No. 13-1080

IN THE

Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
425 3rd St. SW, Suite 1000
Washington, DC 20024
(202) 639-2100

THOMAS H. DUPREE, JR.
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Respondent Association of American Railroads

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 Association of American Railroads is a trade association. It has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

BRIEF IN OPPOSITION

Respondent Association of American Railroads respectfully submits this brief in opposition to the petition for a writ of certiorari filed by the United States Department of Transportation, et al.

STATEMENT

The Government's petition barely addresses, and does not satisfy, this Court's criteria for granting review. *See* S. Ct. Rule 10. This case does not even arguably implicate a circuit split and presents a narrow question of limited jurisprudential significance. The Government does not identify any coherent policy purpose behind the odd and unprecedented rulemaking procedure at issue here. This Court has stated many times that it does not grant review merely to engage in error correction, yet that is all the petition requests.

There was no error here in any event. The unanimous D.C. Circuit panel faithfully applied this Court's precedents in holding that Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) effected an unconstitutional delegation. The court of appeals correctly explained that PRIIA § 207 creates an unprecedented and untenable situation: a for-profit corporation exercising Article I legislative power over other private companies in the same industry, and wielding its regulatory authority to gain a commercial advantage. A statute that attempts to confer such power "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 oth-

ers in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

The petition for a writ of certiorari should be denied.

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 is rather a private, "for-profit corporation" and "shall be operated and managed" as such. 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: Amtrak runs primarily on tracks owned by host freight railroads. In fact, 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. JA 155; *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. Thus, while Amtrak and the freight railroads do not compete for customers, they do compete over access to a limited resource: capacity, or the ability to operate trains within the limited slots available on a rail line.

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. *See* JA 261, 268, 275-76, 282-83. 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." JA 151.

2. Congress enacted 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 (STB) to investigate violations of the Metrics and Standards. If Amtrak's "ontime 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, JA 23, and "jointly issu[ed]" their final rule on May 6, 2010. JA 59, 82. 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. JA 59. The rule also stated that the FRA had prepared its responses to the comments on the proposed rule "with Amtrak's concurrence." JA 61. 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." JA 64.

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 ontime performance to be deemed satisfactory: Effective Speed, Endpoint On-Time Performance, and All-Stations On-Time Performance. These standards and performance requirements are far more demanding than provisions in the existing contracts between Amtrak and the host freight railroads. *See, e.g.*, JA 258, 261, 265, 269, 281. The Metrics and Standards became effective on May 11, 2010. JA 98.

3. The freight railroads are already burdened by their obligation to host Amtrak trains. PRIIA and the Metrics and Standards exacerbate these burdens in many respects. Among other things, 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." JA 267. "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.*; *see also* JA 262, 266, 273-74, 281. Indeed, 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." JA 283.

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* JA 257-61, 267-68, 274, 281-82.

Notwithstanding the freight railroads' extensive efforts, the FRA's 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. JA 193-255. 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* JA 257-58, 266, 273, 281; District Court Docket 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." JA 377.

The Metrics and Standards affect the freight railroads in another way. PRIIA § 207 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. JA 275-76.

4. The Association of American Railroads (AAR) challenged PRIIA § 207 as violating both the nondelegation principle and the Due Process Clause. 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 Government," 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.

REASONS FOR DENYING THE PETITION

This case meets none of this Court's traditional criteria for granting certiorari. *See* S. Ct. Rule 10. As the Government itself concedes, Pet. 24, the D.C. Circuit's decision does not conflict with the decisions of other circuits. Nor does the decision below conflict with any decision of this Court. Instead, the D.C.

Circuit faithfully applied this Court's nondelegation caselaw in holding that Amtrak—a private, for-profit corporation, *see* 49 U.S.C. § 24301(a)—could not be given the power to co-author federal regulations governing the railroad industry, or the power to force a federal agency to accept the judgment of a private arbitrator as to the content of those regulations.

The Government does not provide any credible reason why this case warrants plenary review. It does not argue that the decision below will have a broad effect—or for that matter *any* effect beyond the narrow confines of this case and this Amtrak-specific statute. And the Government notably fails to explain why Congress would need the ability to make this novel sort of delegation to accomplish its legislative objectives—in this context or in any other context. Here, for example, if Congress believes it is important to develop performance metrics for Amtrak, it can easily do so in a way that does not violate the Constitution.

This Court's review is not warranted simply because a lower court has invalidated a federal statute, as the Government seems to think. The Court has denied review in many other cases where a lower court has struck down a federal statute, but the Government failed to make the case for certiorari. *See infra* Part II. It should deny review here too.

I. THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF THIS OR ANY OTHER COURT.

The nondelegation principle and the Due Process Clause bar private parties from wielding the lawmaking power of the sovereign for their own commercial advantage. Section 207 makes Amtrak an entity without precedent in our constitutional sys-

tem: a corporation that simultaneously acts as a profit-maximizing commercial actor *and* as 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.

As the D.C. Circuit correctly observed—and as the Government does not appear to dispute—"the Supreme Court has never approved a regulatory scheme that so drastically empowers a private entity in the way § 207 empowers Amtrak." Pet. App. 9a.

A. Section 207 Is An Impermissible Delegation.

1. The Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1. Whereas Congress may vest Executive Branch agencies with rulemaking authority, it may not grant such power to private corporations.[1]

More than 70 years ago, this Court held that it is unconstitutional to delegate to private individuals or companies the power to promulgate regulations governing the conduct of other private parties. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In

[1] This constitutional prohibition is "the lesser-known cousin" of the more prominent nondelegation principle that when Congress grants rulemaking authority to an Executive Branch agency, it must "prescribe an intelligible principle governing the statute's enforcement." Pet. App. 7a-8a.

Carter Coal, 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. *See id.* at 310-11. 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 intrusted 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.*

The Court revisited the 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. *Adkins* involved a statute authorizing members of the coal industry to propose minimum coal prices to the National Bituminous Coal Commission, a Government agency. 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 *Adkins*, 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.

The D.C. Circuit faithfully applied these standards in holding that PRIIA § 207 impermissibly grants Amtrak—a private, "for-profit corporation," 49 U.S.C. § 24301(a)(2)—legislative and rulemaking authority. *See* Pet. App. 7a-16a. Amtrak does not "function subordinately" to the Government under the statute. *Adkins*, 310 U.S. at 399. To the contrary, the statute's plain text, which provides that Amtrak and the FRA shall "jointly" develop and promulgate the Metrics and Standards, enshrines Amtrak and the FRA as co-equal partners in the rulemaking process. Indeed, throughout the rulemaking, Amtrak and the FRA emphasized that they were acting jointly and as co-equals. *See, e.g*., JA 98 ("the FRA and Amtrak have jointly made, and are jointly issuing, revisions to the Metrics and Standards"). Before the D.C. Circuit, the Government described Amtrak as the "co-author" of the regulations. Gov't CADC Br. at 18.

By enacting Section 207, Congress forced the FRA to compromise with a private party by delegating to the private party one-half of the lawmaking power, thus creating a scheme in which Amtrak held the trump card and could veto the FRA's preferred approach and force the agency into arbitration. That delegation of legislative authority to a private entity is flatly at odds with this Court's decision in *Carter Coal* and the settled constitutional principles on which that decision rests.

As the D.C. Circuit correctly observed, 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 Government has never identified a similar statute—one that vests a private, for-profit corporation with regulatory authority over other companies in the same industry. This is another strong indicator that Section 207 is unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3158, 3159 (2010) ("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).

The D.C. Circuit's decision is consistent with the underlying purposes of the nondelegation principle, one of which is to 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*. Amtrak seized that competitive advantage by drafting regulations that require the freight railroads to modify their operations and delay freight traffic in order to benefit Amtrak's for-profit business. It should be no surprise that the Metrics and Standards are skewed in Amtrak's favor. The on-time performance requirements, for example, are not remotely realistic. What is more, the Metrics and Standards rely on Amtrak-generated "Conductor Delay Reports" to assign responsibility for particular delays. Thus, Amtrak has not only written the rules governing the business operations of the freight railroads—it also creates and supplies the evidence that will be used to determine responsibility for violations of the rules it drafted. Section 207 has created a system in which Amtrak is poised to reap substantial benefits from the parties it is regulating.

Amtrak can wield its lawmaking 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." JA 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.

The Government nevertheless contends that the decision below conflicts with *Currin v. Wallace*, 306 U.S. 1 (1939), in that it is not constitutionally problematic to condition an agency's regulation on the assent of the private parties being regulated. Pet. 14-15. But *Currin* involved a scheme where the private parties were given the ability to *opt out* of the exercise of coercive state power; they were not given the ability to *wield* coercive state power over their business competitors. Whereas in *Currin* the regulated parties were allowed to vote whether to subject themselves to the regulation, here the freight railroads were given no choice—the Metrics and Standards were forced upon them. Indeed, this was the very basis upon which the *Currin* Court distinguished *Carter Coal*—that *Currin* did not present a situation where private parties could "make the law and force it upon" other private parties against their will. 306 U.S. at 15. Of course, that is exactly what happened here.[2]

The Government also claims a conflict with *Adkins*. Pet. 15. In *Adkins*, however, the private parties merely *proposed* maximum coal prices to the Government, which then decided whether to adopt, modify or reject the proposals. *See* 310 U.S. at 398. That is a classic example of a private entity playing an advisory role. But whereas in *Adkins* the Government could simply have rejected the private par-

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[2] *United States v. Rock Royal Co-Op.*, 307 U.S. 533 (1939), is distinguishable for the same reason: it involves waiver of a Government-drafted regulation by the regulated parties themselves.

ties' advisory proposal and set its own prices, the FRA could not do that here. Amtrak could block the FRA's proposal and the private party's wishes would trump the Government's.

2. The arbitration provision in Section 207 only worsens the nondelegation problem. That provision grants 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.

As the D.C. Circuit recognized, 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. It is beyond debate that private arbitrators may not enact federal laws or regulations over the Government's opposition, yet that is precisely what Section 207 authorizes. 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. 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 a private arbitrator who might force the Government to accept a rule it did not want.

The Government contends that, to avoid constitutional concerns, Section 207(d) should be construed as requiring the appointment of a Government arbitrator. Pet. 17 n.7. But of course the statute itself

does not say this, and as the court of appeals pointed out, "[t]he constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures." Pet. App. 15a n.7 (citing *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997)); *see also United States v. Stevens*, 559 U.S. 460, 481 (2010) (the Court "will not rewrite a law to conform it to constitutional requirements") (internal quotation marks and alteration omitted).

3. The Government attempts to cure these constitutional shortcomings by arguing that any future sanctions against the railroads would be based on violations of the statutory preference requirement rather than the Metrics and Standards themselves. *See* Pet. 18-19 (citing 49 U.S.C. § 24308(c) (requiring carriers to give preference to Amtrak over freight traffic)). The D.C. Circuit expressed confusion when the Government made this argument below, *see* Pet. App. 11a ("[w]e are not entirely certain what to make of this argument"), and the Government offers this Court no additional insight.

If the Government means to argue that the Metrics and Standards have no direct impact on the freight railroads, that would be wrong. The freight railroads submitted unrebutted evidence documenting the many steps they have taken in order to satisfy the Metrics and Standards. *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."). If the Government means to argue that the involvement of the Surface Transportation Board in enforcing the preference requirement cures any nondelegation problem, that would also be wrong. The Board had no authority over the promulgation of the

Metrics and Standards, and has no role with regard to a key element of the statutory scheme: the requirement in Section 207(c) that the freight railroads amend their contracts with Amtrak to incorporate the Metrics and Standards. In any event, 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.

B. Section 207 Also Violates Due Process.

Section 207 also violates the Due Process Clause because the Government has granted Amtrak regulatory authority over the very industry where it is a market participant trying to make a profit. Although the D.C. Circuit did not need to reach respondent's due process challenge, *see* Pet. App. 23a, it provides further confirmation that the court's decision is correct and does not warrant review.[3]

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 and not for the private economic benefit of the regulator. In *Carter Coal*, the Court held that granting a corporation "the power to regu-

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[3] Even the Government's *amicus* agrees that Section 207 violates due process. *See* Sasha Volokh, *My Amicus Cert Petition*, www.washingtonpost.com (Apr. 11, 2014) ("My view is that this delegation violates due process, not non-delegation, so the D.C. Circuit got it right for the wrong reason.").

late 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). A regulator must be "presumptively disinterested," *id*. at 311, and it should be self-evident that a for-profit corporation cannot simultaneously regulate the same industry where it is seeking to make a profit as a commercial actor. *See id*. (describing as "fundamental" the "difference between producing [a good or service] and regulating" it).

The Court has reaffirmed this basic due process principle in similar contexts, making clear that entities wielding Government power must be disinterested such that private self-interest does not influence the discharge of a public duty. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), for example, the Court held that partiality is forbidden in the exercise of sovereign authority, and warned of the mere "*potential* for private interest to influence the discharge of public duty." *Id*. at 805 (emphasis in original). Likewise, in *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), the Court held that due process is violated when individuals wield Government authority in an area where they have private pecuniary interests.

Section 207 violates the Due Process Clause because Amtrak has a direct commercial interest in the substance of its regulations and has no obligation to adopt regulations that are in the public interest. The same Amtrak directors who were granted regulatory authority over the industry in which they are market participants are required by federal law to make decisions in a way that maximizes 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 operated under a similar mandate when exercising its regulatory authority under PRIIA: Congress provided that one of PRIIA's objectives was "to increase [Amtrak's] profitability." PRIIA § 228(a)(14). The potential for financial self-interest affecting the regulatory decisions of Amtrak directors is not just theoretical—it is mandated by federal law.

In addition to the statutory mandate, Amtrak's directors have a fiduciary duty to maximize corporate profits. They are not disinterested 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 therefore had every incentive to draft the Metrics and Standards in a way favorable to Amtrak and unfavorable to the freight railroads. Indeed, 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." JA 3 (Gov't 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 obviously incorrect proposition that any danger of bias is eliminated if a decision is made jointly by a biased decisionmaker and an unbiased decisionmaker. *Cf. Caperton v. A.T. Massey Coal*

Co., 556 U.S. 868, 872, 879 (2009) (single biased judge taints entire panel).

Amtrak has stated that it expects the freight railroads to amend their operating agreements pursuant to Section 207(c) by incorporating the Metrics and Standards. JA 275-76. But due process does not permit Congress to launch Amtrak into the marketplace to negotiate contracts with the freight railroads in its role as a private corporation, then empower Amtrak to assume the mantle of a Government regulator and seek to amend those contracts—contracts that the Government itself has described as "private agreements among private parties." JA 151; *see also Atchison*, 470 U.S. at 470 (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"). Due process forbids Congress from empowering Amtrak to achieve through regulatory fiat what it could not achieve through negotiation.[4]

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[4] The Government suggests that respondent's due process argument depends on a determination that Amtrak is a private actor. Pet. 7-8. Not so. Respondent's due process claim was framed broadly. *See* JA 21 (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); *id.* at 23a (noting "AAR's separate argument that Amtrak's involvement in developing the metrics and standards deprived its members of due process"). Respondent has always argued that Section 207 violates due process under *Carter Coal*, which prohibits rulemaking by a self-interested

C. Amtrak Is Not The Government.

The Government contends that the decision below is "inconsistent" with *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), because the D.C. Circuit should have treated Amtrak as a Government entity. Pet. 20-24. This argument provides no basis for review, as the Government did not press its *Lebron* claim before the court of appeals. In fact, the D.C. Circuit commented on the Government's "[s]trange[ ]" failure to do so, concluding that "[p]erhaps this indicates the government's agreement with AAR's reading of [*Lebron*]." Pet. App. 20a n.8.

Even if the Government had preserved the argument, it is meritless. *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.

As the D.C. Circuit correctly recognized, "*Lebron*'s holding was comparatively narrow, deciding only that Amtrak is an agency of the United States for the purpose of the First Amendment." Pet. App. 21a-

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[Footnote continued from previous page]

rulemaker—regardless of whether the rulemaking entity is public, private, or something in between.

22a. "It did not opine on Amtrak's status with respect to the federal government's structural powers under the Constitution—the issue here." *Id*. at 22a. In fact, the *Lebron* Court strongly suggested that while 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. *See* 513 U.S. at 398-99.

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 regulatory authority to Amtrak to exercise in its own right, without the involvement of any federal agency, and Amtrak could exercise this power free of any APA constraints, making Amtrak a more powerful rulemaking body than the Department of Transportation itself.

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 v. Valeo*, 424 U.S.

1, 140-43 (1976) (per curiam). 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).

The Government contends that the D.C. Circuit did not give sufficient weight to what it calls Amtrak's "host of ties" to the Government, noting that Amtrak receives federal subsidies and most of its Board members are presidentially appointed. Pet. 22-24. But *Carter Coal* and *Adkins* prohibit delegations to private companies, period. They do not permit delegations to private companies that are subsidized by the Government or over which the Government exercises some degree of influence through its power to fund or to make appointments.

Moreover, the suggestion that the Government exercises sufficient influence over Amtrak's day-to-day operations to enable it to exercise Article I lawmaking power is belied by the fact that "Amtrak's day-to-day operations are *not* subject to close government supervision," and "[t]he officers and employees who conduct 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) (emphasis added). Any Government official who attempted to direct Amtrak as to how it should conduct the 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). In fact, PRIIA itself recognizes that Amtrak officials are not subject to Government orders in conducting the rulemaking. The dispute-resolution provision giving an arbitrator the power to draft the rule in the event Amtrak and the FRA can-

not agree would be completely unnecessary if the Government controlled Amtrak's rulemaking efforts. *See* PRIIA § 207(d).

A 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 (1984). When power is delegated outside the federal 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). 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 repeatedly proclaims on its website that "Amtrak is a private corporation and not a federal agency." *See* www.amtrak.com, not www.amtrak.gov.

As the D.C. Circuit correctly concluded, "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.

II. THE DECISION BELOW DOES NOT WARRANT PLENARY REVIEW.

The Government makes almost no effort to explain why this case warrants review under the Court's usual criteria. The petition concedes the absence of a circuit split. *See* Pet. 24 (arguing review is warranted "even in the absence of a circuit split"). And as demonstrated above, the D.C. Circuit faithfully applied this Court's nondelegation jurisprudence.

The Government defaults almost completely on its obligation to demonstrate the importance of the question presented. It does not argue, for example, that the D.C. Circuit's decision will have a broader impact beyond the confines of this litigation. Nor does it contend that the ruling below may call into question the constitutionality of other statutes. The D.C. Circuit invalidated a unique, Amtrak-specific delegation of a type that does not appear elsewhere in federal law. In fact, in the Government's view, the Metrics and Standards do not matter very much because the freight railroads' obligations are defined by the statutory preference requirement. Pet. 18.

The D.C. Circuit did not hold that Congress lacks the power to delegate authority to set performance standards for Amtrak; it merely invalidated the par-

ticular scheme established in PRIIA § 207. The Government does not explain why Congress's goals can only be achieved by vesting Amtrak with co-equal legislative authority. Forbidding this particular type of delegation would not unduly restrict Congress in achieving its legislative objectives, and the Government does not even make this claim. Indeed, Congress could achieve its goals consistently with the Constitution simply by giving Amtrak an *advisory* role in the rulemaking process, as it has done in other statutes. The Government does not argue that congressional power has been meaningfully restricted by the ruling below, and has not demonstrated significant harm to a federal program or objective.

The Government nevertheless seems to assume that this Court automatically grants review any time a lower court holds any portion of a federal statute unconstitutional, no matter how insignificant. That is not this Court's practice. For example, in *Beer v. United States*, 696 F.3d 1174, 1186 (Fed. Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1997 (2013), after the Federal Circuit held that four federal statutes blocking salary increases for federal judges and other high-level officials were unconstitutional under the Compensation Clause, the Government petitioned for review in this Court. Just as in this case, the United States argued that *Beer* "presents issues of exceptional importance," and observed that "this Court has often reviewed lower-court decisions holding that a federal statute is unconstitutional, even in the absence of a circuit conflict." Pet. in No. 12-801, 2013 WL 51969, at 27 (filed Jan. 3, 2013). The Court nonetheless denied certiorari. Likewise, in *ACLU v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009), the Third Circuit held that the Child Online Protection Act violated the

First and Fifth Amendments. The Court denied certiorari notwithstanding the Government's argument that the lower court's "decision renders an important Act of Congress a nullity" and "clearly warrants this Court's review." Pet. in No. 08-565, 2008 WL 4753025, at 18 (filed Oct. 29, 2008).[5]

In sum, the D.C. Circuit invalidated a unique, Amtrak-specific delegation of a type that is not replicated elsewhere in federal law, appears to be wholly unprecedented, serves no important federal purpose, and relates to regulations that the Government itself argues are insignificant. This Court should deny review.

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[5] There are many other examples of this Court's denying certiorari in cases where the court below struck down a federal statute as unconstitutional. *See, e.g.*, *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997); *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
425 3rd St. SW, Suite 1000
Washington, DC 20024
(202) 639-2100

THOMAS H. DUPREE, JR.
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Respondent
Association of American Railroads

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