

No. 13-1080

IN THE
Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the District of Columbia
Circuit

**BRIEF OF PROFESSOR ALEXANDER VOLOKH
AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS**

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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

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES..... iii

INTEREST OF THE *AMICUS CURIAE*..... 1

SUMMARY OF THE ARGUMENT..... 1

ARGUMENT 3

 I. The D.C. Circuit’s private delegation doctrine finds no support in this Court’s precedent..... 3

 A. The non-delegation doctrine does not distinguish between private and public actors. 3

 B. The D.C. Circuit misconstrued due process cases to support a non-delegation analysis..... 6

 II. Amtrak is a state actor subject to the Due Process Clause. 9

 III. Analyzing Congress’s grant of authority to Amtrak under due process would better protect accountability..... 11

 A. Analyzing under the Due Process Clause allows for damages actions. 11

 B. Bias is the issue..... 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

<i>A.L.A. Schechter Poultry Corp v. United States</i> , 295 U.S. 495 (1935)	4
<i>Aetna Life Ins. Co. v. Lavoie</i> , 475 U.S. 813 (1986)	14
<i>Ass'n of Am. Railroads v. U.S. Dep't of Transp.</i> , 721 F.3d 666 (D.C. Cir. 2013)	passim
<i>Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics</i> , 403 U.S. 388 (1971)	12
<i>Cargo of the Brig Aurora v. United States</i> , 11 U.S. 382 (1813)	6
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936)	2, 6, 7, 8
<i>Civil Rights Cases</i> , 109 U.S. 3 (1883)	9
<i>Currin v. Wallace</i> , 306 U.S. 1 (1939)	2, 5, 6
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	12
<i>Eubank v. City of Richmond</i> , 226 U.S. 137 (1912)	8
<i>Gibson v. Berryhill</i> , 411 U.S. 564 (1973)	8
<i>J.W. Hampton, Jr., & Co. v. United States</i> , 276 U.S. 394 (1928)	6
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345 (1974)	9, 10

<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982).....	7
<i>Lebron v. Nat'l R.R. Passenger Corp.</i> , 513 U.S. 374 (1995).....	2, 9, 10
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803).....	12
<i>Marshall Field & Co. v. Clark</i> , 143 U.S. 649 (1892).....	6
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	3, 4, 7
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935).....	4, 6
<i>State of Washington ex rel. Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928).....	8
<i>Synar v. United States</i> , 626 F. Supp. 1374 (D.D.C. 1986) (Scalia, J.), <i>aff'd sub nom. Bowsheer v. Synar</i> , 478 U.S. 714 (1986).....	8
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927)	12, 13
<i>Ward v. Village of Monroeville</i> , 409 U.S. 57 (1972).....	12, 13
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001).....	4, 5, 8

STATUTES

42 U.S.C. § 1983 (2012) 11

Passenger Rail Investment and
Improvement Act of 2008 § 207,
49 U.S.C. § 24101 (2012) 2, 10

49 U.S.C. § 24301(a) (2012) 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. Vpassim

U.S. CONST. amend. XIV, § 1..... 3, 10, 13

U.S. CONST. art. I, §1 3, 4

INTEREST OF THE *AMICUS CURIAE*¹

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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 vacate the decision below and remand with

¹ The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in conjunction with the certificate of service. Counsel of record for all parties received notice at least 10 days before the due date of amicus curiae’s intention to file this brief. No person other than amicus and his counsel made a monetary contribution to its preparation or submission. No counsel for a party authored the brief in whole or in part.

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, 311 (1936), and *Currin v. Wallace*, 306 U.S. 1 (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* does 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. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013), needlessly creates two different tests for the private-public distinction where one would suffice.

Analyzing grants of regulatory authority to private entities under the Due Process Clause better

protects accountability for three reasons. First, it is incorporated against the states through the Fourteenth Amendment. Second, it preserves the availability of a damages action for injured parties. Third, it has consistently been applied to issues of bias or fairness.

ARGUMENT

I. The D.C. Circuit's private delegation doctrine finds no support in this Court's precedent.

Limits on delegation of Congressional power fall into at least two categories: (1) the non-delegation doctrine, derived from the Vesting Clause of Article I; and (2) due process limits on delegation of regulatory authority, derived from the Fifth Amendment, which generally prohibit unfair treatment. Contrary to the D.C. Circuit's holding, the non-delegation doctrine does not distinguish between private and public actors. A delegation of regulatory power to a biased party may implicate the Due Process Clause, but does not violate the non-delegation doctrine if circumscribed by an intelligible principle.

A. The non-delegation doctrine does not distinguish between private and public actors.

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). Rooted in separation of powers

principles, the non-delegation doctrine prohibits Congress from delegating its legislative power. *Id.*

To prevent the delegation of any 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.* This Court has found only two cases where such a requisite intelligible principle was lacking: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp v. United States*, 295 U.S. 495 (1935). See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001) (identifying *Panama* and *Schechter* as the only two such cases “[i]n the history of the Court.”).

In *Panama*, the statute provided literally no guidance. As the Court wrote: “Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the [regulated activity] is to be allowed or prohibited.” *Panama*, 293 U.S. at 430. In *Schechter*, the statute “conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’” *Am. Trucking Ass’ns*, 531 U.S. at 474 (citing *Schechter*, 295 U.S. at 495).

By contrast, delegations have been upheld where the intelligible principle was no more specific than that broadcast licenses be awarded in the “public interest,” that prices be set at “fair and equitable”

levels, and that the structure of holding companies be modified so as not to be “unduly and excessively complicate[d].” *Id.* at 474 (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); *Yakus v. United States*, 321 U.S. 414, 420, 423–26 (1944); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). The non-delegation cases show that the requirements for satisfying the intelligible principle are quite low.

The question before the Court is whether the statute authorizing Amtrak to act as co-equal with the FRA offers the requisite minimal intelligible principle to sustain the delegation under the non-delegation doctrine. The statute does provide such a principle: Amtrak “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.

The D.C. Circuit adopted Respondent’s argument that delegation to a private party is a per se violation of the non-delegation doctrine. *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013). This position has no support in this Court’s non-delegation cases. To the contrary, this Court upheld a delegation to private parties in *Currin v. Wallace*, 306 U.S. 1 (1939).

Currin concerned a challenge to the Tobacco Inspection Act of 1935. The Act authorized the Secretary of Agriculture to establish uniform standards for tobacco and designate tobacco markets where no tobacco could be sold unless it was

inspected and certified according to those standards. But the Secretary was forbidden from designating a market unless two-thirds of the growers in that market voted in favor of such a designation in a referendum. 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. 382, 386 (1813); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892); *Panama*, 293 U.S. at 430. In *Currin*, this Court upheld the delegation to the industry members as being no worse than the delegation to the President upheld in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). Therefore, this Court held, the delegation did “not involve any delegation of legislative authority.” *Currin*, 306 U.S. at 15.

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.

B. The D.C. Circuit misconstrued due process cases to support a non-delegation analysis.

The D.C. Circuit purported to find a rule against private delegations in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Ass’n of Am. Railroads*, 721 F.3d at

670. But *Carter Coal* was not decided under the non-delegation doctrine.

It is true that, in *Carter Coal*, this Court disapproved a delegation of power to some members of industry to impose regulations on other members of industry. *Carter Coal*, 298 U.S. at 311. This was, the Court held, “legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” *Id.* The mere recitation of the word “delegation,” however, does not imply an invocation of the non-delegation doctrine. *See 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* stated which part of the Constitution was 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.

This Court has more recently recognized, on multiple occasions, that *Carter Coal* is a due process case, not a non-delegation doctrine case. *See Mistretta*, 488 U.S. at 373 (listing *Panama* and *Schechter* as the only two cases to strike down statutes under the non-delegation doctrine, and omitting *Carter Coal*); *accord Am. Trucking Ass’ns*,

531 U.S. at 474; *see also Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (Scalia, J.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) (stating that, though *Carter Coal* “discussed” the delegation doctrine, the holding of the case “appears to rest primarily upon denial of substantive due process rights”).

Thus, while a delegation of regulatory power to a financially interested party may well violate the Due Process Clause, it does not violate the non-delegation doctrine provided an intelligible principle is present. The due process approach finds support in many of this Court’s cases. *See, e.g., Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912); *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Carter Coal*, 298 U.S. at 311–312; *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). 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. Railroads*, 721 F.3d at 670, 677 (refusing to consider Respondent’s Due Process argument).

Moreover, despite the D.C. Circuit’s statement that the difference between the non-delegation and due process approaches is purely academic, *id.* at 671 n.3, in fact there are substantial differences between the two approaches. Notably, they differ in whether state officials and agencies are also covered and in whether damages are available for successful challengers. These differences are covered further in Part III.

II. Amtrak is a state actor subject to the Due Process Clause.

Under both the Fifth and Fourteenth Amendments, only state action is subject to the limitations imposed by constitutional due process. *Civil Rights Cases*, 109 U.S. 3, 11 (1883). A private entity can engage in state action when it undertakes a function that is traditionally and exclusively done by the state, commonly called a “public function.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). If it is a state actor, a private entity is subject to the same restrictions as a government entity. This case is properly considered under the Due Process Clause because Amtrak is a state actor.

In spite of this well-developed state action doctrine, the D.C. Circuit unnecessarily created a separate, ad hoc private–public distinction. The D.C. Circuit held that Amtrak was a private corporation that had been given unconstitutional regulatory power. *Ass’n of Am. Railroads*, 721 F.3d at 669. It analyzed the structure, statutory description, operations, and case history of Amtrak. The court concluded that Amtrak was a private corporation because (1) Congress designated it a private corporation; and (2) Congress instructed it to maximize profit. *Id.* at 677. This reasoning is not compelling. This Court has previously held that Amtrak, as a corporation created by the government for the furtherance of governmental objectives, is a government entity for constitutional purposes. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

In *Lebron*, Amtrak rejected an advertisement based on its policy that it would not display political advertising. This Court concluded that Amtrak was a governmental agency for the purposes of individual rights guaranteed by the Constitution, and therefore was subject to First Amendment restrictions. *Id.* at 399–400 (“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”).

Because the United States created Amtrak in order to further governmental objectives, it makes no difference that this case arises in a Due Process Clause context rather than a First Amendment context. As this Court has determined that Amtrak is subject to First Amendment restrictions, it follows that the rest of the Bill of Rights applies to Amtrak as well.

Compared to *Lebron*, Amtrak’s actions in this case are even more consistent with those actions generally reserved for the government. 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 Metropolitan Edison*, 419 U.S. at 352.

Amtrak's proposed standards are consistent with this axiom for two reasons: (1) they were published for public comment, and criticism was reflected in the final version of the metrics and standards—similar to how federal agencies regulate through a notice and comment period; and (2) the STB 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 Amtrak is a state actor for purposes of analysis under due process.

III. Analyzing Congress's grant of authority to Amtrak under due process would better protect accountability.

Due process is a better avenue for scrutinizing delegation to private parties for three reasons: (1) Unlike the non-delegation doctrine, due process restrictions on delegation apply against the states through the Fourteenth Amendment; (2) by analyzing cases like the instant case under the Due Process Clause rather than the non-delegation doctrine, prevailing plaintiffs will be able to recover damages; and (3) it makes more sense that issues of bias or fairness should be analyzed under due process rather than a principle rooted in separation of powers.

A. Analyzing under the Due Process Clause allows for damages actions.

In civil suits for deprivation of rights, 42 U.S.C. § 1983 gives courts the ability to award damages when

a plaintiff brings a proper cause of action for violation of constitutional rights by the State. For federal violations of constitutional rights, a remedy is available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 391 (1971). The protection afforded in *Bivens* was specifically extended to violations of due process under the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228 (1979).

By making a remedy available, both § 1983 and *Bivens* are consistent with the principle that “the very essence of civil liberty . . . [is] the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

B. Bias is the issue.

This Court has consistently analyzed issues of bias or fairness under the Due Process Clause. In examining bias, the Court will look to a state actor that “occupies two practically and seriously inconsistent positions” where one is subject to bias, particularly financial bias, and the other is regulatory. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). As a general matter, government employees are presumed to be impartial in the execution of their authority; when a state actor has a “direct, personal, substantial pecuniary interest” in the result, however, he has a motivation to act in his own interest. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). Thus, when there is a substantial

pecuniary interest at stake, there is a high likelihood that the delegation can be found unconstitutional.

For example, during Prohibition in the 1920s, an Ohio statute stated that judges in cases of violation of the prohibition law would receive a portion of any resulting fines. 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. *Tumey*, 273 U.S. 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. 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, the Court held that the situation still introduced a substantial pecuniary bias that prevented the mayor from acting as an impartial judge. *Ward*, 409 U.S. at 60. The 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.*

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. 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. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 816–17 (1986). 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 823–24.

When compared to government employees, the bias of a private party may be found even greater—particularly if delegation to private parties allows those parties unconstrained discretion. The private-public distinction, however, is not significant as long as the party is a state actor for the purpose of due process, and this Court has unequivocally stated that Amtrak is a state actor for this purpose. Thus, the important factors for consideration of Respondent’s due process challenge should instead be the existence of bias by the actor and the extent of that bias.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted, and the decision below vacated and remanded to be considered under the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

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