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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 FOR RESPONDENT

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QUESTIONS PRESENTED

Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a)(3), yet Section 207 of the Passenger Rail Investment and Improvement Act of 2008 grants Amtrak the power to co-author regulations governing private freight railroads. A unanimous panel of the D.C. Circuit held Section 207 unconstitutional.

The questions presented are:

1. Whether Section 207 violates the nondelegation principle.

2. Whether Section 207 violates the Due Process Clause.

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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BRIEF FOR RESPONDENT

Respondent Association of American Railroads respectfully submits that the judgment of the court of appeals should be affirmed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States."

The Fifth Amendment to the Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Relevant statutory provisions are reproduced in the Addendum to this brief.

STATEMENT

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 creates an unprecedented and untenable situation: a for-profit corporation exercising rulemaking authority over other companies in the same industry, and wielding its regulatory power to seize a commercial advantage. The Constitution does not permit Congress to create a corporation, declare it nongovernmental, launch it into the commercial world with a for-profit mandate—and then vest it with regulatory authority over its own industry. Nor does the Constitution permit Congress to empower a private arbitrator to write and issue federal regulations, yet Section 207 delegates that authority as well. Because Section 207 violates both the nondelegation principle and the Due Process Clause, the judgment below should be affirmed.

1. In 1970, Congress established the National Railroad Passenger Corporation, better known as Amtrak, to engage in the commercial enterprise of providing intercity passenger rail service. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985). Congress's purpose was to "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking." H.R. Rep. No. 91-1580 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4735.

Congress specifically provided that Amtrak "is not a department, agency, or instrumentality of the United States Government," but rather "shall be operated and managed" as a private, "for-profit corporation." 49 U.S.C. § 24301(a)(2)-(3); *see also Atchison*, 470 U.S. at 454-55 (Amtrak is "a private, for-profit corporation" that "is not 'an agency or establishment' of the Government but is authorized by the Government to operate or contract for the operation of intercity rail passenger service."). Establishing Amtrak as a private corporation was consistent with historic practice, as "[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not . . . government[ ]." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 686 (1982).

Amtrak began offering passenger service on May 1, 1971. *Atchison*, 470 U.S. at 456. Because essentially all of the Nation's rail infrastructure was owned at the time by the freight railroads, the only option was to operate Amtrak's passenger trains over the freight railroads' tracks. The same is true today: 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. Pet.

App. 4a; *see also Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 410 (1992) ("Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads.").

The tracks used by the Amtrak trains are also used by the host railroads to move freight traffic. Just as an air-traffic controller manages departures and landings at a busy airport, the freight railroads must carefully schedule and manage the timing and sequencing of the passenger and freight trains operating on their tracks to minimize back-ups and delays. J.A. 180, 188, 195, 203. Amtrak trains limit the host railroad's ability to move freight. Thus, while Amtrak and the freight railroads do not compete for customers, they do compete for a limited resource: capacity, or the ability to operate trains within the limited slots available on a rail line. Pet. App. 19a.

Amtrak has entered into contracts with the freight railroads that host its trains. These contracts—commonly known as operating agreements—are painstakingly negotiated documents that were executed soon after Amtrak's creation and have been amended or renegotiated over the years. J.A. 179-206. The operating agreements establish the agreed-upon conditions governing Amtrak's use of the freight railroads' tracks, and spell out the rights and duties of the parties. *Atchison*, 470 U.S. at 455. The Department of Transportation has recognized that "the operating agreements between Amtrak and its host railroads are private agreements among private parties." CADC J.A. 151.

2. Congress enacted the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. *See* Pub. L. No. 110-432, Division B, 122 Stat. 4848, 4907

(codified generally in Title 49). Section 207(a) of PRIIA provides:

> Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

Section 207(c) of PRIIA, entitled "Contracts With Host Rail Carriers," provides: "To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements."

Section 207(d) provides that if Amtrak and the Federal Railroad Administration (FRA) fail to reach agreement on the content of the Metrics and Standards, or for whatever reason do not timely promulgate the Metrics and Standards, "any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."

Section 213(a) of PRIIA empowers the Surface Transportation Board to investigate violations of the Metrics and Standards. If Amtrak's "on-time performance"—a term defined by the Metrics and Standards, *see* PRIIA § 207(a)—falls below 80 percent for two consecutive quarters, or if Amtrak's service fails to satisfy other Metrics and Standards, the Board "may" initiate an investigation—and "shall" launch an investigation if Amtrak or a host railroad files a complaint. *Id*. § 213(a). The Board's investigation will "determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators." *Id*.

Section 213(a) further provides: "If the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation," as required by 49 U.S.C. § 24308(c), "the Board may award damages against the host rail carrier" and "prescrib[e] such other relief to Amtrak as it determines to be reasonable and appropriate." In fashioning a remedy, the Board may consider the need for compensation as well as deterrence, and may "order the host rail carrier to remit the damages awarded under this subsection to Amtrak." PRIIA § 213(a).

Amtrak and the FRA published proposed Metrics and Standards on March 13, 2009, J.A. 11, and "jointly issu[ed]" their final rule on May 6, 2010. J.A. 77, 157-158. The final rule stated that "the FRA and Amtrak jointly drafted performance metrics and

standards for intercity passenger rail service," and designated both an FRA official and an Amtrak employee as the contacts for further information. J.A. 157-158. The rule also stated that the FRA had prepared its responses to the comments on the proposed rule "with Amtrak's concurrence." J.A. 81. With regard to concerns expressed by several commenters about Amtrak's role in developing the Metrics and Standards, Amtrak and the FRA responded that the statute left them no choice. They explained that "PRIIA, the statutory basis for these performance measures, directly incorporates Amtrak into their creation by stating that FRA and Amtrak 'shall jointly' develop the Metrics and Standards." J.A. 88.

The final rule provided that Amtrak's on-time performance for each of its routes be assessed by reference to three metrics, each of which must be met for on-time performance to be deemed satisfactory: Effective Speed, Endpoint On-Time Performance, and All-Stations On-Time Performance. J.A. 132-136. These standards and performance requirements differ from, and are more demanding than, provisions in the existing contracts between Amtrak and the host freight railroads. *See, e.g.*, J.A. 192.

• Effective Speed is the distance of the route divided by the average time it actually takes for Amtrak trains on the route to get from one endpoint to the other. To be deemed satisfactory, a route's Effective Speed must be equal to or better than the route's Effective Speed in Fiscal Year 2008. *See* J.A. 132.

• Endpoint On-Time Performance measures how often trains on the route arrive on time at the endpoint terminal. To be deemed satisfactory, Endpoint

OTP must be at least 80 percent (increasing to 85 and 90 percent in future years). J.A. 133-134.

• All-Stations On-Time Performance measures how often the trains on the route arrive on-time at each station on the route. To be deemed satisfactory, All-Stations OTP must be at least 80 percent (increasing to 85 and 90 percent in future years). J.A. 135-136.

Thus, to satisfy the On-Time Performance metric, a route must maintain an Effective Speed equal to or better than the route's Effective Speed in Fiscal Year 2008, and it must maintain an 80 percent Endpoint and All-Stations On-Time Performance (increasing to 85 and 90 percent in future years). J.A. 135-136. Amtrak and the FRA have emphasized that their On-Time Performance metric "is all the more important because deficiencies in performance could subject host railroads to fines administered by the Surface Transportation Board." J.A. 24.

The final rule also addresses permissible delays. It allows the host freight railroad no more than 900 minutes of delays per 10,000 route miles. J.A. 138. In cases where a third party or Amtrak itself is responsible for the delay, those delay minutes do not count toward the host railroad's limit. However, Amtrak and the FRA have explained that the basis for determining who is at fault for a particular delay will be Amtrak's Conductor Delay Reports. *See* J.A. 44 (minutes of delay "is derived from conductor reports"); J.A. 138 n.23. These are reports prepared by the conductor of the delayed Amtrak train and are based solely on what Amtrak's conductor personally observes or assumes. In many cases, the conductor must complete the report and assign fault based on very limited information, *e.g.*, when the train is

stopped for reasons unknown to the Amtrak conductor. In other cases, the conductor may lack full understanding of the reason for a delay, *e.g.*, in a case where the host railroad directs the Amtrak train to stop in order to permit the FRA to inspect the track, the conductor may not realize that the delay was prompted by the Government rather than the host railroad. Consequently, in many instances, the conductor misidentifies the true root cause of a delay. *See* J.A. 181.

The Metrics and Standards became effective on May 11, 2010. J.A. 158.

3. The freight railroads are already burdened by their obligation to host Amtrak trains. Amtrak operates its trains on routes that are primarily used for freight traffic, many of which are at or near capacity. J.A. 180, 188, 195-196, 203-204. Amtrak trains consume a disproportionate share of the limited capacity or "train slots" available on a line. That is because (among other things) passenger trains travel at higher speeds than freight trains, thus requiring the freight trains to pull aside to allow the Amtrak trains to pass. J.A. 180, 188, 195.

Section 207 and the Metrics and Standards exacerbate these burdens in many respects. The Metrics and Standards place greater demands on the host freight railroads and adversely affect their operations and ability to serve their customers. As one railroad official explained, efforts "to achieve the Metrics and Standards will come at the expense of our freight traffic, which in many cases must be delayed." J.A. 190. "For this reason, the Metrics and Standards adversely affect our business by making it more difficult to serve our freight customers and to operate an efficient freight rail network." *Id.* In-

deed, the very day that Amtrak and the FRA issued their regulations, a senior Amtrak official emailed a copy of the regulations to a Union Pacific official, and stated: "These Metrics and Standards will have a big impact on UP and Amtrak." J.A. 206.

That prediction was accurate. The freight railroads have taken many steps in an effort to meet the Metrics and Standards, including modifying freight train schedules to accommodate Amtrak trains, rescheduling maintenance work, rerouting freight traffic, and diverting internal resources. *See* J.A. 182-183, 190-191, 197, 204-205; Pet. App. 11a n.6 ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take.").

Notwithstanding the freight railroads' extensive efforts, FRA reports demonstrate that the Metrics and Standards are not being met on numerous routes. In February 2011, the FRA issued its first quarterly report identifying the freight railroads' lines on which the Metrics and Standards were not being met. J.A. 159; Pet. App. 30a. The report determined that the Metrics and Standards were not achieved on most of Amtrak's routes during the July-September 2010 period. The FRA issued subsequent quarterly reports based upon Amtrak's data reflecting the same conclusion: the Metrics and Standards were not being met on most routes. *See* CADC J.A. 257-258, 266, 273, 281; District Court Docket Entry No. 8, Attachment Nos. 16, 17, 18 (FRA Quarterly Performance Reports from April, July and September 2011). Armed with such evidence, Amtrak filed a petition for relief with the STB against Canadian National, claiming that the freight railroad "refused to

adopt measures necessary to satisfy the standards developed pursuant to Section 207." J.A. 211.

The Metrics and Standards affect the freight railroads in another way. PRIIA § 207(c) directs the freight railroads to "incorporate the metrics and standards . . . into their access and service agreements" with Amtrak "[t]o the extent practicable." Amtrak has stated that it expects the freight railroads to amend their operating agreements to incorporate the Metrics and Standards pursuant to Section 207. J.A. 199.

4. The Association of American Railroads (AAR) challenged PRIIA § 207 as violating both the nondelegation principle and the Due Process Clause. J.A. 161. The parties agreed that discovery was unnecessary and that the case could be resolved through cross-motions for summary judgment.

The district court concluded that Section 207 was constitutional. While the court acknowledged that "AAR is correct that this scheme in a sense makes Amtrak the FRA's equal—as opposed to its subordinate" in the rulemaking process, Pet. App. 46a, it held that Section 207 was nonetheless a constitutional delegation of power because "the government retains ultimate control over the promulgation of the Metrics and Standards." *Id*. at 44a. The court also held that Section 207 did not violate the Due Process Clause, reasoning that under *Lebron v. National Railroad Passenger Corp*., 513 U.S. 374 (1995), Amtrak was the Government "for the purpose of individual rights guaranteed against the Government by the Constitution." Pet. App. 37a (internal quotation marks omitted).

The D.C. Circuit reversed. It held that Section 207 "constitutes an unlawful delegation of regulatory

power to a private entity." Pet. App. 3a. The court began "with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity." *Id*. at 7a. It then noted "the unprecedented regulatory powers delegated to Amtrak" by Section 207, observing that under the scheme "Amtrak enjoys authority equal to the FRA." *Id*. at 10a. "Should the FRA prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission." *Id*. The court added that "the government revealingly cites no case—nor have we found any—embracing the position that a private entity may jointly exercise regulatory power on equal footing with an administrative agency." *Id*. at 14a. The court also noted that Section 207(d)'s arbitration provision "polluted the rulemaking process over and above the other defects besetting the statute," in that it "stacked the deck in favor of compromise" by giving Amtrak the power to outsource the rulemaking and making it "entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government." *Id*. at 15a. For all of these reasons, the court concluded, Section 207 effects an unconstitutional delegation "[u]nless it can be established that Amtrak is an organ of the government." *Id*. at 16a.

The D.C. Circuit next determined that "Amtrak is a private corporation with respect to Congress's power to delegate regulatory authority." Pet. App. 23a. Although many of Amtrak's Board Members are presidentially appointed and the Government owns most of its stock, Congress expressly provided that Amtrak "shall be operated and managed as a for-profit corporation" and "is not a department, agency, or instrumentality of the United States Gov-

ernment." 49 U.S.C. § 24301(a)(2)-(3). "In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive." Pet. App. 23a. The court emphasized that, by delegating rulemaking power to an entity that Congress and Amtrak itself publicly describe as a private company, the Government could evade accountability for the resulting regulations. *Id*. at 18a. The court also noted that "[p]erverse incentives abound" because "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id*. at 20a. Finally, even though the Government had "[s]trangely" avoided discussing *Lebron* in its brief, the court nonetheless examined *Lebron* and concluded that this Court "did not opine on Amtrak's status with respect to the federal government's structural powers under the Constitution." *Id*. at 20a n.8, 22a.

The court denied the Government's petition for rehearing en banc. Pet. App. 51a.

SUMMARY OF ARGUMENT

I. Congress may not delegate rulemaking power to private companies or individuals. The principle this Court recognized in *Carter v. Carter Coal Co*., 298 U.S. 238, 310-11 (1936)—that such delegations are unconstitutional because they are not "delegations 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"—remains good law today. Although private companies may perform an advisory or ministerial role in rulemaking, they must "function subordinately" to the Government. *Sun-*

shine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

Section 207 of PRIIA violates the nondelegation principle by vesting Amtrak and the Federal Railroad Administration with co-equal rulemaking power. Amtrak "is not a department, agency or instrumentality of the United States Government," but rather a private company that is "operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a). The Constitution does not permit a private corporation to co-author federal regulations and then impose those regulations on other companies in the same industry. Here, Amtrak was able to wield the sovereign's regulatory power to its own commercial advantage by issuing regulations that have forced the freight railroads to delay freight traffic in order to benefit Amtrak's for-profit business.

The statute's arbitration provision, Section 207(d), separately violates the nondelegation principle because it permits a private arbitrator to draft and issue the regulations if Amtrak and the FRA reach an impasse—thus excluding the Government entirely from the rulemaking process. The Government urges this Court to construe this provision as requiring the appointment of a Government arbitrator, but the statutory text contains no such requirement and this Court has repeatedly made clear that it does not rewrite statutes, even to avoid constitutional issues. *See United States v. Stevens*, 559 U.S. 460, 480-81 (2010).

Amtrak should not be deemed a federal agency for purposes of a nondelegation analysis. While this Court held in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 399 (1995), that Amtrak may be deemed part of the Government for purposes of the

constitutional *obligations* of Government, it strongly suggested that Amtrak is *not* part of the Government for purposes of the sovereign's inherent *powers and privileges*, such as the rulemaking power. Nor do Amtrak's connections to the Government entitle it to exercise regulatory authority. Amtrak employees are not federal employees, and the Government conceded below that it "does not control Amtrak's day-to-day operations." U.S. CADC Br. at 29. Indeed, the very existence of the arbitration provision—which reflects the need for a third party to resolve impasses—confirms that the Government did not have the ability to control Amtrak's actions in the rulemaking.

II. Section 207 also violates the Due Process Clause. Empowering a corporation to regulate other companies in its own industry violates due process, which requires a "presumptively disinterested" regulator. *Carter Coal*, 298 U.S. at 311-12. A corporation such as Amtrak—which acts under a for-profit mandate and has a powerful commercial self-interest in its own regulations—is not "disinterested."

Section 207 makes Amtrak an unconstitutional hybrid: a corporation that is simultaneously a profit-seeking commercial actor *and* a Government regulator of the very industry in which it is a market participant. Permitting Congress to delegate its Article I power in this way would be dangerous not only to our constitutional structure, but also to businesses that will face the chilling prospect of a for-profit market competitor endowed with the sovereign lawmaking authority of the United States and a mandate to regulate other companies in the same industry for its own commercial benefit.

ARGUMENT

This case presents the question whether Congress can charter a corporation as a nongovernmental entity, launch it into the commercial world with a for-profit mandate, and then give it regulatory power over other companies in the same industry. This Court's precedent—and settled principles of separation of powers and fundamental fairness—foreclose such a delegation.

I. SECTION 207 IS AN UNCONSTITUTIONAL DELEGATION.

A. Congress May Not Delegate Rulemaking Power To Private Companies.

The Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1. Although "[t]his text permits no delegation of those powers," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001), the Court has "long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." *Touby v. United States*, 500 U.S. 160, 165 (1991). "Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Id*.

While the Court has permitted grants of rulemaking power to executive or judicial actors in the coordinate branches, it has drawn the line at delegations to persons or entities *outside* the Government. For more than 70 years, the Court has recognized that Congress may not delegate to private individuals or companies the power to promulgate regulations governing the conduct of other private parties.

In *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936), the Court struck down a statute that granted certain coal producers and miners the power to issue rules setting maximum labor hours and minimum wages. The Court explained that a delegation of rulemaking authority to a private party "is 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.* at 311. The Court emphasized that "one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Id.*[1]

The Court revisited the private-party nondelegation principle in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), where it held that Congress may give private entities a role in rulemaking provided that they "function subordinately" to the Government. *Sunshine Anthracite* involved a

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[1] *See also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) ("But would it be seriously contended that Congress could delegate its legislative authority to [private] groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (invalidating, as an unconstitutional delegation, a zoning ordinance giving landowners the authority to restrict a neighbor's lawful use of his property).

statute authorizing members of the coal industry to propose minimum coal prices to the National Bituminous Coal Commission, a Government agency. The Government then decided whether to adopt, modify or reject the proposals. *See id*. at 398. The Court concluded that Congress had not impermissibly delegated its legislative authority to the industry, because under the statutory scheme, the private actors merely *proposed* minimum prices—it was the Government that had complete and unfettered authority to *determine* the minimum prices. *Id*. at 388, 399.

Following *Carter Coal* and *Sunshine Anthracite*, the courts of appeals have held that Congress may grant private entities no more than a "ministerial" or "advisory" role in the exercise of Government power. For example, in *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), the Fourth Circuit "summarize[d] the Supreme Court's holdings" in this area as "articulat[ing] the standard that Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others." *Id*. at 395 (emphases in original). Similarly, in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc*., 521 U.S. 457 (1997), the Third Circuit turned away a nondelegation challenge on the basis that, under the statute in question, the private entities merely "serve[d] an advisory function" and "a ministerial one," and thus did not transgress constitutional boundaries. *Id*. at 1129.[2]

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[2] Although the Court has not struck down a delegation to private parties since *Carter Coal*, the Court has continued to recognize the prohibition on private delegations. *See, e.g*., *Mis-*

B. Section 207 Violates The Nondelegation Principle.

Section 207 enables Amtrak to wield sovereign power to its own commercial advantage. Amtrak co-authors the rules, triggers the investigation, provides the evidence, and then reaps the benefits. Section 207 also gives Amtrak authority to demand that its contracts with the freight railroads be amended to incorporate the Amtrak-drafted regulations. And in the event the FRA does not agree with Amtrak's preferred approach, Section 207 provides that the Government may be cut out of the rulemaking process entirely and a private arbitrator may step in to write the federal regulations.

1. Section 207 gives Amtrak co-equal rulemaking power with the Department of Transportation.

a. Section 207 violates the nondelegation principle because it grants rulemaking authority to Amtrak—a private, "for-profit corporation" that is "not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a).

Amtrak is not limited to a ministerial or advisory role, and it does not "function subordinately" to the

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tretta v. United States, 488 U.S. 361, 373 n.7 (1989) (noting that the challenged statute did not "delegate regulatory power to private individuals"); *id*. at 422 (Scalia, J., dissenting) ("This is an undemocratic precedent that we set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government"); *New Motor Vehicle Bd. v. Orrin W. Fox Co*., 439 U.S. 96, 125-26 (1978) (Stevens, J., dissenting) (discussing *Carter Coal* with approval and concluding that private delegation violates due process).

Government in the regulatory scheme. *Sunshine Anthracite*, 310 U.S. at 399. To the contrary, the plain text of the statute—that Amtrak and the FRA shall "jointly" develop and issue the Metrics and Standards—establishes that their rulemaking authority is identical. In the Government's words, Amtrak is the "co-author" of the Metrics and Standards. U.S. CADC Br. at 18; *see also* J.A. 158 ("the FRA and Amtrak have jointly made, and are jointly issuing, revisions to the Metrics and Standards"). Section 207 closely resembles the statute struck down in *Carter Coal*, where the private parties were not limited to a subordinate—*i.e.*, ministerial or advisory—role, but were given actual rulemaking power. *See* Pet. App. 14a ("Section 207 is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen.").

The FRA was powerless to issue a regulation that Amtrak opposed. Whereas in *Sunshine Anthracite*, the Government could simply have rejected the private parties' advisory proposal and set its own prices, the FRA could not do that here. In fact, Amtrak had the authority to block the rulemaking entirely. At a minimum, Amtrak could use its delegated power as leverage to extract concessions from the Government in the rulemaking by threatening to veto the Government's preferred rule, or to refer the entire rulemaking to an arbitrator who might force the Government to accept a rule it did not want. By giving Amtrak the power to block the rulemaking—or to bring in a private, third-party arbitrator to write the rule over the Government's objections—Section 207 forces a federal agency to compromise with a private party about what the law should be.

b. The Government appears to concede that, as a general matter, a private party cannot be vested

with rulemaking authority. But it contends that Section 207 simply amalgamates different aspects of statutory schemes that have been approved by this Court. The Government's argument bears an uncanny resemblance to the argument rejected in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3159 (2010), in that it assumes that Congress is free to add aspects of the scheme approved in *Sunshine Anthracite* to aspects of the scheme approved in *Currin v. Wallace*, 306 U.S. 1 (1939). *See* U.S. Br. 26; Pet. App. 13a. The Government is mistaken. Section 207 is a unique statute that goes well beyond anything this Court has ever approved.

In *Currin*, the Government wrote tobacco regulations, but provided that the regulations would not be applicable to any given market unless two-thirds of the tobacco growers in the market voted in favor of them. The *Currin* scheme is distinguishable from Section 207 in at least two ways. First, in *Currin*, it was the Government that wrote the regulations; indeed, this Court held the statute constitutional precisely because "it is *Congress* that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 306 U.S. at 16 (emphasis added). In other words, "Congress has merely placed a restriction upon its *own* regulation . . . ." *Id*. at 15 (emphasis added). The Metrics and Standards, in contrast, are not the Government's "own regulation[s]"; the regulatory authority was exercised jointly by the Government and Amtrak. Second, the Court in *Currin* underscored that "[t]his is not a case where a group of producers may make the law and force it upon a minority." *Id*. Of course, in this case, Section 207 empowered *a single company*

to co-author the law and force it upon the rest of the industry.

The Government also cites *United States v. Rock Royal Co-Op.*, 307 U.S. 533 (1939), which is distinguishable for the same reason: the Court relied on *Currin* in upholding a statute that allowed a supermajority of the regulated parties to determine when a Government-drafted regulation would become effective. The private parties in *Rock Royal* did not draft the regulation themselves and foist it on unwilling companies in the same industry.

This Court has long recognized the distinction between exercising legislative power, on the one hand, and determining when an exercise of legislative power may become effective, on the other. That was the distinction this Court relied upon in *Currin*, as well as in *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), where the Court explained that Congress may permit residents of a district to vote whether to be subject to legislation. "While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district." *Id.* at 407. Under Section 207, Amtrak did not determine when an exercise of legislative power would become effective; rather, it exercised legislative power itself by co-authoring the Metrics and Standards.

The Government has never identified a similar statute—one that vests a federally-chartered, for-profit corporation with regulatory authority over other companies in the same industry. This is an-

other strong indicator that Section 207 is unconstitutional. *See Free Enter. Fund*, 130 S. Ct. at 3159 ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.") (internal quotation marks omitted). Whereas Congress has given self-regulatory organizations authority over an industry, in those cases the organization is subject to Government oversight and is not itself an industry participant that could seek to leverage its regulatory power to serve its own commercial self-interest.[3]

Likewise, the Government has never identified a policy purpose behind the odd and unprecedented rulemaking procedure enshrined in Section 207—let alone suggested that Congress's goals can only be achieved by vesting Amtrak with co-equal rulemaking authority. If Congress believes it important to develop performance metrics for Amtrak, it could easily do so in a way that does not violate the Constitution, such as by giving Amtrak an advisory role in the rulemaking process, as it has done in other statutes. *See, e.g.*, Pub. L. No. 101-610, Title VI, § 601(d), 104 Stat. 3127, 3186 (1990) (directing Secretary of Transportation to consult with Amtrak in issuing regulations). The Government offers no reason to think that Congress needs the ability to make this novel sort of delegation to accomplish its legisla-

[3] In the D.C. Circuit, the Government noted that Congress gave the former National Association of Securities Dealers authority to "develop rules for disciplinary proceedings concerning their members, subject to the review and approval of the Securities and Exchange Commission." U.S. CADC Br. at 27 (citing the Maloney Act, 15 U.S.C. § 78o-3). That example has now been deleted from the Government's brief, presumably because under the Maloney Act, the SEC has plenary authority to override and rewrite those rules if it chooses.

tive objectives—in this context or in any other context.

c. Section 207 implicates two key purposes underlying the nondelegation principle: that private companies not use regulatory power to their own commercial advantage, and that the Government not be able to evade accountability for regulatory choices.

i. The nondelegation principle helps ensure that private companies "are not able to use their position for their own advantage [and] to the disadvantage of their fellow citizens." *Pittston Co.*, 368 F.3d at 398. Here, "Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce track." Pet. App. 19a. In that regard, Section 207 "grants Amtrak a distinct competitive advantage: a hand in limiting the freight railroads' exercise of their property rights over an essential resource." *Id.*[4]

Amtrak seized that commercial advantage by drafting regulations that benefit Amtrak and harm the freight railroads. It should be no surprise that the regulations are commercially favorable to Amtrak, and impose standards the freight railroads cannot meet without modifying their operations and further delaying freight traffic. In fact, the on-time performance standards cannot be achieved as a practical matter on many routes. *See, e.g.*, J.A. 189.

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[4] Even if Amtrak and the freight railroads did not compete, Section 207 would still violate the nondelegation principle, as *Carter Coal* makes clear that the constitutional inquiry turns on whether the statute delegates rulemaking power to a private entity. That the delegate may regulate competitors simply *exacerbates* the violation. *See* 298 U.S. at 311 ("[O]ne person may not be entrusted with the power to regulate the business of another, and *especially* of a competitor.") (emphasis added).

What is more, Amtrak and the FRA have determined that the Metrics and Standards will rely on Amtrak-generated "Conductor Delay Reports" to assign responsibility for particular delays. J.A. 44. Thus, not only has Amtrak written the rules, it creates and supplies the evidence that will be used to determine responsibility for violations of its rules.

Amtrak can wield its rulemaking authority to its own commercial advantage in another way: It can leverage its power under Section 207(c)—the provision requiring the freight railroads to incorporate the regulations into their contracts with Amtrak to the extent practicable—in an attempt to pressure the freight railroads to rewrite those contracts or otherwise grant Amtrak concessions or benefits. The Department of Transportation has acknowledged that these contracts are "private agreements among private parties." CADC J.A. 151. The contract provision makes abundantly clear that Section 207 violates the nondelegation principle, as it enables one private party to wield Government power in an attempt to rewrite private contracts at the expense of the other private party. Section 207 has created a system in which Amtrak is poised to reap substantial commercial benefits from the parties it is regulating.

ii. Another key purpose of the prohibition on delegation to private entities is preventing "the harm done thereby to principles of political accountability." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984). When power is delegated outside the Government, the lines of accountability are blurred, and Congress is able to diffuse responsibility for the formulation of policy, undermining an important democratic check on government decisionmaking. *See Free Enter. Fund*, 130 S. Ct. at 3155 ("Without a clear and effective chain of

command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.") (internal quotation marks omitted); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch [of the Government] . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.").

Here, Congress, the President and Amtrak itself have all publicly and emphatically denied that Amtrak is part of the Government. Congress has provided in the U.S. Code that Amtrak "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(3). The President has also publicly denied accountability for Amtrak, stating that "Amtrak is not an agency or instrument of the U.S. Government." Executive Office of the President, OMB, *Budget of the U.S. Government (FY 2013)*, at 1014. And Amtrak itself proclaims on its website that "Amtrak is a private company" and "not a government agency." *See* www.amtrak.com, not www.amtrak.gov.

As the D.C. Circuit explained, "delegating the government's powers to private parties saps our political system of democratic accountability," and "[t]his threat is particularly dangerous where both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity." Pet. App. 18a. Here, there is diminished public accountability for the exercise of Government lawmaking power under Section 207—because Amtrak and the Government have repeatedly told the public in the plainest possible terms that Amtrak is *not* part of the Government. Congress cannot exercise its Article I lawmaking power by del-

egating it to a corporation that Congress, the President and the corporation itself all deny is a Government actor.

2. The arbitration provision standing alone makes Section 207 an unconstitutional delegation.

The statute's arbitration provision, Section 207(d), gives Amtrak the right—in the event the FRA refuses to bend to Amtrak's demands in the joint rulemaking—to outsource the rulemaking to "binding arbitration" in which the regulations would be written by an unspecified arbitrator appointed by the Surface Transportation Board. This extraordinary provision, in and of itself, renders Section 207 unconstitutional.[5]

Empowering a private arbitrator to override the Government's proposed regulation and replace it with one of the arbitrator's own choosing is a plain violation of the nondelegation principle. The Government emphasizes that the arbitrator would be "government-appointed," U.S. Br. 27, but the constitutional flaw is the identity of the arbitrator, not the appointing entity.

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[5] If the Court were to agree that delegating rulemaking power to a private arbitrator is unconstitutional, it would not need to decide whether Amtrak is a private company for purposes of this case. *See* Section I.C *infra*. Nor is the arbitration clause severable from the remainder of Section 207: PRIIA does not contain a severability clause; Section 207 would not remain "fully operative" absent the dispute-resolution provision because there would be no method for resolving an impasse between Amtrak and the FRA; and there is no basis for concluding that Congress would have enacted Section 207 absent that provision. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-87 (1987).

The Government does not dispute that Section 207 would be unconstitutional if it allowed a private arbitrator to write federal regulations. The Government contends, however, that Section 207(d) should be construed as requiring the appointment of a *Government* arbitrator. U.S. Br. 27-29. But the statute itself does not say this, and the Court "will not rewrite a law to conform it to constitutional requirements." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and alteration omitted).

a. The Government contends that "normal principles of statutory construction," U.S. Br. 27, require the words "an arbitrator" in Section 207(d) to be replaced with the words "a Government arbitrator." That is not a tenable reading. Nothing in the text of the statute suggests that Congress required the appointment of a Government arbitrator. In fact, both this Court and the Government itself have recognized that the ordinary meaning of the word "arbitrator" refers to a *nongovernmental* actor. *See, e.g.*, *Gordon v. United States*, 74 U.S. (7 Wall.) 188, 194 (1868) (relying on legal dictionary's definition of "arbitrator" as "'a private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same'") (emphasis omitted); *The Constitutional Separation of Powers Between the President & Congress*, 20 Op. O.L.C. 124 (1996), 1996 WL 876050, at *15 ("Typically, arbitrators are private individuals chosen by the parties to the dispute."); *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208 (1995), 1995 WL 917140, at *5 (arbitrators who resolve disputes involving the federal government "are manifestly private actors who are, at most, independent contractors to, rather than em-

ployees of, the federal government"). The arbitration program currently administered by the STB contemplates that the arbitrator will not be a Government official. *See* 49 C.F.R. § 1108.6.

The Government argues that, in the absence of an "affirmative showing," Congress should not be presumed to have authorized sub-delegations to outside parties. U.S. Br. 27. But the plain text of the statute constitutes an affirmative showing that Congress did not require the appointment of a Government arbitrator. Similarly, although the Government points to other sections of PRIIA calling for the appointment of particular types of arbitrators, *see* U.S. Br. 28, that just undercuts the Government's argument. Congress knows how to place limits on the selection of arbitrators, as it did elsewhere in PRIIA, but it did not place any such limits here. Indeed, Congress knows how to write a statute requiring a Government arbitrator, *see, e.g.*, 7 U.S.C. § 1359ff(a)(2)(A), but it did not do so here.

b. The Government urges the Court to adopt its strained reading based on "principles of constitutional avoidance." U.S. Br. 29. But this Court has repeatedly declined to apply "the canon of avoidance" to "bypass [a] constitutional issue" if doing so would require it to "rewrite the statute, not interpret it." *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (internal quotation marks and alteration omitted); *see also, e.g.*, *Stevens*, 559 U.S. at 481; *Salinas v. United States*, 522 U.S. 52, 59-60 (1997); *United States v. Monsanto*, 491 U.S. 600, 611 (1989). As the Court has explained, to do so "would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481 (internal citations and quotation marks omitted).

In applying this rule, the Court has held that reading atextual qualifications into a statute to avoid constitutional concerns "requires rewriting, not just reinterpretation." *Stevens*, 559 U.S. at 481. For example, in *Stevens*, the Court rejected the Government's invitation to construe 18 U.S.C. § 48—which applies to "anyone who knowingly 'creates, sells, or possesses a depiction of animal cruelty,' if done 'for commercial gain' in interstate or foreign commerce," *id*. at 464-65—"to reach only 'extreme' cruelty." *Id*. at 480; *see also CFTC v. Schor*, 478 U.S. 833, 842 (1986) (refusing to "read into the facially unqualified reference to counterclaim jurisdiction a distinction between counterclaims arising under the Act or CFTC regulations and all other counterclaims" because even if that "reading permitted [us] to avoid a potential Article III problem, it [would do] so only by doing violence to the [Act]").

Moreover, "redraft[ing] the statute" to require the appointment of a Government arbitrator would itself "raise independent constitutional concerns whose adjudication is unnecessary to decide this case." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995). Specifically, reading Section 207(d) to require a Government arbitrator would raise serious concerns under the Appointments Clause. Unless the Government arbitrator were appointed by the President and confirmed by the Senate, he or she would be constitutionally prohibited from exercising rulemaking power under *Buckley v. Valeo*, 424 U.S. 1, 140-43 (1976) (per curiam). Moreover, for the STB's appointment to be constitutionally valid, the Government arbitrator would need to be removable at will by the STB, *see Free Enterprise Fund*, 130 S. Ct. at 3162-64; 49 U.S.C. § 701(b)(3), yet Section 207(d) does not address the STB's remov-

al power. All of these constitutional concerns would require this Court to insert *additional* limitations and requirements that do not appear in the statutory text.

The Government cannot salvage the provision by downplaying what it calls a mere "hypothetical possibility" that the STB might appoint a private arbitrator. U.S. Br. 29. As the Court stated in *Stevens*, "[w]e would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." 559 U.S. at 480 (citing *Whitman*, 531 U.S. at 473). Indeed, "[t]he Government's assurance that it will apply [Section 207] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Id*. Similarly, it is immaterial that the arbitration provision has not yet been invoked. U.S. Br. 27. The nondelegation inquiry turns on the delegation itself—*i.e*., the authority that Congress conferred by statute—rather than how the delegated authority was actually exercised. Parties cannot cure an unconstitutional delegation of power simply "by declining to exercise some of that power." *Whitman*, 531 U.S. at 473.

3. The Government errs in claiming that the Metrics and Standards have no "regulatory effect" on the freight railroads.

The Government attempts to cure these constitutional shortcomings by raising several arguments intended to downplay the effects of the Metrics and Standards. U.S. Br. 30-37. None of the Government's arguments has merit.

The Government suggests that the Metrics and Standards do not have a "direct regulatory effect" on the freight railroads. U.S. Br. 31. But this is plainly wrong: Section 207 provides that the freight railroads "shall" amend their contracts with Amtrak to incorporate the Metrics and Standards to the extent practicable. This provision has a direct and indisputable regulatory effect on the freight railroads. The Government underscores the "to the extent practicable" language, implying that this qualification somehow eliminates the regulatory effect. U.S. Br. 36. But unless the Government intends to suggest that this qualification renders the statute a nullity—*i.e.*, that it will *never* be practicable for any freight railroad to incorporate a single Metric or Standard—then this provision must have *some* regulatory effect.[6]

The Government insists that the Metrics and Standards "serve primarily as tools to measure Amtrak's own performance." U.S. Br. 30-31. But the Government cannot deny that the Metrics and Standards are *also* intended to measure the freight railroads' performance in hosting Amtrak trains. Indeed, the freight railroads are allotted a certain number of "delay minutes." J.A. 138. Moreover, the statute subjects freight railroads to federal investigations if the Metrics and Standards are not satisfied. Even in cases where the target has done nothing wrong, an investigation can impose significant costs

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[6] The Government's observation, U.S. Br. 36, that Section 207 threatens no specific "statutory penalty" for noncompliance is misleading. Presumably the Government does not mean to suggest that freight railroads may defy Section 207(d)'s mandate without consequence, such as being forced to defend their position before the STB.

of compliance, business uncertainty and harm to reputation.

The Government's suggestion that the Metrics and Standards have no effect on the freight railroads is further undercut by the evidence documenting the many steps the freight railroads have been forced to take in order to satisfy the Metrics and Standards—evidence that the Government did not contest in the district court, where it conceded there were no disputed material facts. *See* Pet. App. 11a n.6 ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take."); J.A. 179, 186, 194, 202. The Government acknowledges these direct regulatory effects when it admits that "perhaps" the Metrics and Standards had "some incentivizing effect" on the freight railroads. U.S. Br. 30. The Government further undercuts its own argument by pointing to what it claims are the significant changes in Amtrak's on-time performance after the D.C. Circuit issued its decision in this case. *Id*. at 31.

Finally, the Government argues that any future sanctions against the freight railroads would be based on the STB's finding violations of the statutory preference requirement rather than of the Metrics and Standards themselves. U.S. Br. 34 (citing 49 U.S.C. § 24308 (requiring carriers to give preference to Amtrak over freight traffic)).[7] But Amtrak is

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[7] The Government implies that Congress required the freight railroads to give Amtrak preferential access to their tracks "[a]s a condition of relieving railroads of passenger-rail-service obligations." U.S. Br. 2-3. In fact, the Rail Passenger Service Act of 1970 required the freight railroads to make large cash payments to Amtrak over three years "[i]n consideration of being

treating the failure to satisfy the Metrics and Standards as *evidence* that the preference requirement was violated. J.A. 211. Nor can the STB's involvement in enforcing the preference requirement cure the constitutional defects in Section 207, just as the Government's enforcement role did not save the rulemaking scheme in *Carter Coal*. The Board had no authority over the promulgation of the Metrics and Standards. The Constitution does not permit Congress to vest a private party with rulemaking authority on the theory that a federal agency may someday resolve disputes arising under those rules.

C. Amtrak Is Not A Federal Agency For Purposes Of A Nondelegation Analysis.

The Government contends that Amtrak should be deemed a federal agency for purposes of a nondelegation analysis. The Government relies on *Lebron v. National Railroad Passenger Corp.*, 513 U.S.

[Footnote continued from previous page]

relieved of this responsibility." Pub. L. No. 91-518, § 401(a)(2), 84 Stat. 1327, 1334-35. The Interstate Commerce Commission soon recognized that those payments were "the entire consideration" that Congress required of the freight railroads "for being relieved of the common carrier responsibilities for providing intercity rail passenger service." *Penn Cent.-Compensation for Passenger Service*, 342 I.C.C. 765, 768 (1973). The statute requiring the freight railroads to give Amtrak "preference over freight transportation," 49 U.S.C. § 24308(c), was not enacted until 1973. And both the statute and ICC precedent make clear that the freight railroads are entitled to compensation for *at least* the "incremental costs" that Amtrak's use of the tracks imposes. *See* 49 U.S.C. § 24308(a)(2)(B); *Nat'l R.R. Passenger Corp. v. ICC*, 610 F.2d 865, 880 (D.C. Cir. 1979); *Nat'l Rail Passenger Corp. Application*, 1 I.C.C.2d 243, 250 (1984).

374 (1995), as well as what it calls Amtrak's "host of ties" to the Government. U.S. Br. 42.

Notably, the Government did not make its *Lebron* argument to the D.C. Circuit. There, the Government effectively conceded in its brief that Amtrak is a private party for purposes of a nondelegation challenge, but argued that the Government exercised what it called "structural control" over Amtrak. *See* U.S. CADC Br. at 29. In fact, the D.C. Circuit commented on the Government's "[s]trange[ ]" failure to make a *Lebron* argument, concluding that "[p]erhaps this indicates the government's agreement with AAR's reading of [*Lebron*]." Pet. App. 20a n.8.

The Government's new argument is meritless in any event. *Lebron* recognizes that Amtrak should be deemed the Government for purposes of the constitutional obligations of Government, but not for the constitutional powers and privileges of Government.

1. *Lebron* distinguished between Amtrak's status for purposes of the constitutional *obligations* of the Government and the constitutional *powers* of the Government.

Lebron does not hold that Amtrak may exercise the sovereign authority of the United States by promulgating federal regulations. *Lebron* involved an artist who wished to install a politically controversial display in New York's Penn Station. When Amtrak prohibited the installation, the artist sued Amtrak for violating his First Amendment rights. The Court allowed the lawsuit to proceed, holding that Amtrak must be deemed the Government "for the purpose of individual rights guaranteed against

the Government by the Constitution." 513 U.S. at 394.

While *Lebron*'s holding is narrow, the Court's analysis strongly suggests that although Amtrak is part of the Government for purposes of the constitutional *obligations* of the Government—such as the obligation to respect an artist's First Amendment rights—Amtrak is *not* part of the Government for purposes of the inherent *powers and privileges* of the Government. That was the basis on which the Court distinguished its prior case holding that the Bank of the United States was not vested with the inherent constitutional powers of the Government. *See* 513 U.S. at 398-99 (discussing *Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904 (1824)). The Court explained that "it does not contradict [*Bank of the United States*] to hold that [Amtrak] is an agency of the Government, for purposes of the constitutional obligations of Government rather than the privileges of the Government." *Id.* at 399 (internal quotation marks omitted).

Lebron's analysis thus establishes that while Amtrak is a Government agency for purposes of the Government's constitutional obligations, it is *not* a Government agency for purposes of the Government's inherent powers and privileges, such as the Article I lawmaking power. As the Court acknowledged, deeming Amtrak the Government for purposes of exercising governmental power would contradict *Bank of the United States*.

In fact, the *Lebron* Court expressly stated that by establishing Amtrak as a private, for-profit corporation, Congress necessarily "deprive[d] Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress

to eliminate." 513 U.S. at 392. The Court had "no doubt" that "the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit, and of the ordinarily presumed power of Government agencies authorized to incur obligations to pledge the credit of the United States." *Id*. (citations omitted). If the private charter makes Amtrak a private actor for purposes of these sovereign powers and privileges, it makes Amtrak a private actor for purposes of the sovereign lawmaking power as well.[8]

Congress made a deliberate choice to charter Amtrak as a private, for-profit corporation organized under the District of Columbia Business Corporation Act. This gave Amtrak many benefits in the commercial sphere, including freedom from civil service laws, procurement requirements, and the numerous other obligations of government agencies. *See* David E. Lilienthal & Robert H. Marquis, *The Conduct of Business Enterprises by the Federal Government*, 54 Harv. L. Rev. 545, 562 (1941) ("The corporation, because of its legal status as an entity separate and distinct from the United States, may properly be accorded a measure of financial independence which, in ordinary departments or administrative agencies, might be wholly impracticable.") (footnote omitted).

In fact, in the years since *Lebron* was decided, Congress has taken further steps to eliminate Government control over Amtrak. In 1997, Congress

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[8] The Government errs in suggesting that the D.C. Circuit's approach is inconsistent with *Free Enterprise Fund*. U.S. Br. 41. As the Court acknowledged, the parties in *Free Enterprise Fund* simply did not dispute that the PCAOB should be treated as a Government entity for purposes of the challenges to the removal restrictions in that case. *See* 130 S. Ct. at 3148.

amended 31 U.S.C. § 9101(2) by deleting Amtrak from the list of "mixed-ownership Government corporations"—a list that includes, among others, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation—to make absolutely clear that Amtrak is a private actor. *See* Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 415(2), 111 Stat. 2570, 2590-91. In signing the amendment into law, President Clinton explained that the change will "free Amtrak to operate . . . more like a private entrepreneurial corporation." 33 Weekly Comp. Pres. Doc. 1955 (Dec. 2, 1997). The change was significant, in that it relieved Amtrak from many of the audit, accounting and budget reporting requirements set forth in the Government Corporation Control Act, 31 U.S.C. §§ 9101 et seq. The purpose of the change was to avoid federal "micromanagement of Amtrak's operations," H.R. Rep. No. 105-251, at 13 (1997), and to enable Amtrak to "operate as much like a private business as possible." S. Rep. No. 105-85, at 1 (1997), *reprinted in* 1997 U.S.C.C.A.N. 3055, 3055.

Having made the choice to establish Amtrak as a private entity, Congress cannot then vest Amtrak with sovereign powers that the Constitution does not allow private entities to exercise. A federally-chartered corporation cannot be both a commercial actor and a regulator of its own industry. Just as a Government-created corporation cannot claim sovereign immunity when "the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise," *Library of Cong. v. Shaw*, 478 U.S. 310, 317 n.5 (1986), a Government-created entity that functions as a private commercial enterprise cannot claim a similar inherent privilege of Government—the power to make laws and issue

regulations. As this Court held long ago: "The government, by becoming a corporator, lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege that is not derived from the charter." *Bank of the U.S.*, 22 U.S. at 908.

Lebron cannot possibly be read as permitting Congress to vest Amtrak with rulemaking power. *Lebron* imposes *restrictions* on the power of federally chartered corporations; the Court expressed deep concern over the danger that Congress could violate constitutional limits by devising new ways to structure such corporations. *See* 513 U.S. at 397 ("It surely cannot be that government . . . is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). *Lebron* "*constrains* governmental action by whatever instruments or in whatever modes that action may be taken." *Id*. at 392 (emphasis added; internal quotation marks omitted). For the Government to argue that *Lebron* actually *empowers* a federally chartered corporation to exercise sovereign powers that the Constitution bars all other corporations from exercising turns *Lebron* on its head. By admonishing that the Government cannot use the corporate form to evade its constitutional obligations, the Court did not rule that Congress was otherwise free to manipulate the corporate form by vesting Amtrak with sovereign lawmaking power in order to enhance its own for-profit business at the expense of other railroads.

2. Amtrak's connections to the Government do not give Amtrak the power to issue federal regulations.

The Government emphasizes Amtrak's connections to the Government, noting that Amtrak's stock is largely owned by the Government and most of its Board members are presidentially appointed. U.S. Br. 42-46. But none of this can change the fact that Congress chose to establish Amtrak as a private corporation rather than as a federal agency. *See* 49 U.S.C. § 24301(a). Congress cannot vest the sovereign rulemaking power in an entity that it deliberately placed outside of the Government in order to reap the commercial benefits from that designation.

The Government's argument that Amtrak's governmental connections allow Amtrak to exercise the sovereign rulemaking power conflicts with this Court's recognition that Congress's "statutory disavowal" of Amtrak's agency status has consequences. Specifically, the statutory disavowal prevents Amtrak from exercising the powers and privileges of the Government, such as the power to pledge the credit of the United States and the privilege to claim sovereign immunity. *See Lebron*, 513 U.S. at 392. If the Government were correct that Amtrak's ties to the Government were sufficient to override the statutory disavowal, then Amtrak *could* do those things *Lebron* said it *cannot* do.

The Government argues that Amtrak should be allowed to exercise rulemaking power because the Government owns virtually all of Amtrak's stock. U.S. Br. 43. But the Court rejected that argument long ago, when it held that sovereign power does not inhere in a corporation whose stock is owned by the

Government. *See Bank of the U.S.*, 22 U.S. at 908 ("The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank.").[9] The Government also argues that Congress has directed Amtrak to pursue goals in addition to profit-seeking, U.S. Br. 42-43, but that does not differentiate Amtrak from private corporations. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014) ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.").

Nothing in this Court's nondelegation decisions suggests that Congress may delegate rulemaking power to private companies that are subsidized by the Government or over which the Government exercises some degree of influence. Surely the Government would not suggest that General Motors, in the days following its bankruptcy, could issue federal regulations on the theory that the Government exercised "sufficient control" over the company.

Any Government "control" over Amtrak for purposes of the Metrics and Standards rulemaking was remote and attenuated in any event. As the Government conceded below, it "does not control Amtrak's day-to-day operations," U.S. CADC Br. at 29, and "[t]he officers and employees who conduct

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[9] The Amtrak stock held by the Government has no voting rights or liquidation preference. *See* Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(c)(1)(A) & (2)(A), 111 Stat. at 2590.

Amtrak's day-to-day affairs are not federal employees." *Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1255 (5th Cir. 1984); *see also United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 490 (D.C. Cir. 2004) (Roberts, J.) (stating, in case arising under the False Claims Act, that "Amtrak is not the Government"). Under the Government's theory, the Amtrak employees who were tasked with writing the regulations were accountable to their supervisors, and through them to Amtrak's Board of Directors, and through the Board to the President (via the appointment of some but not all Board members) and to Congress (via the funding power). These multiple layers of supervision diluted any federal control that even arguably existed and made it a practical impossibility that the Government actually exercised its purported control over Amtrak in the rulemaking. In fact, any Government official who attempted to direct Amtrak as to how it should conduct the Metrics-and-Standards rulemaking would arguably be violating federal law, which prohibits treating Amtrak as an "instrumentality" or "agency" of the Government. *See* 49 U.S.C. § 24301(a)(3).

Section 207 itself recognizes that Amtrak officials are not subject to Government control in conducting the rulemaking. The dispute-resolution provision giving an arbitrator the power to draft the rule in the event Amtrak and the FRA cannot agree would be completely unnecessary if the Government controlled Amtrak's rulemaking efforts. *See* PRIIA § 207(d). Similarly, Congress has authorized the Attorney General to "bring a civil action for equitable relief in a district court of the United States when Amtrak" acts in a manner "inconsistent with" federal law on rail passenger transportation. 49 U.S.C. § 24103. There would be no need for that provision if

Amtrak's day-to-day operations were in fact under Government control.

Deeming Amtrak the Government for rulemaking purposes would have many troubling consequences. For one thing, Amtrak—unlike every other federal agency—would be able to exercise rulemaking power freed from the constraints of the Administrative Procedure Act and its many procedural protections, such as notice-and-comment requirements and the prohibition on arbitrary and capricious agency action. *See Lebron*, 513 U.S. at 392 (observing that Amtrak is not subject "to statutes that impose obligations . . . upon Government entities, such as the Administrative Procedure Act"). Moreover, Congress could delegate additional regulatory authority to Amtrak to exercise in its own right, without the involvement of any federal agency; and because Amtrak could exercise this power free of any APA constraints, Amtrak would be a more powerful rulemaking body than the Department of Transportation, the Department of Defense, and all other federal agencies.

Treating Amtrak as the Government for rulemaking purposes would also call into question Amtrak's structure under the Appointments Clause. "[R]ulemaking" power may properly "be exercised only by 'Officers of the United States,' appointed in conformity with" the Clause. *Buckley*, 424 U.S. at 140-43. The President of Amtrak (who serves as a member of Amtrak's Board) is appointed not by the President of the United States, however, but by the other eight Board Members. *See* 49 U.S.C. § 24302(a)(1)(B); *id*. § 24303(a).

In sum, Congress cannot give rulemaking power to a company that Congress itself established as a

nongovernmental, for-profit commercial entity—an entity over which it divested itself of day-to-day control by prohibiting federal employees from treating Amtrak as a Government "instrumentality." 49 U.S.C. § 24301(a).

II. SECTION 207 VIOLATES DUE PROCESS.

Congress's power to enter the commercial sphere by creating federally chartered, statutorily "private" corporations is firmly established. *See Lebron*, 513 U.S. at 386-91. Likewise, Congress's power to delegate regulatory authority to federal agencies is well settled. *See Touby*, 500 U.S. at 165. But due process does not permit Congress to *blend* the two—to give a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry. An arrangement of this type violates due process because it allows rulemaking power to be exercised not by a neutral and "presumptively disinterested" regulator, but by a for-profit corporation that is an industry participant and has a direct commercial interest in the substance of its regulations. *See Carter Coal*, 298 U.S. at 311-12. For that reason, Section 207 violates the Due Process Clause of the Fifth Amendment.

A. Due Process Requires Disinterested Rulemaking.

Neither Government officials nor corporations vested with governmental authority may issue regulations when they have a commercial self-interest in the subject of the regulation. This ensures that Government power is exercised in a neutral and disinterested manner consistent with due process.

Carter Coal applied this due process principle to delegations of rulemaking power to corporations. Af-

ter analyzing the challenged statute under nondelegation standards, the Court went on to state that granting a corporation "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311-12 (collecting cases). Because a regulator must be "presumptively disinterested," Congress could not give selected coal companies the power to issue regulations governing the rest of the industry. *Id*. at 311. In short, a regulator must act for the public benefit rather than for the benefit of a particular company in the industry—or even for the majority of companies in the industry, as was the case in *Carter Coal*.

The Court has held in many different contexts that those wielding Government power must be disinterested. In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), the Court held that due process bars a statutory scheme in which the adjudicator—in that case, a mayor adjudicating violations of Prohibition-era laws—received a portion of the fine, and thus had a personal financial stake in the outcome. Likewise, in *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), the Court invalidated on due process grounds a similar scheme, in which the mayor—with "executive responsibilities for village finances"—adjudicated traffic violations with fines payable to the village. *See also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (explaining that partiality is forbidden in the exercise of sovereign authority, and warning of the mere "*potential* for private interest to influence the discharge of public duty") (emphasis in original); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (due process violated when individuals wield Government authority in an area where they have pecuniary interests).

B. Congress May Not Give Amtrak Regulatory Authority Over Its Own Industry.

Due process does not allow Congress to create a private, for-profit corporation and give it regulatory authority over its own industry. This Court has long respected the "fundamental" distinction between market participant and market regulator. *See Carter Coal*, 298 U.S. at 311 ("The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a government function . . . ."). A for-profit commercial participant in a market cannot also be a disinterested regulator of that market because its regulatory judgments will be based on its own narrow commercial interest rather than the broader public interest.

Amtrak cannot be a "presumptively disinterested" regulator of the railroad industry. *Carter Coal*, 298 U.S. at 311. Amtrak directors are required by federal law to make decisions in a way that increases Amtrak's profits. *See* 49 U.S.C. § 24301(a)(2). Indeed, Congress has directed Amtrak not to conduct itself like a neutral and disinterested regulatory agency, but rather to "use its best business judgment" in generating profit for Amtrak by "improving its contracts with operating rail carriers," and by "undertak[ing] initiatives . . . designed to maximize [Amtrak's] revenues." 49 U.S.C. § 24101(c)-(d).

Amtrak had a strong commercial interest in the substance of its Metrics and Standards—and it had powerful financial incentives to draft the regulations in ways that would be favorable to Amtrak's for-profit business and unfavorable to the freight railroads. Moreover, Amtrak's officers had a *personal*

financial interest in the substance of their regulations. Under federal law, Amtrak's officers may receive pay greater than "the general level of pay for officers of rail carriers with comparable responsibility" for any year in which Amtrak does not receive federal assistance, 49 U.S.C. § 24303(b), thus giving them a strong private financial incentive to maximize Amtrak's profits. The potential for financial self-interest affecting the regulatory decisions of Amtrak officers is not just theoretical—it is built into federal law.[10]

It is no answer to say that because Amtrak's charter requires it to pursue "public" goals, such as providing passenger rail service, *any* regulation Amtrak enacts is by definition in the "public interest." The public interest necessarily encompasses *all* market participants—including the freight railroads that serve shippers and consumers of goods throughout the United States—and nothing in Amtrak's charter requires Amtrak to regulate through anything other than an Amtrak-focused lens. In issuing the Metrics and Standards, Amtrak was motivated to regulate the railroad industry with the goal of benefiting a single corporation within that industry—Amtrak. Amtrak's "private company" designation,

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[10] In fact, the Government admitted in the district court that Amtrak had the incentive to engage in biased rulemaking, but argued that the FRA's involvement "*decreased* Amtrak's desire to act in a biased fashion." U.S. MSJ Opp., District Court Docket Entry 10, at 4 (emphasis added). Of course, regulators exercising government power should have *no* bias—not just a "decreased" bias—and the Government cited no authority for the proposition that any danger of bias is eliminated if a decision is made jointly by a biased decisionmaker and an unbiased decisionmaker. *Cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-28 (1986) (single biased judge taints entire panel).

its for-profit mandate, and the salary incentives for board members further ensured that Amtrak would be regulating in the best interests of Amtrak, just as any commercial actor would if Congress happened to grant it regulatory power over its own industry.

Amtrak officials are not government employees running a regulatory agency, but rather are individuals engaged in a commercial enterprise—operating a for-profit passenger railroad on the same tracks used by the freight railroads. Amtrak's board members do not take an oath of office to uphold the Constitution, as do Article II officers vested with rulemaking authority; rather, Amtrak's board members owe a fiduciary duty to the corporation. Indeed, Amtrak itself has told this Court that its officers and directors run Amtrak like a business, not a regulatory agency. In its *Lebron* brief, Amtrak explained that "Amtrak's directors—like the directors of any other private corporation—assume a fiduciary duty to the corporation and its shareholders, common and preferred. That duty is not to operate Amtrak as part of the government, but 'as a for-profit corporation.' It is not to discharge a governmental function, but to oversee a commercial one. The board's duty is to maximize revenues and minimize costs, so as to protect the economic interests of all of the corporation's investors. It is, in short, the duty of a corporate director, not that of a government official." Amtrak Br. in No. 93-1525, 1994 WL 488299, at *28-29 (citation and footnote omitted).

Congress cannot delegate regulatory authority to a corporation that denies it is a regulatory agency, that does not conduct itself like a regulatory agency, and that Congress has specified is *not* a regulatory agency. This Court looks to historic practice as a touchstone for due process, *see Honda Motor Co. v.*

Oberg, 512 U.S. 415, 430 (1994), and the Government has never identified another entity that blends commercial and regulatory functions the way Section 207 envisions. Indeed, Congress's attempt to vest Amtrak with rulemaking power is directly at odds with the way Amtrak has operated since its creation. *See Held v. Nat'l R.R. Passenger Corp.*, 101 F.R.D. 420, 423 (D.D.C. 1984) ("Amtrak has no rulemaking authority."); *see also* Amtrak Br. in No. 93-1525, 1994 WL 488299, at *24 ("Amtrak does not in any sense 'govern'; it runs a commercial railroad.").

The constitutional violation is especially stark with regard to Section 207(c)'s requirement that the freight railroads amend their contracts with Amtrak to incorporate the Metrics and Standards to the extent practicable. Congress launched Amtrak into the commercial sphere to negotiate these contracts with the freight railroads in its role as a private corporation. *See Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 470 (1985) (contracts between freight railroads and Amtrak "are contracts not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak"); CADC J.A. 151 (Department of Transportation statement that these contracts are "private agreements among private parties"). Now, Congress is attempting to empower Amtrak to assume the mantle of a Government regulator and amend these private contracts, achieving through regulatory fiat what it could not achieve through negotiation.

Empowering Burger King to regulate McDonald's would violate due process. That result should not change just because the regulating entity is a Government-created corporation. Permitting Government-created corporations to regulate private corpo-

rations in the same industry would be unfair and would give Government-created corporations an immense and unfair competitive advantage in the market, violating this Court's admonishment that when the Government enters the commercial sphere it must compete on a level playing field. *See Cooke v. United States*, 91 U.S. 389, 398 (1875) ("If [the federal government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.").

Because Section 207 vests rulemaking power in a regulator that is not disinterested—and gives a single corporation regulatory authority over the industry where it is a for-profit market participant—the statute violates due process.

C. Respondent's Due Process Challenge Is Properly Before This Court.

This Court should reach and resolve the due process claim. Respondent has consistently pressed its due process challenge in the district court, the court of appeals, and this Court, and it was fully briefed below. There are no factual disputes that would prevent this Court from resolving the challenge. Moreover, as the Court recognized in *Carter Coal*, nondelegation and due process claims are related and often overlap. *See* 298 U.S. at 311 (discussing both nondelegation and due process). As the decision below illustrates, the lower courts would benefit from guidance on these issues. *See* Pet. App. 8a n.3 (questioning whether there was a substantive difference between nondelegation and due process claims in this context).

The Government suggests that respondent's due process argument depends on a determination that

Amtrak is a private actor. U.S. Br. 11. Not so. Amtrak's status as a private corporation *exacerbates* the due process violation, but is not necessary to *establish* the violation. Respondent's due process claim was framed broadly. *See* J.A. 177 (complaint alleging that "Section 207 of PRIIA violates the due process rights of the freight railroads because it purports to empower Amtrak to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants"). As the D.C. Circuit recognized, AAR's "complaint asserted . . . that empowering Amtrak to regulate its competitors violates the Fifth Amendment's Due Process Clause." Pet. App. 6a (citing Compl. ¶¶ 47-54, at 16-17); *see also id*. at 23a (noting "AAR's separate argument that Amtrak's involvement in developing the metrics and standards deprived its members of due process"). But even if the Government were correct—and it is not—this Court will reach "a new argument" in support of a party's "consistent claim" of constitutional violation, *Lebron* 513 U.S. at 379, and there is no question that respondent has vigorously pressed its due process claim at all stages of this case.

CONCLUSION

The Government has never identified another statute that vests a private, for-profit corporation with rulemaking power over other companies in the same industry, let alone a statute that empowers a private arbitrator to draft and issue federal regulations. Delegation to an Executive Branch agency is one thing; delegation to a federally-chartered corporation and an arbitrator is something quite different and crosses long-settled constitutional lines.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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September 22, 2014

ADDENDUM

Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4916 (codified at 49 U.S.C. § 24101 note)

SEC. 207. METRICS AND STANDARDS.

(a) IN GENERAL.—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation.

Amtrak shall provide reasonable access to the Federal Railroad Administration in order to enable the Administration to carry out its duty under this section.

(b) QUARTERLY REPORTS.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

(c) CONTRACTS WITH HOST RAIL CARRIERS.—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

(d) ARBITRATION.—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

Section 213(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4916 (codified at 49 U.S.C. § 24308(f))

SEC. 213. PASSENGER TRAIN PERFORMANCE.

* * *

"(f) PASSENGER TRAIN PERFORMANCE AND OTHER STANDARDS.—

"(1) INVESTIGATION OF SUBSTANDARD PERFORMANCE.—If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board (referred to in this section as the 'Board') may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators. As part of its investigation, the Board has authority to review the accuracy of the train performance data and the ex-

tent to which scheduling and congestion contribute to delays. In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.

"(2) PROBLEMS CAUSED BY HOST RAIL CARRIER.—If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.

"(3) DAMAGES AND RELIEF.—In awarding damages and prescribing other relief under this subsection the Board shall consider such factors as—

"(A) the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards; and

"(B) what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.

"(4) USE OF DAMAGES.—The Board shall, as it deems appropriate, order the host rail carrier to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service. Such damages shall be used for capital or operating expenditures on the

routes over which delays or failures to achieve minimum standards were the result of a rail carrier's failure to provide preference to Amtrak over freight transportation as determined in accordance with paragraph (2).".

* * *

49 U.S.C. § 24301

§ 24301. Status and applicable laws

(a) Status.—Amtrak—

(1) is a railroad carrier under section 20102(2) and chapters 261 and 281 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.

* * *