Nos. 24-354 and 24-422

In the

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

SHLB COALITION, ET AL.,
Petitioners,

v.

CONSUMERS' RESEARCH, ET AL.,
Respondents.

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

BRIEF OF THE MACKINAC CENTER FOR PUBLIC POLICY, INSTITUTE FOR THE AMERICAN WORKER AND PELICAN INSTITUTE FOR PUBLIC POLICY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amicus Mackinac Center for Public Policy is a Michigan based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. It has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws, and its work in that area has been cited by the United States Supreme Court.[2]

Amicus Institute for the American Worker is devoted to informing policymakers and stakeholders about current developments in labor policy. Its leadership consists of experts in labor law, labor policy, and the inner workings of congressional labor.

Amicus Pelican Institute for Public Policy is a non-partisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

[1] In accordance with Supreme Court Rule 37.6, *amici* declare that no party or counsel in the pending appeal either authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of the accompanying brief, and no person or entity made a monetary contribution intended to fund the preparation or submission of the accompanying brief other than *amici* or their members. In accordance with Supreme Court Rule 37.2, amici certify that they notified counsel for all parties of their intent to file this brief at least ten days before filing the brief.

[2] *See Janus v. AFSCME*, 585 U.S. 878, 898 n.3 (2018).

Amici have a strong interest in promoting transparent, fair, and constitutional regulatory processes in the workplace. They consistently oppose regulatory overreach harming American workers and their constitutional rights. They therefore file this amicus brief to help the Court understand how this case affects workplace regulation. In particular, the brief explains how confusion over the different permutations of the "private nondelegation" doctrine has opened space for state and local governments to delegate power to private groups to regulate the workplace. The brief urges the Court to alleviate this confusion and clarify the doctrinal structure. That clarity will not only help resolve this case, but will also help American workers protect themselves from unconstitutional delegations of regulatory power.

SUMMARY OF ARGUMENT

This case asks the Court to consider a delegation of regulatory power to private parties. Such delegations have sometimes been analyzed under the so-called "private nondelegation" doctrine—ostensibly, a general rule against giving government power to private parties. But in fact, there is no one nondelegation doctrine; there are two. The two doctrines stem from independent constitutional sources and apply in different context. And yet, they have often been conflated and confused by lower courts. *See, e.g.*, *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1325–26 (D.C. Cir. 2024) (holding that delegation of power to body of private regulators was unconstitutional without specifying the constitutional source of the rule); *Ass'n of Am. R.R. v. U.S. Dep't of Transp.* (*Amtrak I*), 721 F.3d 666, 668 (D.C. Cir. 2013) (applying similar undifferentiated analysis). This case offers the Court a chance to relieve the doctrinal confusion and provide badly needed clarity. *See* Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203, 208 (2023) (tracing confusion over the sources and extents of the different doctrines); Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 Green Bag 157, 168–69 (Winter 2014) (same).

To start, the Court should delineate clearly between the two doctrines. The first doctrine stems from the Constitution's Vesting Clauses. Articles I and II vest all legislative and executive power in, respectfully, Congress and the president. The Clauses also prohibit those branches from giving their powers away. *See U.S. Dep't of Transp. v. Ass'n of Am. Railroads* (*Amtrak II*), 575 U.S. 43, 69 (2015) (Thomas, J., concurring) (describing the vesting clauses as "absolute"). That rule applies to all delegations, including delegations to private parties. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (invalidating delegation of congressional legislative power to private industry groups). *See also* Joseph Story, Commentaries on the Law of Agency §§ 13, 14 (1st ed. 1839) (citing the common-law rule "*delegata potestas non potest delegari*"—delegated power cannot be delegated). So in that sense, the Vesting Clauses embody a "private nondelegation" principle—one stemming from the Constitution's absolute assignments of power. *See Schechter*, 295 U.S. at 537 (describing private delegation as "utterly inconsistent with the constitutional prerogatives and duties of Congress").

The second doctrine stems from the Due Process Clauses. For centuries, due process has forbidden self-interested parties from wielding government power.

See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 531, 534 (1927); *Calder v. Bull*, 3 U.S. 386, 388 (1798) (describing "law that makes a man a Judge in his own cause" as contrary to due process). *See also* Paul J. Larkin Jr., *The Private Delegation Doctrine*, 73 Fla. L. Rev. 31, 69 (2021) (noting that the requirement of a disinterested decisionmaker has "deep roots in our law"). That limitation applies not only to government officials, but also to those officials' delegees. Just as the government cannot engage in self-interested decisionmaking, it cannot license self-interested decisionmaking by delegating power to someone else, including a self-interested private party. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121–22 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 143 (1912). So in that sense, the Due Process Clauses also embody a "private nondelegation" rule. *See Roberge*, 278 U.S. at 122 (describing delegation to self-interested private parties as "repugnant to the due process clause of the Fourteenth Amendment").

Though the doctrines come from different sources, lower courts have sometimes treated them as one undifferentiated rule. *See, e.g., Amtrak I*, 671 n.3; *Alpine Sec. Corp.*, 121 F.4th at 1325–26. *Cf. also Rice v. Vill. of Johnstown, Ohio*, 30 F.4th 584, 589 (6th Cir. 2022) (describing due-process limits on delegation as "obscure"). Worse, these courts have read the undifferentiated rule narrowly, at times suggesting that only the Vesting Clauses limit private delegations. That approach effectively reads due process out of the analysis. *See Alpine Sec. Corp.*, 121 F.4th at 1325–26 (considering undifferentiated "nondelegation" doctrine; *Walmsley v. FTC*, 117 F.4th

1032, 1038 (8th Cir. 2024) (considering unspecified "nondelegation" challenge without mentioning due process); *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023) (analyzing private delegation as solely a Vesting Clause problem). *But see Oklahoma*, 62 F.4th at 237 (Cole, J., concurring) (writing separately to emphasize that "the private nondelegation doctrine is rooted in both due process and separation of powers concerns").

That erasure has created space for new, more aggressive delegations at the state and local level. Without meaningful limits, states and cities are increasingly delegating regulatory power to self-interested private parties. *See, e.g.*, Cal. Lab. Code § 1475(d)(1)(A) (empowering board of mostly private parties to regulate wages and working conditions in fast-food industry); Initiative Petition 23-35: An Act Giving Transportation Network Drivers the Option to Form a Union (Mass. 2023) [hereinafter Mass. Rideshare Petition] (authorizing private union and rideshare companies to negotiate agreement regulating wages, hours, and working conditions for entire industry). *See also* Alexander T. MacDonald et al., U.S. Chamber of Commerce, How Union Tactics Sideline Businesses and Workers 15–21 (2024)[3] (describing proliferation of quasi-private labor standards boards to regulate sector-wide working conditions). These delegations do not trigger the Vesting Clauses, which limit only delegations Congress and the President. But they do implicate due process. It is therefore crucial that this Court clarify the distinction and reaffirm the due-process

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[3] Available online: https://www.uschamber.com/assets/documents/USCC-White-Paper-Union-Tactics.pdf.

limits on private delegations. This case offers the opportunity to do so.

Argument

1. The due-process limits on delegation stem from the common-law rule against self-interested decisionmaking.

For centuries, "due process" has meant that no person may be a judge in his or her own case. This principle sometimes goes by its Latin moniker: *nemo judex in causa sua*, or simply *nemo judex*. As its name suggests, it is older than even the Constitution. It traces its roots to the pre-Founding common law. Its most famous articulation came in *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P.1610). Decided in 1610, that case involved a delegation of regulatory power to a private medical college. Acting under a government charter, the college could both license medical doctors and punish people who practiced without a license. *Id.* at 646. An unlicensed practitioner challenged the delegation as inconsistent with basic principles of fairness. Writing for the court, Lord Edward Coke agreed. He noted that the college acted not only as a regulator and adjudicator, but also as a practitioner. *Id.* at 652. Its censors were themselves licensed medical professionals. If private practitioners could license and judge their peers, they would be "judges, ministers, and parties" all at once. *Id.* And that combination of roles could not be squared with the common law. *See id.* ("[F]or when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."). *See also* David Chan Smith, Sir Edward Coke and the Reformation of the Laws 168–74 (2014) (describing the case's history and the court's rationale) ("[I]f the College could fine unlicensed practitioners and benefit from half the amount, they were judges in their own cause.").

That common-law rule is essential to constitutional due process. Due process forbids government officials from taking part when they have an interest. *See, e.g.*, *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016); *Tumey*, 273 U.S. at 531, 534. It also forbids those officials from delegating power (2016); to self-interested private parties. *See Eubank*, 226 U.S. at 143; *Roberge*, 278 U.S. at 121–22. Just as government officials cannot violate the *nemo judex* rule, they cannot avoid the rule by delegating their power to others. *See* Larkin, *supra*, at 31 ("Put differently, Congress cannot escape constitutional restraints by delegating government authority to private parties to accomplish indirectly what Congress cannot do directly.").

That principle explains the result in *Eubank v. City of Richmond*. There, the Court struck down a city ordinance as inconsistent with due process. The ordinance allowed two-thirds of property owners in a neighborhood to decide the street setoffs in their neighborhoods. 226 U.S. at 140–41. That is, the ordinance allowed some property owners to regulate the property of others. *See id.* The Court found that delegation of regulatory power improper. The delegation effectively allowed private parties to regulate in a matter in which they had a personal "interest." *Id.* at 144. And that kind of self-interested regulation, the Court explained, violated basic principles of due process. *See id.* (holding that city could not leave "control of the property of plaintiff" in the hands of "other owners of property").

Fifteen years later, the Court reached the same result in *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*. *Roberge* involved a similar delegation to private property owners. A local zoning ordinance allowed property owners to build certain kinds of facilities (e.g., a "philanthropic home for children or for old people") only with the consent of their neighbors. 278 U.S. at 117–18. The ordinance set no standards or conditions on that consent; it simply allowed some property owners to regulate the property of others. *Id.* Again, the Court found the delegation improper because it would allow the owners to wield state power for "arbitrary" or "selfish" reasons. *Id.* at 121–22. And that kind of self-interested lawmaking was "repugnant to the due process clause of the Fourteenth Amendment." *Id.*

A decade later, Court returned to that point in *Carter v. Carter Coal Co. Carter Coal* involved the Bituminous Coal Act of 1935, in which Congress gave certain coal-mine operators and unions the power to set regional wages, hours, and prices. 298 U.S. at 283–84 (citing 15 U.S.C. § 808(g)). These regional standards applied not only to the participating operators and unions, but also to their competitors. *See id.* In the Court's words, the law allowed these private parties to regulate "the affairs of an unwilling minority." *Id.* at 311. They could effectively make law in their own self-interest and disadvantage others in the same business. *Id.* That combination made the Act a delegation "in its most obnoxious form"—and violated due process. *Id.*

2. The due-process limits have been conflated with limits stemming from the vesting clauses in Articles I and II.

Like *Eubank* and *Roberge*, *Carter Coal* was grounded in due process. *See id.* at 311 (citing U.S. Const. amend. V). It emphasized the fundamental unfairness of giving regulatory power to self-interested industry players. *Id.* at 310–11. *See also Ass'n of Am. Railroads v. U.S. Dep't of Transp. (Amtrak III*), 821 F.3d 19, 30–31 (D.C. Cir. 2016) (interpreting *Carter Coal* as grounded in due process). But because it involved a federal statute, it has sometimes been misunderstood by lower courts. *See, e.g.*, *Consumers' Rsch. v. FCC*, 67 F.4th 773, 795 (6th Cir. 2023) (citing *Carter Coal* as a Vesting Clause decision); *Oklahoma*, 62 F.4th at 237 (Cole, J., concurring) (same). Some courts have lumped it in with a different line of nondelegation cases—a line stemming from the Vesting Clauses. *See* Massey, *supra*, at 165 (attributing the confusion to ambiguity in *Carter Coal*'s rationale). That confusion has led to doctrinal imprecision and legislative mischief.

The confusion stems from a basic similarity: both doctrines can limit delegations to private parties. The Vesting Clauses do so through their exclusive assignments of power. Article I assigns all legislative power to Congress, and Article II assigns all executive power to the President. *See* U.S. Const. art. I, § 1 (legislative power); art. II, § 1 (executive power). Those assignments are absolute; they allow only Congress to exercise legislative power, and only the President to exercise executive power. *See Gundy v. United States*, 588 U.S. 128, 135 (2019). *See also Amtrak II*, 575 U.S. at 75 (Thomas, J., concurring) (explaining that the Vesting Clauses are "absolute").

By the same token, neither Congress nor the President can give their power away. *See Gundy*, 588 U.S. at 135. They cannot authorize people outside their respective branches to exercise their assigned authority—a limitation that applies as much to private delegations as to public ones. *See Schechter Poultry*, 295 U.S. at 537. *See also Amtrak II*, 61 (Alito, J., concurring) (explaining that executive power cannot be assigned to private parties outside the executive branch); *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 451 (2023) (Thomas, J., dissenting) (questioning whether private persons can exercise executive prosecutorial power under False Claims Act consistent with Article II).

Lower courts have sometimes read *Carter Coal* as an example of that principle in action. *See, e.g.*, *Consumers' Rsch*, 67 F.4th at 795; *Oklahoma*, 62 F.4th at 237 (Cole, J., concurring). They have reasoned that the problem with the Bituminous Coal Act wasn't that it deputized self-interested parties; it was that it assigned legislative power away from Congress. *See Alpine Sec. Corp.*, 121 F.4th at 1343 & n.42 (Walker, J., dissenting). That is, the delegation to private operators and unions didn't violate due process; it violated Article I's Vesting Clause. *See Consumers' Rsch.*, 109 F.4th at 768–69 (considering *Carter Coa*l alongside Vesting Clause precedents).

But *Carter Coal* wasn't a Vesting Clause case. Again, the Court emphasized not the exclusivity of Congress's power, but the self-interest of the private delegees. *See* 298 U.S. at 311. The Court also explicitly cited the Fifth Amendment's due process clause. *See id.* It left no room for true confusion about its foundations. *See id.* (finding the delegation to be "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment”). But even so, it has been reinterpreted or misunderstood as a Vesting Clause case. *See Consumers’ Rsch.*, 109 F.4th at 768–69. *See also Amtrak I*, 721 F.3d at 671 n.3 (noting that scholars have described *Carter Coal* as a due-process decision but nevertheless continuing to treat it as (at least in part) a Vesting Clause case).

This misreading of *Carter Coal* has produced even more confusion. By misunderstanding the decision’s foundations, courts have conflated the two constitutional limits on delegation. Rather than analyzing the due-process and vesting limits separately, courts have treated them as one undistinguished “private nondelegation” doctrine. *See, e.g.*, *Oklahoma*, 62 F.4th at 228–29 (lumping together due-process and Vesting Clause cases under one doctrine). Some have even suggested that the Vesting Clauses are the only limit on private delegation; due process adds little or nothing to the mix. *See Alpine Sec. Corp.*, 121 F.4th at 1325–26 (analyzing private delegation as a Vesting Clause issue only). *See also Amtrak I*, 721 F.3d at 671 n.3 (concluding that the distinction between the doctrines was irrelevant to the court’s analysis).

That approach effectively treats the distinction as a legal nicety. But in fact, the distinction matters in both theory and in practice. In theory, the two doctrines guard against different risks. *See* Volokh, *supra*, at 226 (explaining that the doctrines each “correspond to a different constitutional concern”). The Vesting Clauses protect structural safeguards. The Constitution sets out limits on government power; for example, it requires principal officers to be appointed with advice and consent, and it requires Congress to pass laws through both houses. *See* U.S.

Const. art. I, § 7; *id.* art. II, § 2. Those guardrails would mean little if they could be avoided simply by delegating responsibility to a private party, who is subject to no such limits. The Vesting Clauses therefore protect the Constitution's guardrails by keeping power in accountable hands. *See Amtrak II*, 575 U.S. at 61 (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty.").

The due-process doctrine protects a different value: fundamental fairness. The doctrine ensures that public power is exercised only by disinterested decisionmakers. It recognizes that public power must be exercised for the public benefit, and the public benefit is less likely to be served by self-interested people. As a matter of human nature, people cannot be expected to set aside their own interests in important matters. *See In re Murchison*, 349 U.S. 133, 136 (1955). In close cases, they will favor their own interests, even if only subliminally. *See Williams*, 579 U.S. at 8–14 (explaining that due process does not permit a person with significant prior involvement in a case to serve as adjudicator). *See also* Massey, *supra*, at 168 ("Private parties are apt to use delegated sovereign power for personal profit, despite the public cost that may be imposed."); Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103, 120 (2018) (describing *Williams*' analysis as being rooted in the "reality of human behavior"). They therefore cannot be trusted with regulatory power. *See* The Federalist No. 51 (James Madison) ("It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angles, no government would be necessary.").

The distinction also matters at a practical level. Because the Vesting Clause doctrine stems from Articles I and II, it applies only to the federal government. Volokh, *supra*, at 213. But the due-process doctrine is broader. Due process protects people from interested decisionmaking not only at the federal level, but at the level of state and local government. *See* U.S. Const art. XIV, § 1. State and local officials have the same duty to act neutrally. *See Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 61–62 (1972) (state violated due process by assigning adjudication to decisionmaker (a mayor) with financial interest in case). Due process checks their behavior even though the Vesting Clauses do not. *See Eubank*, 226 U.S. at 143 (invalidating delegation under local ordinance); *Roberge*, 278 U.S. at 121–22 (same). *See also Gen. Elec. Co. v. N.Y. State Dep't of Lab.*, 936 F.2d 1448 (2d Cir. 1991) (applying due-process precedents to delegation under state prevailing-wage law); Massey, *supra*, at 168 (observing that due-process limits on delegation bind "the states as well as the federal government").

But though due process applies to more levels of government, it also applies to a narrower range of delegations. Again, the Vesting Clauses are absolute: when they apply, they forbid all delegations—without exception. *See Amtrak II*, 575 U.S. at 69 (Thomas, J., concurring). *Cf. United States v. Arthrex, Inc.*, 594 U.S. 1, 17 (2021) (explaining all power wielded by executive officers is by virtue of Article II's vesting clause necessarily "executive"). Due process, by contrast, forbids only delegations to people with an actual or apparent interest in the issue at hand. For example, it forbids a city from delegating zoning power to a majority of owners on a neigborhood street. *Eubank*, 226 U.S. at 143. It forbids Congress from delegating general regulatory power to private coal producers. *Carter Coal*, 298 U.S. at 311. And it forbids a state from assigning adjudicatory power to industry participants with a "pecuniary interest" in the case. *See Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973). These delegations offend due process because the delegees have a stake in the outcome; they have an inherent incentive to disadvantage their neighbors and competitors. *See id*. But other delegations may satisfy due process. Due process would not, for example, forbid the government from enlisting disinterested private expertise. The government can and often does develop regulation by looking to independently developed private standards. *See, e.g.*, 29 C.F.R. § 1.2 (defining "prevailing wages" for certain federal construction projects by incorporating privately negotiated wages); *Indep. Roofing Contractors v. Dep't of Indus. Rels.*, 23 Cal. App. 4th 345, 357 (1994) (upholding similar system under state law when there was no evidence of private collusion in setting rates). *But see Gen. Elec. Co.*, 936 F.2d at 1459 (finding a triable due-process issue when there was evidence of collusion in setting private rates to influence regulatory standard). If the private expert had no stake in the matter, he or she could help with government decisionmaking without offending due process. *See* Volokh, *supra*, at 224–25 (explaining that due-process problems can be relieved by removing decisionmaker's self-interest or bias, such as by subject decision to disinterested review). *But see* Larkin, *supra*, 84–93 (arguing that "dynamic" incorporation of private standards into law is inconsistent with Article I).

The difference can be seen in recent litigation over the Passenger Rail Investment and Improvement Act (PRIIA) of 2008, Pub. L. 110-432, 122 Stat. 4848. In the PRIIA, Congress gave Amtrak co-regulatory authority over certain passenger rail travel. *See id.* § 207 (codified at 49 U.S.C. § 24101 note). Through a multi-step regulatory process, Amtrak could effectively dictate the practices of its rival operators. *See id.* The D.C. Circuit originally found the Act invalid because it gave regulatory authority to a private party—Amtrak. *See Amtrak I*, 721 F.3d at 668. This Court reversed, finding that Amtrak was in fact (for some purposes) a public entity. *See Amtrak II*, 575 U.S. at 55–56. Yet on remand, the D.C. Circuit still found the Act unconstitutional. *See Amtrak III*, 821 F.3d at 34. The problem wasn't that Amtrak was a private party; it was that Amtrak was a self-interested one. *Id.* at 32. Public or private, Amtrak had a financial stake in the rules governing the passenger-rail industry. *Id.* It therefore could not regulate other industry players consistent with due process. *Id.* at 34 ("Because PRIIA endows Amtrak with regulatory power over its competitors, that delegation violates due process.").

3. The doctrinal confusion has created space for constitutionally dubious delegations to private regulators.

The PRIIA is hardly the only recent delegation to self-interested parties. Increasingly, states and cities have enlisted private actors to regulate their own markets. These actors have been empowered to set legal standards not only for themselves, but also for other industry participants, including their competitors.

For example, California recently delegated wage-setting powers to a quasi-private regulatory entity, the "Fast Food Council." The Council includes representatives from franchisors, franchisees, employees, and employee "advocates." Cal. Lab. Code § 1475(a)(1). Together, these representatives have the power to raise minimum wages for the entire industry. *Id.* § 1475(d)(2)(B). They also have the power to promulgate standards for other "working conditions." *Id.* § 1475(d)(1)(A). Their working-condition standards are ostensibly reviewed by the California Labor Commissioner, who can either reject them or publish them as binding regulations. *Id.* § 1475(d)(1)(C)(iii). The Commissioner's review gives the Council's standards a veneer of public action. *See id.* But in fact, the Commissioner cannot modify the standards. *See id.* Nor can she reject them because she has a different view of policy. Instead, she can only measure the standards against broad statutory criteria, such as "clarity," "authority," and "nonduplication." *Id.* (incorporating by reference Cal. Govt. Code § 11339.1(a)). If the standards are "consistent" with those criteria, the Commissioner must adopt them: she has no power to change them because she disagrees on the merits. *See id.* Worse, the Commissioner has no control over the Council's wage increases. Once the Council announces a wage increase, that increase takes effect without any public review; It becomes the state-wide minimum wage as a matter of law. *See id.* § 1475(d)(2)(D).

A similar delegation is afoot in Massachusetts. There, the state recently approved a law organizing app-based rideshare drivers under a system of "sectoral bargaining." That system allows a small fraction of drivers—as few as 2.5%—to form an industry-wide union.[4] *See* Mass. Rideshare Petition, *supra*, § 5(D). This union will bargain with rideshare companies about compensation, hours, and working conditions. *Id.* § 6(A). The resulting agreement will be sent to the state secretary of labor, who will publish it as a statewide regulation. *Id.* § 6(F). This regulation will bind every driver and company in the industry, even those who had no role in bargaining. *Id. See also* U.S. Chamber Report, *supra*, at 15 (describing system). In effect, it will allow one union and a handful of companies to dictate labor policies for the whole sector with only the thinnest veneer of public review. *See* U.S. Chamber Report, *supra*, at 20 (explaining that when unions "represent" workers on this kind of labor board, "they're no longer just private organizations: they're quasi-public officials with government authority. That authority lends them a sheen of legitimacy.").

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[4] The law allows 5% of "active drivers" to initiate a union election. The law defines active drivers to include only drivers who have completed more than the mediation number of rides in the most recent quarter. That means half of drivers are immediately excluded from the process, and a union election can be triggered by as few as 2.5% of all drivers. *See* Mass. Rideshare Petition, *supra*, §§ 2(A) (defining active drivers), 5(D) (setting out election procedures). *See also* Tufts Univ. Ctr. for State Policy Analysis, Question 3: A Union for Rideshare Drivers 2 (Sept. 2024), https://cspa.tufts.edu/sites/g/files/lrezom361/files/2024-09/cSPA_2024_Q3_rideshare_union.pdf. By comparison, the National Labor Relations Act requires support from 30% of all employees in an election unit. *See* Nat'l Lab. Rels. Bd. Casehandling Manual Pt. Two: Representation Proceedings § 11023.1 (Jan. 2025), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/chm-part2-january2025.pdf.

In both Massachusetts and California, lawmakers chose this indirect regulatory model to avoid limits under federal labor and antitrust law. *See, e.g.*, *Chamber of Com. of the U.S. v. City of Seattle*, 890 F.3d 769, 788 (9th Cir. 2018) (considering antitrust- and NLRA-preemption challenges to similar law for rideshare drivers); Cynthia Estlund, *Sectoral Solutions That Work: The Case for Sectoral Co-Regulation*, 98 Univ. Chi-Kent L. Rev. 539, 555 (2023) (describing sectoral schemes as a solution to preemption "problem"). Normally, federal antitrust law would forbid private collusion over wages, and federal labor law would preempt alternative bargaining systems. *See City of Seattle*, 890 F.3d at 780–81, 788. The California and Massachusetts laws try to avoid those limits by laundering private collusion through a quasi-public process. *See* Estlund, *supra*, at 541, 556 (recognizing that because of NLRA preemption, states cannot adopt direct sectoral bargaining schemes; they must instead enact them indirectly through quasi-private "co-regulatory" schemes). That shell game may fit the laws into labor and antitrust exceptions for public action. *See, e.g.*, *Parker v. Brown*, 317 U.S. 341, 351 (1943) (state-action immunity under the Sherman Act); *Building & C. Trades Counc. v. Assoc. Bldrs.*, 507 U.S. 218, 231–32 (1993) (exemption for state regulatory activity under NLRA preemption doctrine). But it also highlights risks private delegation poses to fundamental fairness. Both laws delegate legislative power to people with a direct stake in the regulated industry. Both laws therefore raise serious questions under the Due Process Clause of the Fourteenth Amendment. *See Berryhill*, 411 U.S. at 578–79 (holding that unconstitutional scheme allowing practicing optometrists to rule on licensure proceedings of other optometrists); *Carter Coal*, 298 U.S. at 311 (holding unconstitutional scheme allowing unions and producers to set wages, hours, and working conditions for themselves and their competitors). Unless this Court reasserts the limits of that Clause, similar delegations are sure to follow.

CONCLUSION

The *nemo judex* rule remains a vigorous pillar of constitutional due process. *See De Martinez v. Lamagno*, 515 U.S. 417, 428 (1995) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." (quoting The Federalist No. 10 (Madison))). *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–77 (2009) (recognizing same principle). This Court should reaffirm that principle here. It should remind public officials that private delegation is not simply a structural concern; it stems from more than the U.S. Constitution's vesting clauses. It stems also from an ancient tradition of fundamental fairness. Today, no less than ever, due process demands a neutral decisionmaker.

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