha*, the Court invalidated a provision of the Immigration and Nationality Act authorizing a one-house legislative veto of decisions by the Attorney General to allow individual deportable aliens to remain in the United States. 462 U.S. at 923. The Court began by explaining that "even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." *Id.* at 945. One such demand is that Congress can make law only through the bicameralism-and-presentment procedure of Article I. That lawmaking process serves "essential constitutional functions," including tempering majoritarian passions inimical to liberty, promoting deliberation, and reducing the threat that "special interests could be favored at the expense of public needs." *Id.* at 948–51. The Court had no trouble concluding that the one-house veto was an unconstitutional circumvention of that procedure because it was "essentially legislative" in character. "When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it," and that presumption was confirmed by the fact that the one-house veto functioned as a substitute for lawmaking "in purpose and effect." *Id.* at 951–52.

Once again in *Bowsher*, the Court enforced a structural limitation on delegation by invalidating a statute under which Congress delegated its own

agent a role in executing the law. The Gramm-Rudman-Hollings Act capped the federal budget deficit for a five-year period and required the Comptroller General to determine and report to the President across-the-board spending cuts necessary meet the caps. The President was, in turn, required to issue a sequestration order implementing the cuts specified by the Comptroller General. The Court explained that because the Comptroller General was removable by Congress, not the President, he could not be clothed with power "entailing execution of the law," as the Act authorized. 478 U.S. at 732–33. "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 726. The Court thus concluded that violations of the Constitution's structural limitation on delegation of executive authority, no less than legislative authority, "must be resisted." *Id.* at 727 (quoting *Chadha*, 462 U.S. at 951).

Clinton v. City of New York also demonstrates the Court's assertive enforcement of procedural constraints on statutory delegation. In that case, the Court considered the constitutionality of the Line Item Veto Act, which permitted the President to "cancel in whole" certain spending and tax benefits enacted into law. 524 U.S. at 436. The substantive scope of authority delegated by the Line Item Veto Act was no broader than delegations the Court had approved in past cases, as the dissenting justices noted. *See id.* at 468–69 (Scalia, J., dissenting); *id.* at 485 (Breyer, J., dissenting). The Act's constitutional deficiency was the procedure by which the delegated

power was to be exercised. *Id.* at 448 ("[O]ur decision rests on the narrow ground that the procedures authorized by [the Act] are not authorized by the Constitution.") (majority op.). The statute required the President to make a one-time, irrevocable decision regarding tax and spending provisions within five days of enactment. *Id.* If the President canceled an item, it ceased to have "legal force or effect." *Id.* at 438. And unlike other statutory delegations, the President and his successors did not "remain free to change their minds over time concerning the best way to execute the statute." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1389 (2001)). In short, the procedure was "the functional equivalent of a partial repeal" of a statute, and the Court concluded that kind of power can be exercised only by Congress and only through lawmaking process set forth in Article I, § 7. *City of N.Y.*, 524 U.S. at 441.

2. In each of these cases, the Court has rigorously enforced structural limitations on excessive delegation. That is no accident. This Court has appeared to recognize that where it cannot or will not enforce substantive limitations on delegations of lawmaking power, it must at least insist that that power be channeled through constitutionally appropriate procedures. Even if judges struggle to distinguish executive and legislative power, they are well-equipped to police procedural rules that govern how and by whom federal power can be exercised—"the carefully crafted restraints spelled out in the Constitution." *Chadha*, 462 U.S. at 959; *see also* Clark, 79 TEX. L. REV. at

1385–86 ("Although it [can be] difficult to . . . characterize policymaking discretion as either executive or legislative power in the abstract, the identity of the actor exercising such power largely determines its constitutionality"). And because those "carefully crafted constraints" serve important constitutional interests—including the protection of individual liberty, political accountability, regard for minority rights, and federalism—enforcing those indirect means of limiting governmental power can supplement lax policing of direct substantive limitations on legislative power.

Viewed as a structural limitation on delegation, the rule against private delegations is an obvious case for robust enforcement for two reasons rooted in the Court's separation-of-powers jurisprudence.

First, policymaking by private parties is stripped of *all* "auxiliary precautions" that redound to our protection. THE FEDERALIST NO. 51, at 319. Unlike administrative agencies, private entities are led by individuals who swear no public oaths; cannot be impeached; cannot have their decisions overruled by the President; and need not subject their decisionmaking process to judicial review—to name but a few differences.

One particular danger raised by private delegations is that "special interests could be favored at the expense of public needs," *Chadha*, 462 U.S. at 950. The Framers addressed this threat not by pretending to shut out "various and interfering interests," but rather by designing a constitutional system in which private interests would be moderated or balanced by countervailing private

interests. THE FEDERALIST NO. 10, at 73–74. As a result, narrow factions would tend to be outvoted or forced to form broader coalitions to pursue their interests. That balance is grossly upended, however, when Congress lodges regulatory power *directly* in the hands of a favored private party—particularly a member of the regulated industry itself. *See id.* at 74 ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment.").

As this Court and other courts have recognized, such delegations heighten the risk of rent-seeking and other forms of self-serving regulation. *See Carter Coal*, 298 U.S. at 311 (noting the danger of placing regulatory authority in the hands of private parties whose interests are "adverse to the interests of others in the same business"); *Pittston Co. v. United States*, 368 F.3d 385, 398 (4th Cir. 2004) (noting the danger that private-party regulators could "use their position for their own advantage [and] to the disadvantage of their fellow citizens"); *see also State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29, 36 (Cal. 1953) (noting that the "practical tendency" of private-party delegations "is to create and foster monopoly, to prevent, not to encourage competition, to maintain maximum, not minimum prices, all of which is against, not in aid of, the interest of the consuming public") (quoting *Becker v. State*, 185 A. 92, 100 (Del. Super. Ct. 1936)). And as the courts of appeals correctly held, "[n]othing about the government's involvement in Amtrak's operations restrains the corporation" from issuing regulations that "inure to its own financial benefit rather than the common good." Pet. App. 20a.

Second, when a private party exercises quasi-lawmaking power on an equal basis with an administrative agency, its actions are not incidental to *any* assigned constitutional function. The Court has explained that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." *Chadha*, 462 U.S. at 951. But a private party clothed with federal power is not "presumptively act[ing] in an executive or administrative capacity as defined in Art. II" or in a judicial capacity as defined in Article III. *Id.* Instead, it is presumptively acting in an extraconstitutional capacity.

What, then, can legitimize federal regulatory activity by a private party? This Court's precedents and the decision below disclose a straightforward answer: Private entities in a regulatory role must "function subordinately" to the Executive Branch. *Sunshine Anthracite*, 310 U.S. at 399; Pet. App. 14a (noting the "principle that private parties must be limited to an advisory or subordinate role in the regulatory process"); *accord Pittston Co.*, 368 F.3d at 394–97 ("Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others."); *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). When private regulatory activity is not subject to the full control and supervision of the Executive Branch, it operates outside constitutional checks and balances.

PRIIA violates that bright-line rule by making Amtrak a "co-author" (in the government's words) of the metrics and standards regulation. U.S. CADC Br. at 18. It is no answer to say that Amtrak's rulemaking authority appears modest in scope compared to many regulatory delegations, just as the narrow scope of the review board's power in *Metropolitan Washington Airport Authority* could not save that constitutional violation. *See* 501 U.S. at 277. The danger raised by this case is the statute's basic "blueprint" for exercise of regulatory power outside its "constitutionally confined" channels. *Id*.

If the constitutional bar against private delegations is weakened, there will be no backstop in this Court's nondelegation jurisprudence to limit the breadth of discretionary power that private parties could wield. If, as the government contends, private entities may permissibly co-author regulations on an equal basis with a federal agency, then Congress can also authorize them to co-regulate broadcast licensing as "public interest, convenience, or necessity" require, *Nat'l Broad.*, 319 U.S. at 225, or to co-regulate charging of "excessive" profits, *Lichter v. United States*, 334 U.S. 742, 785 (1948), or to co-regulate "just and reasonable" rates in the energy sector, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600–03 (1944). This Court's underenforcement of the conventional nondelegation doctrine makes it critically important to honor the Constitution's limitations on how and by whom delegated power can be exercised.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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