No.

# In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

*v.*

ASSOCIATION OF AMERICAN RAILROADS

*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**PETITION FOR A WRIT OF CERTIORARI**


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## QUESTION PRESENTED

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak "jointly * * * develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by 49 U.S.C. 24308(c) (Supp. V 2011). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917. The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

## PARTIES TO THE PROCEEDINGS

The four petitioners were the appellees in the court of appeals: the United States Department of Transportation; Anthony Foxx, in his official capacity as Secretary of Transportation; the Federal Railroad Administration; and Joseph C. Szabo, in his official capacity as the Administrator of the Federal Railroad Administration.

The only appellant in the court of appeals was respondent Association of American Railroads.

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**PETITION FOR A WRIT OF CERTIORARI**

The Solicitor General, on behalf of the United States Department of Transportation and its Secretary, as well as the Federal Railroad Administration and its Administrator, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 721 F.3d 666. The opinion of the district court (App., *infra*, 24a-50a), is reported at 865 F. Supp. 2d 22.

**JURISDICTION**

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on October 11, 2013 (App., *infra*, 51a-52a). On December

31, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2014. On January 28, 2014, the Chief Justice further extended the time to March 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the Constitution provides in relevant part: "All legislative powers herein granted shall be vested in a Congress of the United States." Pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 53a-71a.

## STATEMENT

1. a. Before 1970, railroads offering intercity passenger service in the United States were, as common carriers, generally obligated to continue to do so until relieved of their passenger-service obligations by the Interstate Commerce Commission or state regulatory authorities. *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 454 (1985). Although many railroads sought to discontinue those operations, Congress determined that "the public convenience and necessity require[d] the continuance and improvement" of passenger-rail service. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 101, 84 Stat. 1328. Accordingly, in 1970, Congress established the National Railroad Passenger Corporation (Amtrak) to serve as the successor to those railroads abandoning passenger-rail service (*id.* §§ 301, 401(a), 84 Stat. 1330, 1334-1335), thereby "avert[ing] the threatened extinction of passenger trains in the United States." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

Congress has declared that Amtrak is "not a department, agency, or instrumentality of the United States Government," and it has directed that Amtrak be "operated * * * as a for-profit corporation." 49 U.S.C. 24301(a)(2) and (3).[1] But it has also required Amtrak to pursue various other public objectives. See, *e.g.*, 49 U.S.C. 24101(c), 24902(b). And Congress has subjected Amtrak to government oversight and control through a variety of mechanisms, including the appointment of eight of Amtrak's nine directors by the President with the advice and consent of the Senate (with the ninth director, the President of Amtrak, being appointed by the other eight). 49 U.S.C. 24302(a)(1), 24303(a).

As a condition of relieving railroads of passenger-rail-service obligations, Congress required railroads to allow Amtrak to use their tracks and facilities, at rates either agreed to by Amtrak and the host railroads or prescribed by the Surface Transportation Board (STB). 49 U.S.C. 24308(a). In addition, to ensure the "improvement" of passenger-rail service for the public good, in 1973 Congress granted Amtrak a general preference over freight transportation in using rail facilities, specifying that "[e]xcept in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the [STB] orders otherwise under this subsection." 49 U.S.C. 24308(c); see Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10(2), 87 Stat. 552 (initial version). Since then, Congress has remained

[1] All citations to Title 49 of the United States Code in this petition reflect the 2006 volume and any amendments shown in the 2011 supplement.

closely involved with Amtrak's operations, enacting several statutes aimed at improving Amtrak's service,[2] and providing annual appropriations to ensure Amtrak's continued operations, see, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, Div. C, Tit. II, 125 Stat. 659-660 (appropriating more than $1.4 billion for Amtrak).

b. This case concerns Congress's most recent effort to enhance passenger-rail performance and service: the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907. Section 207(a) of the PRIIA provided that, within 180 days of its October 2008 enactment,

> 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.

49 U.S.C. 24101 note (emphases added). The statute further provided that, if the metrics and standards

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[2] See, *e.g.*, Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, 93 Stat. 537; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, §§ 1170-1189, 95 Stat. 687-699; Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570.

were not completed within 180 days, "any party involved in the development of those standards [could] petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 49 U.S.C. 24101 note (PRIIA § 207(d)).

Congress specified that, once the metrics and standards were developed, Amtrak would use them for various purposes, including annual evaluations of its performance, the development of performance improvement plans for long-distance routes, and the development and implementation of a plan to improve on-board service. 49 U.S.C. 24710(a)-(b); 49 U.S.C. 24101 note (PRIIA § 222). Congress also instructed that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards * * * into their access and service agreements." 49 U.S.C. 24101 note (PRIIA § 207(c)).

The PRIIA also provided that certain investigations by the STB may or shall be initiated in the event of sustained failures by any Amtrak intercity passenger train to meet the minimum standards developed pursuant to Section 207. 49 U.S.C. 24308(f)(1).[3] In such investigations, the STB "shall obtain information from all parties involved." *Ibid.* It may then "review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to de-

[3] The statute specifies that, when the standards have not been satisfied for two consecutive calendar quarters, the STB itself "may initiate an investigation," or, alternatively, that the STB "shall initiate such an investigation" "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." 49 U.S.C. 24308(f)(1).

lays." *Ibid.* Following an investigation, the STB may choose to "award damages against" a host railroad if the STB determines that Amtrak's substandard performance is attributable to the "rail carrier's failure to provide preference to Amtrak over freight transportation as required" by the pre-existing preference provision in 49 U.S.C. 24308(c). 49 U.S.C. 24308(f)(2). If the STB deems it appropriate for damages to be remitted to Amtrak, then Amtrak must use them "for capital or operating expenditures on the routes over which delays" were the result of the host railroad's failure to grant the statutorily required preference to Amtrak. 49 U.S.C. 24308(f)(4).

2. In March 2009, the Federal Railroad Administration (FRA) and Amtrak, acting pursuant to Section 207(a) of the PRIIA, jointly issued a draft version of the metrics and standards, C.A. App. 23-56, and sought comments from the various stakeholders identified in the statute, including freight railroads, 74 Fed. Reg. 10,983 (Mar. 13, 2009). After receiving and considering comments, the FRA and Amtrak issued the final version of the metrics and standards in May 2010. C.A. App. 59-97.[4] Some of the metrics involve Amtrak's financial performance, for which the associated standard is that there be "[c]ontinuous year-over-year improvement on a moving eight-quarter average basis." *Id.* at 83. The on-time performance metrics apply to the ends of each route as well as to all station stops. *Id.* at 84-85; see 49 U.S.C. 24101(c)(4) (calling for "station stops within 15 minutes of the time estab-

[4] The metrics and standards themselves appear at C.A. App. 83-88, which are also available at FRA, Dep't of Transp., *Metric and Standards for Intercity Passenger Rail Service* 25-30 (May 12, 2010), www.fra.dot.gov/Elib/Document/1511.

lished in public timetables"). The standards associated with those metrics require on-time performance at least 80% to 95% of the time for each route, depending on the route and year. C.A. App. 84-85. The standards associated with train delays specify a maximum number of "minutes [of delay] per 10,000 Train-Miles," ranging from 265 to 900. *Id.* at 85-86. Other metrics and standards involve minimum customer-satisfaction rates in surveys, *id.* at 87, and some metrics (*e.g.*, the percentage of passengers connecting to or from other routes, or the percentage of passenger-trips to or from underserved communities) have no associated standards, *id.* at 87-88.

3. In August 2011, respondent—an association representing large freight railroads that own tracks on which Amtrak operates—commenced this suit against petitioners in the United States District Court for the District of Columbia. C.A. App. 2; App., *infra*, 30a-31a.[5] Respondent advanced two claims. First, it contended that "Section 207 of PRIIA violates the non-delegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate." C.A. App. 20 (Compl. ¶ 51). Second, it contended that Section 207 violates the Fifth Amendment's Due Process Clause by "[v]esting the coercive power of the

[5] Although Amtrak is also a member of respondent's association (App., *infra*, 30a-31a), petitioners did not challenge respondent's ability to represent the freight railroads. See *Humane Soc'y of the United States* v. *Hodel*, 840 F.2d 45, 59 n.25 (D.C. Cir. 1988) (observing that an organization's "internal conflict" is not "a basis for defeating associational standing").

government in interested private parties." *Id.* at 21 (Compl. ¶¶ 53-54).

In addition to a declaration of Section 207's unconstitutionality, respondent sought vacatur of the Amtrak-performance metrics and standards, the issuance of an injunction against any action by the Department of Transportation or the FRA pursuant to the metrics and standards or Section 207 (and that any such actions previously taken be declared null and void), and an award of "reasonable costs, including attorney's fees." C.A. App. 21.

The district court granted summary judgment in favor of petitioners. App., *infra*, 24a-50a. The court noted that both of respondent's claims for relief depend on the premise that Amtrak is a private rather than governmental entity. *Id.* at 34a. With respect to respondent's due-process claim, the court determined that, under this Court's decision in *Lebron*, "Amtrak is the government in the context of claims that invoke the Constitution's guarantees of individual rights." *Id.* at 42a. Accordingly, it held that Section 207 does not impermissibly vest "regulatory authority" in an "interested private part[y]." *Id.* at 35a.

With respect to respondent's nondelegation claim, the district court held that "[e]ven if Amtrak is a private entity, as [respondent] contends, the government retains ultimate control over the promulgation of the [m]etrics and [s]tandards," and Section 207 therefore "passes constitutional muster." App., *infra*, 43a-44a. The court emphasized that "Amtrak could not have promulgated [the metrics and standards] without the FRA's approval" and that "the STB also retains control over their enforcement." *Id.* at 46a. Moreover, the court concluded that, "even if the involvement of

these agencies is not enough to ensure the constitutionality of [Section] 207's delegation, the government retains structural control over Amtrak itself." *Ibid.* The court concluded that "[t]aken together, the involvement of the FRA in promulgating the regulations, the role of the STB in their enforcement, and the government's structural control over Amtrak itself more than suffice" to render the statute constitutional. *Id.* at 49a.

4. The court of appeals reversed, App., *infra*, 1a-23a, holding that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity," *id.* at 3a.

The court of appeals acknowledged that Section 207 bears a "passing resemblance" to statutory frameworks that this Court sustained against delegation challenges in *Currin* v. *Wallace*, 306 U.S. 1 (1939), and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). App., *infra*, 9a. It also acknowledged that "no court has invalidated a scheme like [Section] 207's." *Id.* at 12a. But it concluded that "[n]o case prefigures the unprecedented regulatory powers delegated to Amtrak." *Id.* at 10a.

Despite the FRA's role in devising and approving the Amtrak-performance metrics and standards, the court of appeals noted that the FRA was "impotent" to "choose its [own] version without Amtrak's permission." App., *infra*, 10a. The court found further cause for concern in the provision requiring that any impasse between Amtrak and the FRA be resolved by having the STB "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* at 14a (quoting 49 U.S.C. 24101 note (PRIIA § 207(d)). The court rejected the government's sug-

gestion that the statute's reference to "an arbitrator" could be construed, if necessary to avoid serious constitutional concerns, as authorizing the STB to appoint only a governmental official as the arbitrator. *Id.* at 15a n.7.

Although the court of appeals recognized that "the metrics and standards themselves impose no liability," it nevertheless concluded that Amtrak's ability to participate in their approval reflects the kind of power that cannot be delegated to a private entity because they "lend definite regulatory force to an otherwise broad statutory mandate." App., *infra*, 11a, 12a. The court therefore concluded that, "[u]nless it can be established that Amtrak is an organ of the government, * * * [Section] 207 is an unconstitutional delegation of regulatory power to a private party." *Id.* at 16a.

The court of appeals recognized that "[m]any of the details of Amtrak's makeup support the government's position that it is not a private entity of the sort described in" *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the last case in which this Court invalidated an Act of Congress under the nondelegation doctrine. App., *infra*, 16a. But the court of appeals emphasized Congress's declarations 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.'" *Id.* at 17a (quoting 49 U.S.C. 24301(a)(2) and (3)). As a result, the court concluded that Section 207 does not adequately serve what it saw as the "functional purposes" for distinguishing between public and private entities "when it comes to delegating regulatory power." *Id.* at 18a. The court held that allowing Amtrak to play a role in drafting the

metrics and standards for evaluating Amtrak's own performance fails to serve two such purposes. First, it does not promote "democratic accountability," because Congress has denominated Amtrak a "for-profit corporation" rather than a "department, agency, or instrumentality of the United States Government." *Ibid.* (citations omitted). Second, it does not promote "the public good," because, the court believed, "[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 19a, 20a.

Accordingly, the court of appeals held that, "as a private entity, Amtrak cannot be granted the regulatory power prescribed in [Section] 207." App., *infra*, 23a. Having invalidated the statute on the basis of respondent's nondelegation claim, the court found it unnecessary to reach the due-process claim. *Ibid.*

## REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional a key component of Congress's most recent effort to improve passenger-rail service in the United States by providing for the establishment of metrics and standards for evaluating Amtrak's performance. Under respondent's view, the Amtrak-performance metrics and standards that were jointly developed by the Federal Railroad Administration and Amtrak in 2009-2010 must therefore be vacated and all actions taken pursuant to those standards by the Department of Transportation and the FRA must be declared null and void. See p. 8, *supra*. The court of appeals conceded that there is no direct precedent for its holding. App., *infra*, 12a. Its decision is not supported by this Court's decisions, which have not invalidated a federal statute in nearly

80 years on the ground that it impermissibly delegated authority to a private party. Indeed, this Court has repeatedly sustained the constitutionality of Acts of Congress under which certain provisions could not take effect without the approval of private entities. And the Court has held that Amtrak itself is to be considered a governmental actor, rather than a private entity, for at least certain constitutional purposes. Review of the decision below is therefore warranted.

### A. The Government Retained Sufficient Control Over The Development And Application Of The Amtrak-Performance Metrics And Standards To Avoid Nondelegation Concerns

Nondelegation challenges often involve questions about whether Congress has supplied an "intelligible principle" for the responsible decision-maker to apply. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928); see also *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). Respondent does not contend that Section 207 of the PRIIA lacks intelligible principles to guide the FRA and Amtrak, and it does not challenge the provision on that basis.

Instead, respondent contends that Section 207 is unconstitutional because it permits Amtrak (acting jointly with the FRA) to develop the metrics and standards that are to be used to judge Amtrak's performance. In respondent's view, "the nondelegation doctrine bars delegations to nongovernmental parties, *period*." Resp. C.A. Resp. to Pet. for Reh'g 12. But, assuming *arguendo* that Amtrak should be deemed a private entity for purposes of nondelegation analysis, the role Congress assigned to Amtrak does not present nondelegation concerns because indisputably governmental entities had sufficient control over the devel-

opment and adoption of the standards in the first instance. And they also have sufficient control over any enforcement actions against the freight railroads represented by respondent, which would be based upon an independent statutory mandate.

***1. Congress may condition the effectiveness of regulatory provisions on the involvement or approval of private entities***

a. It has been nearly 80 years since this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute that required all coal producers to accept the maximum labor hours and minimum wages negotiated by the producers of more than two-thirds of the annual coal tonnage and representatives of more than half of the mine workers. *Id.* at 283-284, 310-312. In that case, the government had no involvement in the creation or approval of those binding provisions, which were instead devised and approved entirely by private entities.

After *Carter Coal*, however, the Court sustained the validity of statutes that permitted private parties to play a significant role in the process of formulating or imposing new regulatory provisions. In doing so, it recognized that "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality" in fashioning statutory schemes involving private parties. *Currin* v. *Wallace*, 306 U.S. 1, 15 (1939); see also, *e.g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

b. The court of appeals held that Section 207 of the PRIIA delegated "unprecedented regulatory powers" to Amtrak because the requirement that the standards and metrics be "jointly" promulgated by the FRA and Amtrak meant that, if the FRA had "prefer[red] an alternative to Amtrak's proposed metrics and standards," it would have been "impotent to choose its [own] version without Amtrak's permission." App., *infra*, 10a. In fact, however, this Court has repeatedly approved statutory schemes under which particular standards were subject to private parties' veto powers.

In *Currin*, *supra*, the inspection and certification standards could not be applied to tobacco markets designated by the Secretary of Agriculture "unless two thirds of the [tobacco] growers [in that market], voting at a prescribed referendum," approved their application. 306 U.S. at 6. The Court acknowledged that such a scheme "placed a restriction upon [the government's] own regulation," but rejected the contention that it constituted an impermissible "delegation of legislative authority." *Id.* at 15-16. The Court upheld a similar statutory scheme in *Rock Royal Co-operative*, *supra*, which prevented an order governing minimum milk prices paid by handlers from becoming effective unless it was approved by two-thirds of the milk producers in the relevant marketing area. 307 U.S. at 547-548. The Court again held that, so long as Congress had the power to put the order into effect "without the approval of anyone," then the "requirement of [the private producers'] approval would not be an invalid delegation." *Id.* at 577-578.

In this case, the court of appeals believed *Currin* was distinguishable because it involved "the collective participation of two thirds of industry members" ra-

ther than "a statute that favored a single firm over all its market rivals." App., *infra*, 10a n.4. But there is no question that the establishment of particular minimum prices in *Currin* would advantage or disadvantage some participants *vis-à-vis* other participants in the tobacco market. Even more to the point, if the constitutional infirmity consists in allowing a private party to exercise a veto power over a governmental agency's preferred course, it would make no sense to forbid Congress from requiring an agency to secure the consent of one party (as under Section 207 of the PRIIA), and yet permit Congress to require an agency to secure the consent of many such parties (as in *Currin* and *Rock Royal Co-operative*). And here, it was entirely reasonable for Congress to provide a distinct role for Amtrak, because the metrics and standards were intended to assess Amtrak's own performance.

c. This Court has also recognized that private parties are not limited to approving or disapproving standards proposed by governmental actors. They may also play a role in the development of proposed regulatory standards. In *Sunshine Anthracite Coal*, *supra*, for instance, the Court upheld a statutory framework authorizing groups of coal producers to propose prices for coal that were then subject to approval, disapproval, or modification by the National Bituminous Coal Commission (a governmental entity). 310 U.S. at 387-388 & n.2, 399. And the Court summarily rejected a challenge to a statute authorizing a private railway association to establish standard heights for drawbars on railroad cars used in interstate commerce, even though railroads were then subject to monetary penalties for failure to comply with that requirement. See *St. Louis, Iron Mountain*

*& S. Ry.* v. *Taylor*, 210 U.S. 281, 286-287 (1908); Act of Mar. 2, 1893, ch. 196, §§ 5-6, 27 Stat. 531-532.

Section 207 of the PRIIA broke no new ground on this score. Unlike in *Carter Coal*, the Amtrak-performance metrics and standards could not take effect without the active oversight, participation, and assent of the FRA. Amtrak had no more involvement in the standards' development than did the coal producers in *Sunshine Anthracite Coal*. And the requirement that Amtrak agree to the standards was consistent with *Currin* and *Rock Royal Co-operative*. The court of appeals therefore erred in concluding that a private party cannot be involved in the development of a standard and that such a standard cannot be conditioned upon a private party's approval.[6]

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[6] Other courts of appeals have rejected nondelegation challenges to statutes that vested private parties with authority to disapprove regulatory standards. See *Kentucky Div., Horsemen's Benevolent & Protective Ass'n* v. *Turfway Park Racing Ass'n*, 20 F.3d 1406, 1416 (6th Cir. 1994) (rejecting challenge to federal statute giving racehorse owners veto power over racetrack's plan to permit interstate off-track betting); *Sequoia Orange Co.* v. *Yeutter,* 973 F.2d 752, 759 (9th Cir. 1992) (rejecting challenge to Secretary of Agriculture's determination to implement amendments to orange marketing order only with approval of 75% of growers (or those growing two-thirds of total crop)), as amended*,* 985 F.2d 1419 (9th Cir. 1993). Other courts of appeals have also upheld statutes that authorize private parties to take regulatory action subject to the approval of a governmental agency. See *Sorrell* v. *SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982) (rejecting nondelegation challenge to statute allowing private self-regulatory organizations to conduct and develop rules for disciplinary proceedings concerning their members, subject to SEC review and approval); *First Jersey Secs., Inc.* v. *Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1074 (1980); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952).

d. Even assuming that it would generally be impermissible for a governmental entity (the FRA) and a purportedly private entity (Amtrak) to have "equal" authority with respect to the development and adoption of the metrics and standards (App., *infra*, 10a), the court of appeals seriously misconstrued the effect and significance of Section 207(d) of the PRIIA, which provided that if there was an impasse in promulgating the metrics and standards, any party involved in their development could "petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 49 U.S.C. 24101 note. In other words, Amtrak was ultimately not an equal partner with the FRA. Instead, the government retained the upper hand by virtue of the authority exercised by the *government-appointed* arbitrator.[7] In

[7] The court of appeals found that the arbitration provision (which was never actually invoked) compounded the delegation problem because it did not expressly forbid "the appointment of a private party as arbitrator." App., *infra*, 14a-15a. But that conclusion runs contrary to normal principles of statutory construction, under which Congress is, in the absence of "an affirmative showing," presumed not to have authorized "delegations to non-governmental entities." *Gentiva Healthcare Corp.* v. *Sebelius*, 723 F.3d 292, 296 (D.C. Cir. 2013). In any event, if the court of appeals' constitutional concerns were valid, then principles of constitutional avoidance also counseled strongly in favor of reading the provision as contemplating a governmental, rather than private-party, arbitrator. See generally *Boos* v. *Barry*, 485 U.S. 312, 330-331 (1988) ("It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.") (citations omitted); see also *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974) (applying constitutional avoidance in the context of a nondelegation challenge).

light of that authority and the FRA's required active role in adopting the metrics and standards, there is no basis for the court of appeals' conclusion that Section 207 is at all "close to the blatantly unconstitutional scheme in *Carter Coal*." App., *infra*, 14a.

#### ***2. Any future sanctions against freight railroads would be based on a governmental agency's determination that they failed to satisfy an independent statutory obligation, not the Amtrak-performance metrics and standards***

The court of appeals also failed to give proper weight to the limited role the Amtrak-performance metrics and standards play with respect to the conduct of entities other than Amtrak. Put simply, the metrics and standards serve primarily as tools to measure Amtrak's own performance, not to alter freight railroads' legal rights or obligations. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

The court of appeals nonetheless believed that the metrics and standards effectively impose regulatory requirements on freight railroads, App., *infra*, 11a-12a, 16a, concluding that "the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate," *id.* at 12a. The court noted, for example, that respondent's members claimed they had been "forced" to take certain "immediate actions" by the metrics and standards." *Id.* at 11a n.6. That misconceives the way in which any enforcement authority would be brought to bear upon the freight railroads.

Amtrak's failure to satisfy the metrics and standards may trigger an investigation by the STB. 49

U.S.C. 24308(f)(1). But that alone is unremarkable; the law often requires the government to initiate an investigation when spurred by the actions of private parties. See, *e.g.*, 16 U.S.C. 1533(b)(3) (allowing private citizens to petition to have a species listed under the Endangered Species Act, thereby triggering consideration by the Department of the Interior or Department of Commerce). Moreover, the ensuing investigation, and any resulting sanction, will not be about applying the metrics and standards. Instead, the STB will gather information from "all parties" and evaluate "the extent to which scheduling and congestion contribute to delays." 49 U.S.C. 24308(f)(1). If, at the conclusion of its investigation, the STB requires a host railroad to pay damages, it may do so only if it has determined that Amtrak's substandard performance was attributable to the "rail carrier's failure to provide preference to Amtrak over freight transportation as required" by 49 U.S.C. 24308(c). 49 U.S.C. 24308(f)(2). In other words, even when the metrics and standards have not been satisfied, a freight railroad will face liability only if a governmental entity determines that the freight railroad failed to comply with the long-standing statutory-preference requirement, which is independent of the metrics and standards.

Under these circumstances, Amtrak's role in developing the standards intended to measure (and enable improvements in) its own performance is not at all analogous to the "scenario" conjured by the court of appeals, "in which Congress has given to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers." App., *infra*, 1a.

The court of appeals erred in concluding that Section 207 of the PRIIA fails to satisfy constitutional nondelegation concerns, even if Amtrak is deemed to be a private entity for these purposes.

**B. The Court Of Appeals Erroneously Treated Amtrak As A Private Entity For Purposes Of Nondelegation Analysis**

In any event, assuming *arguendo* that the nature of the Amtrak-performance metrics and standards, even when combined with the FRA's involvement in their promulgation and the STB's exclusive enforcement role, would preclude a private entity's participation in their development, the court of appeals still erred in holding that Amtrak is merely "a private corporation" for purposes of nondelegation analysis. App., *infra*, 16a. That holding is inconsistent with this Court's decision in *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), and with the statutory provisions applicable to Amtrak.

1. In *Lebron*, this Court held that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." 513 U.S. at 394. As the Court explained, Congress's characterization is "assuredly dispositive of Amtrak's status as a Government [or non-Government] entity for purposes of matters that are *within* Congress's control—for example, whether it is subject to statutes." *Id.* at 392. But the limits imposed by the nondelegation doctrine are—like the First Amendment and other constitutional restrictions—not statutory rules that Congress may turn on and off.

Here, the court of appeals recognized that respondent's nondelegation challenge presents "a constitution-

al question, not a statutory one." App., *infra*, 21a. It nevertheless attempted to distinguish the individual-rights holding of *Lebron* from the context of nondelegation analysis, which it described as presenting a question about "the federal government's structural powers under the Constitution." *Id.* at 22a. In the court of appeals' view, *Lebron* requires that Amtrak be subject to any "'affirmative prohibitions' on government action," but the principles in *Lebron* for determining what is properly considered governmental do not include the nondelegation doctrine, which "defines the limits of what Congress *can* do," "rather than proscribing what Congress *cannot* do." *Id.* at 22a-23a.

That thin distinction is difficult to square with this Court's recognition that structural constitutional principles protect the liberty of "individuals, too." *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011); see also, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 946-950, 959 (1983). Moreover, the court of appeals' reasoning is difficult to reconcile with this Court's consideration of the Appointments Clause and separation-of-powers challenges to the limitations on the removal of members of the Public Company Accounting Oversight Board (PCAOB) in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3151-3164 (2010). While the PCAOB was—like Amtrak—"a Government-created, Government-appointed entity," *id.* at 3147, Congress specified that the PCAOB "shall not be an agency or establishment of the United States Government" and that none of the PCAOB's members, employees, or agents "shall be deemed to be an officer or employee of or agent for the Federal Government," 15 U.S.C. 7211(b). Nevertheless, this Court quoted *Lebron* in support of the proposition, uncontested by

the parties, that "the [PCAOB] is 'part of the Government' for constitutional purposes." 130 S. Ct. at 3148 (quoting *Lebron*, 513 U.S. at 397).

2. Even apart from this Court's prior cases, the court of appeals' view of Amtrak as a private entity cannot be reconciled with Amtrak's structure and purposes. The court of appeals relied (App., *infra*, 17a, 18a) on Congress's declaration that Amtrak "is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. 24301(a)(3). In doing so, however, the court minimized a host of ties between Amtrak and the federal government demonstrating that Amtrak should not be considered a private entity for purposes of nondelegation analysis.

Not least, "Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." *Lebron,* 513 U.S. at 397. One such goal (which has not yet been realized) is to turn a profit and thereby reduce Amtrak's longstanding dependence on federal subsidies. 49 U.S.C. 24101(c)(12) and (d). But Congress has also identified several competing public objectives, which prevent Amtrak from focusing exclusively on profit maximization. See, *e.g.*, 49 U.S.C. 24902(b) (enumerating seven "considerations," in "order of priority"); 49 U.S.C. 24902(c) (requiring certain improvements to "produce the maximum labor benefit from hiring individuals presently unemployed").

Congress has also provided several more direct forms of governmental control. The federal government not only owns the overwhelming majority of Amtrak's stock, App., *infra*, 16a-17a, but also "controls the operation of the corporation through its appointees," *Lebron*, 513 U.S. at 399. Indeed, that form of control has been strengthened since *Lebron* was de-

cided. Now, eight of Amtrak's nine directors (including the Secretary of Transportation, who serves as an *ex officio* board member) are appointed by the President with the advice and consent of the Senate, 49 U.S.C. 24302(a)(1), and they are understood to be removable without cause by the President, see *Holdover and Removal of Members of Amtrak's Reform Board*, 27 Op. O.L.C. 163, 166 (2003). The ninth director (Amtrak's own President) is selected by the other eight directors. 49 U.S.C. 24302(a)(1)(B), 24303(a). Congress has also established salary limits for Amtrak's officers (49 U.S.C. 24303(b)), required Amtrak to submit reports about its operations to Congress and the President (*e.g.*, 49 U.S.C. 24315(a) and (b)), and subjected Amtrak to review by the Department of Transportation's Inspector General (PRIIA §§ 203(b), 204(d), 221, 225, 227, 122 Stat. 4913, 4914, 4931, 4933, 4934) as well as by another Inspector General for Amtrak, who receives appropriations directly from Congress (Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, Div. C, Tit. III, 125 Stat. 704). Congress has made Amtrak subject to the Freedom of Information Act. See 49 U.S.C. 24301(e). And it has repeatedly "appropriate[d] for Amtrak more than a billion dollars annually." App., *infra*, 38a.

Thus, in addition to the extensive involvement of the FRA in the promulgation of the Amtrak-performance metrics and standards, the federal government's direct connections with Amtrak itself belie the court of appeals' conclusion that Congress sought to "absolv[e] the federal government of all responsibility" for the metrics and standards. App., *infra*, 21a. Contrary to that court's fears, giving the government-

created, government-controlled, and government-subsidized Amtrak a role in the development of the metrics and standards to assess its own performance did not make it possible to evade public criticism by claiming that any flaws in the resulting standards are therefore "not the federal government's fault." *Id.* at 18a.

The court of appeals thus erred in concluding that Amtrak should be treated as a merely private entity for purposes of nondelegation analysis.

### C. The Court Of Appeals' Invalidation Of An Important Component Of An Act Of Congress Warrants This Court's Review

This Court should grant review because the court of appeals has held unconstitutional an important provision of an Act of Congress. This Court has often reviewed lower-court decisions holding that a federal law is unconstitutional, even in the absence of a circuit split. See, *e.g.*, *United States* v. *Alvarez*, 132 S. Ct. 2537, 2542 (2012) (noting that circuit conflict arose "[a]fter certiorari was granted"); *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (same); *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States* v. *Stevens*, 559 U.S. 460 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court's recognition that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" of the courts. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275

U.S. 142, 148 (1927) (opinion of Holmes, J.)). And here, the court of appeals has held Section 207 unconstitutional by relying upon nondelegation principles that this Court has not invoked to invalidate an Act of Congress in almost 80 years, and done so in a manner that is inconsistent with this Court's subsequent cases.

Now that the D.C. Circuit has invalidated the method that Congress prescribed for the development of metrics and standards for Amtrak—and notwithstanding the court of appeals' acknowledgment that "no court has invalidated a scheme like" the one at issue here (App., *infra*, 12a)—there will be no further percolation of the question in other courts of appeals. There will instead be a hole in the framework that Congress devised in 2008 for improving passenger-rail service in the United States. This Court's review is accordingly warranted.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2014

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12-5204

ASSOCIATION OF AMERICAN RAILROADS, APPELLANT

*v.*

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., APPELLEES

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Argued: Feb. 19, 2013
Decided: July 2, 2013

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**OPINION**

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Before: BROWN, Circuit Judge, and WILLIAMS and SENTELLE, Senior Circuit Judges.

BROWN, Circuit Judge:

Imagine a scenario in which Congress has given to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers. And, if the two should happen to disagree on what form those regulations will take, then neither will have the ultimate say.

Instead, an unspecified arbitrator will make the call. Constitutional? The Department of Transportation seems to think so.[1]

Next consider a parallel statutory scheme—the one at issue in this case. This time, instead of General Motors, it is Amtrak (officially, the "National Railroad Passenger Corporation") wielding joint regulatory power with a government agency. This new stipulation further complicates the issue. Unlike General Motors, Amtrak is a curious entity that occupies the twilight between the public and private sectors. And the regulations it codevelops govern not the automotive industry, but the priority freight railroads must give Amtrak's trains over their own. Whether the Constitution permits Congress to delegate such joint regulatory authority to Amtrak is the question that confronts us now.

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 empowers Amtrak and the Federal Railroad Administration (FRA) to jointly develop performance measures to enhance enforcement of the statutory priority Amtrak's passenger rail service has over other trains. The Appellant in this case, the Association of American Railroads (AAR), is a trade association whose members include the largest freight railroads (known in the industry as "Class I" freight railroads), some smaller freight railroads, and

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[1] Counsel for the Appellees embraced precisely this position at oral argument, albeit with some preliminary hemming and hawing. *See* Oral Arg. 30:20-33:00.

—as it happens—Amtrak. Compl. ¶ 10, at 4. Challenging the statutory scheme as unconstitutional, AAR brought suit on behalf of its Class I members against the four Appellees—the Department of Transportation, its Secretary, the FRA, and its Administrator (collectively, the "government"). *Id.* ¶¶ 14-17, at 6-7. We conclude § 207 constitutes an unlawful delegation of regulatory power to a private entity.

I

A

To reinvigorate a national passenger rail system that had, by mid-century, grown moribund and unprofitable, Congress passed the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327. *See Nat'l R.R. Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453-54, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985). Most prominently, the legislation created the passenger rail corporation now known as Amtrak, which would "employ[] innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements." Rail Passenger Service Act, § 301, 84 Stat. at 1330. The act also made railroad companies languishing under the prior regime an offer they could not refuse: if these companies consented to certain conditions, such as permitting Amtrak to use their tracks and other facilities, they could shed their cumbersome common carrier obligation to offer intercity passenger service. *See Nat'l R.R. Corp.*, 470 U.S. at 455-56, 105 S. Ct. 1441. Pursuant to statute, Amtrak negotiates these arrangements with individual railroads, the terms of which are

enshrined in Operating Agreements.[2] *See* 49 U.S.C. § 24308(a). Today, freight railroads own roughly 97% of the track over which Amtrak runs its passenger service.

Naturally, sharing tracks can cause coordination problems, which is why Congress has prescribed that, absent an emergency, Amtrak's passenger rail "has preference over freight transportation in using a rail line, junction, or crossing." *Id.* § 24308(c). More recently, this same concern prompted enactment of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907. At issue in this case is the PRIIA's § 207, which directs the FRA and Amtrak to "jointly . . . 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." PRIIA § 207(a), 49 U.S.C. § 24101 (note). If Amtrak and the FRA disagree about the composition of these "metrics and standards," either "may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* § 207(d), 49 U.S.C. § 24101 (note). "To the extent practicable," Amtrak and its host rail

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[2] If the parties cannot reach agreement, the Surface Transportation Board (STB) will "order that the facilities be made available and the services provided to Amtrak" and "prescribe reasonable terms and compensation." 49 U.S.C. § 24308(a).

carriers must incorporate the metrics and standards into their Operating Agreements. *Id.* § 207(c), 49 U.S.C. § 24101 (note).

Though § 207 provides the means for devising the metrics and standards, § 213 is the enforcement mechanism. If the "on-time performance" or "service quality" of any intercity passenger train proves inadequate under the metrics and standards for two consecutive quarters, the STB may launch 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." PRIIA § 213(a), 49 U.S.C. § 24308(f)(1). Similarly, if "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" files a complaint, the STB "*shall*" initiate such an investigation. *Id.* (emphasis added). Should the STB determine the failure to satisfy the metrics and standards is "attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required," it may award damages or other relief against the offending host rail carrier. *Id.* § 24308(f)(2).

B

Following § 207's mandate, the FRA and Amtrak jointly drafted proposed metrics and standards, which they submitted to public comment on March 13, 2009. *See Metrics and Standards for Intercity Passenger*

*Rail Service Under Section 207 of Public Law 110-432,* 74 Fed. Reg. 10,983 (Mar. 13, 2009). The proposal attracted criticism, with much vitriol directed at three metrics formulated to measure on-time performance: "effective speed" (the ratio of route's distance to the average time required to travel it), "endpoint on-time performance" (the portion of a route's trains that arrive on schedule), and "all stations on-time performance" (the degree to which trains arrive on time at each station along the route). AAR, among others, derided these metrics as "unrealistic" and worried that certain aspects would create "an excessive administrative and financial burden." The FRA responded to the comments, and a final version of the metrics and standards took effect in May 2010. *See Metrics and Standards for Intercity Passenger Rail Service Under Section 207 of the Passenger Rail Investment and Improvement Act of 2008,* 75 Fed. Reg. 26,839 (May 11, 2010).

AAR filed suit on behalf of its Class I freight railroad members, asking the district court to declare § 207 of the PRIIA unconstitutional and to vacate the promulgated metrics and standards. The complaint asserted two challenges: that § 207 unconstitutionally delegates to Amtrak the authority to regulate other private entities; and that empowering Amtrak to regulate its competitors violates the Fifth Amendment's Due Process Clause. Compl. ¶¶ 47-54, at 16-17. The district court rejected these arguments, granting summary judgment to the government and denying it to AAR. *See AAR v. Dep't of Transp.,* 865 F. Supp. 2d 22, 35 (D.D.C. 2012). AAR renews these constitutional claims on appeal.

II

AAR's argument takes the following form: Delegating regulatory authority to a private entity is unconstitutional. Amtrak is a private entity. Ergo, § 207 is unconstitutional. This proposed syllogism is susceptible, however, to attacks on both its validity and soundness. In other words, does the conclusion actually follow from the premises? And, if it does, are both premises true? Our discussion follows the same path.

A

We open our discussion with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity. To do so would be "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.,* 298 U.S. 238, 311, 56 S. Ct. 855, 80 L. Ed. 1160 (1936). This constitutional prohibition is the lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."); *see A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 529, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). This latter proposition finds scarce practical application, however, because "no statute can be entirely precise," meaning "some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it." *Mistretta v. United States,* 488 U.S. 361, 415, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (Scalia, J., dissenting). All that is required

then to legitimate a delegation to a government agency is for Congress to prescribe an intelligible principle governing the statute's enforcement. *See J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S. Ct. 348, 72 L. Ed. 624 (1928).

Not so, however, in the case of private entities to whom the Constitution commits no executive power. Although objections to delegations are "typically presented in the context of a transfer of legislative authority from the Congress to agencies," we have reaffirmed that "the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC ("NARUC"),* 737 F.2d 1095, 1143 (D.C. Cir. 1984) (per curiam).[3] Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority. Such entities may, however, help a government agency

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[3] At least one commentator has suggested that the "doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers." A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution,* 50 DUKE L.J. 17, 153 (2000). *Carter Coal* offers some textual support for this position, describing the impermissible delegation there as "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311, 56 S. Ct. 855. While the distinction evokes scholarly interest, neither party before us makes this point, and our own precedent describes the problem as one of unconstitutional delegation. *See NARUC,* 737 F.2d at 1143 n.41. And, in any event, neither court nor scholar has suggested a change in the label would effect a change in the inquiry.

make its regulatory decisions, for "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality" that such schemes facilitate. *Pan. Ref. Co. v. Ryan,* 293 U.S. 388, 421, 55 S. Ct. 241, 79 L. Ed. 446 (1935). Yet precisely how much involvement may a private entity have in the administrative process before its advisory role trespasses into an unconstitutional delegation? Discerning that line is the task at hand.

Preliminarily, we note the Supreme Court has never approved a regulatory scheme that so drastically empowers a private entity in the way § 207 empowers Amtrak. True, § 207 has a passing resemblance to the humbler statutory frameworks in *Currin v. Wallace,* 306 U.S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939), and *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940). In *Currin* Congress circumscribed its delegations of administrative authority—in that case, by requiring two thirds of regulated industry members to approve an agency's new regulations before they took effect. *See* 306 U.S. at 6, 15, 59 S. Ct. 379. *Adkins,* meanwhile, affirmed a modest principle: Congress may formalize the role of private parties in proposing regulations so long as that role is merely "as an aid" to a government agency that retains the discretion to "approve[], disapprove[], or modif[y]" them. 310 U.S. at 388, 60 S. Ct. 907. Like the private parties in *Currin,* Amtrak has an effective veto over regulations developed by the FRA. And like those in *Adkins,* Amtrak has a role in filling the content of regulations. But the similarities end there. The industries in *Currin* did not craft the regulations, while *Adkins* involved no private check on an agency's

regulatory authority.[4] Even more damningly, the agency in *Adkins* could unilaterally change regulations proposed to it by private parties, whereas Amtrak enjoys authority equal to the FRA. 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. No case prefigures the unprecedented regulatory powers delegated to Amtrak.[5]

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[4] For what it is worth, *Currin* also involved the collective participation of two thirds of industry members, and the regulations in *Adkins* arose from district boards comprising multiple members of the regulated industry. Neither upheld a statute that favored a single firm over all its market rivals.

[5] The government also cites various decisions from other Circuits that purportedly support its position. All are distinguishable. Several upheld schemes like that in *Currin* in which the effect of regulations was contingent upon the assent of a certain portion of the regulated industry. *See Ky. Div., Horsemen's Benevolent and Protective Ass'n v. Turfway Park Racing Ass'n,* 20 F.3d 1406, 1416 (6th Cir. 1994); *Sequoia Orange Co. v. Yeutter,* 973 F.2d 752, 759 (9th Cir. 1992). The others resemble *Adkins* insofar as they approve structures in which private industry members serve in purely advisory or ministerial functions. *See Pittston Co. v. United States,* 368 F.3d 385, 394-97 (4th Cir. 2004); *United States v. Frame,* 885 F.2d 1119, 1128-29 (3d Cir. 1989), *abrogated on other grounds by Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997); *Sorrell v. SEC,* 679 F.2d 1323, 1325-26 (9th Cir. 1982); *First Jersey Sec., Inc. v. Bergen,* 605 F.2d 690, 697 (3d Cir. 1979); *Todd & Co. v. SEC,* 557 F.2d 1008, 1012-13 (3d Cir. 1977); *R.H. Johnson & Co. v. SEC,* 198 F.2d 690, 695 (2d Cir. 1952). In none of these cases did a private party stand on equal footing with a government agency.

The government also points out that the metrics and standards themselves impose no liability. Rather, they define the circumstances in which the STB will investigate whether infractions are attributable to a freight railroad's failure to meet its preexisting statutory obligation to accord preference to Amtrak's trains. *See* PRIIA § 213(a), 49 U.S.C. § 24308(f). We are not entirely certain what to make of this argument. Taken to its logical extreme, it would preclude all preenforcement review of agency rulemaking, so it is probably unlikely the government is pressing so immodest a claim.[6] If the point is merely that the STB adds another layer of government "oversight" to Amtrak's exercise of regulatory power, this precaution does not alter the analysis. Government enforcement power did not save the rulemaking authority of the private coal companies in *Carter Coal*, nor the power of

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[6] AAR's Reply Brief treated this argument as an ordinary ripeness challenge. *See* Br. 18-21. If that is what the government intended, then we are not persuaded. As a purely legal question, § 207's constitutionality is appropriate for immediate judicial resolution. *See Abbott Labs. v. Gardner,* 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). And depriving AAR of review at this stage would result in considerable hardship. *See United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist,* 829 F.2d 1152, 1160 n.29 (D.C. Cir. 1987). The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take. *See* Decl. of Paul E. Ladue ¶¶ 6-9, at 3-5; Decl. of Mark M. Owens ¶ 9, at 4; Decl. of Virginia Marie Beck ¶¶ 9-11, at 4-6; Decl. of Peggy Harris ¶¶ 8-14, at 3-5.

private landowners in *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928), to impose a zoning restriction on a neighbor's tract of land. As is often the case in administrative law, the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate. *See, e.g., Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 465, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). The preference for Amtrak's traffic may predate the PRIIA, but the metrics and standards are what channel its enforcement. Certainly the FRA and Amtrak saw things that way, responding to one public comment by noting the STB "is the primary enforcement body *of the standards.*" J.A. 63 (emphasis added). Not only that, § 207 directs "Amtrak and its host carriers" to include the metrics and standards in their Operating Agreements "[t]o the extent practicable." PRIIA § 207(c), 49 U.S.C. § 24101 (note). The STB's involvement is no safe harbor from AAR's constitutional challenge to § 207.

As far as we know, no court has invalidated a scheme like § 207's, but perhaps that is because no parallel exists. Unprecedented constitutional questions, after all, lack clear and controlling precedent. We nevertheless believe *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* — U.S. —, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010), offers guidance. There the Supreme Court deemed it a violation of separation of powers to endow inferior officers with two layers of good-cause tenure insulating them from removal by the President. *See id.* at 3164. Two principles from that case are particularly resonant. To begin with, just because two structural features raise no

constitutional concerns independently does not mean Congress may combine them in a single statute. *Free Enterprise Fund* deemed invalid a regime blending two limitations on the President's removal power that, taken separately, were unproblematic: the establishment of independent agencies headed by principal officers shielded from dismissal without cause, *see Humphrey's Ex'r v. United States,* 295 U.S. 602, 629-31, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), and the protection of certain inferior officers from removal by principal officers directly accountable to the President, *see Morrison v. Olson,* 487 U.S. 654, 691-93, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988). *See* 130 S. Ct. at 3146-47. So even if the government is right that § 207 merely synthesizes elements approved by *Currin* and *Adkins,* that would be no proof of constitutionality.

As for the second principle, *Free Enterprise Fund* also clarifies that novelty may, in certain circumstances, signal unconstitutionality. That double good-cause tenure, for example, lacked an antecedent in the history of the administrative state was one reason to suspect its legality:

> "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency."

*Id.* at 3159 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)); *accord Nat'l Fed'n of Indep. Bus. v. Sebelius,* — U.S. —, 132 S. Ct. 2566, 2586, 183 L. Ed. 2d 450 (2012). In defending § 207, 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. This fact is not trivial. Section 207 is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen. The government would essentially limit *Carter Coal* to its facts, arguing that "[n]o more is constitutionally required" than the government's "active oversight, participation, and assent" in its private partner's rulemaking decisions. Appellee's Br. 19. This proposition—one we find nowhere in the case law—vitiates the principle that private parties must be limited to an advisory or subordinate role in the regulatory process.

To make matters worse, § 207 fails to meet even the government's ad hoc standard. Consider what would have happened if Amtrak and the FRA could not have reached an agreement on the content of the metrics and standards within 180 days of the PRIIA's enactment. Amtrak could have "petition[ed] the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." PRIIA 207(d), 49 U.S.C. § 24101 (note). And nothing in the statute precludes the appointment

of a private party as arbitrator.[7] That means it would have been entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government. Though that did not in fact occur here, § 207's arbitration provision still polluted the rulemaking process over and above the other defects besetting the statute. As a formal matter, that the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional. *See Whitman,* 531 U.S. at 473, 121 S. Ct. 903. As a practical matter, the FRA's failure to reach an agreement with Amtrak would have meant forfeiting regulatory power to an arbitrator the agency would have had no hand in picking. Rather than ensuring Amtrak would "function subordinately" to the FRA, *Adkins,* 310 U.S. at 399, 60 S. Ct. 907, this backdrop stacked the deck in favor of compromise. Even for government agencies, half an apple is better than none at all.

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[7] The government notes § 207's arbitration provision does not *require* the arbitrator be a private party. This is irrelevant. "[A]n agency can[not] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman,* 531 U.S. at 472, 121 S. Ct. 903. Nor does the canon of constitutional avoidance offer a solution. The statute's text precludes the government's suggestion that we construe the open-ended language "an arbitrator" to include only federal entities. The constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures. *Reno v. ACLU,* 521 U.S. 844, 884-85, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

We remain mindful that the Constitution "contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring). But a flexible Constitution must not be so yielding as to become twisted. Unless it can be established that Amtrak is an organ of the government, therefore, § 207 is an unconstitutional delegation of regulatory power to a private party.

B

Now the crucial question: is Amtrak indeed a private corporation? If not—if it is just one more government agency—then the regulatory power it wields under § 207 is of no constitutional moment.

Many of the details of Amtrak's makeup support the government's position that it is not a private entity of the sort described in *Carter Coal.* Amtrak's Board of Directors includes the Secretary of Transportation (or his designee), seven other presidential appointees, and the President of Amtrak. *See* 49 U.S.C. § 24302(a). The President of Amtrak—the one Board member not appointed by the President of the United States—is in turn selected by the eight other members of the Board. *See id.* § 24303(a). Amtrak is also subject to the Freedom of Information Act. *See id.* § 24301(e). Amtrak's equity structure is similarly suggestive. As of September 30, 2011, four common stockholders owned 9,385,694 outstanding shares, which they acquired from the four railroads whose intercity passenger service Amtrak assumed in 1971. BDO USA, LLP, NATIONAL RAILROAD PASSENGER CORPORATION

AND SUBSIDIARIES (AMTRAK) CONSOLIDATED FINANCIAL STATEMENTS: YEARS ENDED SEPTEMBER 30, 2011 AND 2010, at 18 (2011) (J.A. 351). At the same time, however, the federal government owned all 109,396,994 shares of Amtrak's preferred stock, each share of which is convertible into 10 shares of common stock. *Id.* at 17 (J.A. 350). And, all that stands between Amtrak and financial ruin is congressional largesse. *See id.* at 6 (J.A. 339).

That being said, Amtrak's legislative origins are not determinative of its constitutional status. Congress's power to charter private corporations was recognized early in our nation's history. *See McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 409, 4 L. Ed. 579 (1819). And, as far as Congress was concerned, that is exactly what it was doing when it created Amtrak. As Congress explained it, 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). We have previously taken Congress at its word and relied on this declaration in deciding whether the False Claims Act applies to Amtrak. *See United States ex rel. Totten v. Bombardier Corp.,* 380 F.3d 488, 490 (D.C. Cir. 2004) ("Amtrak is not the Government."); *id.* at 491 ("Amtrak is Not the Government."); *id.* at 502 ("Amtrak is not the Government."). Amtrak agrees: "The National Railroad Passenger Corporation, also known as Amtrak, is not a government agency or establishment [but] a private corporation operated for profit." NAT'L R.R. PASSENGER CORP., FREEDOM OF INFORMATION ACT HANDBOOK 1 (2008). And, some-

what tellingly, Amtrak's website is www.amtrak.com—not www.amtrak.gov.

How to decide? Since, in support of its claim that Amtrak is a public entity, the government looks past labels to how the corporation functions, it is worth examining what functional purposes the public-private distinction serves when it comes to delegating regulatory power. We identify two of particular importance. First, delegating the government's powers to private parties saps our political system of democratic accountability. *See Mich. Gambling Opposition v. Kempthorne,* 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting in part). This 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. *See NARUC,* 737 F.2d at 1143 n.41; *cf. New York v. United States,* 505 U.S. 144, 169, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."). This worry is certainly present in the case of § 207, since Congress has expressly forsworn Amtrak's status as a "department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(3). Dislike the metrics and standards Amtrak has concocted? It's not the federal government's fault—Amtrak is a "for-profit corporation." *Id.* § 24301(a)(2).

Second, fundamental to the public-private distinction in the delegation of regulatory authority is the belief that disinterested government agencies ostensibly look to the public good, not private gain. For this reason, delegations to private entities are particularly perilous. *Carter Coal* specifically condemned delegations made not "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." 298 U.S. at 311, 56 S. Ct. 855. Partly echoing the Constitution's guarantee of due process, this principle ensures that regulations are not dictated by those who "are not bound by any official duty," but may instead act "for selfish reasons or arbitrarily." *Roberge,* 278 U.S. at 122, 49 S. Ct. 50. More recent decisions are also consistent with this view. *See Pittston Co.,* 368 F.3d at 398; *NARUC*, 737 F.2d at 1143-44; *Sierra Club v. Sigler,* 695 F.2d 957, 962 n.3 (5th Cir. 1983). Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce track. Like the "power conferred upon the majority . . . to regulate the affairs of an unwilling minority" in *Carter Coal,* § 207 grants Amtrak a distinct competitive advantage: a hand in limiting the freight railroads' exercise of their property rights over an essential resource. 298 U.S. at 311, 56 S. Ct. 855.

Because Amtrak must "be operated and managed as a for-profit corporation," 49 U.S.C. § 24301(a)(2), the fact that the President has appointed the bulk of its Board does nothing to exonerate its management from its fiduciary duty to maximize company profits. Also consistent with this purpose, "Amtrak is encour-

aged to make agreements with the private sector and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies." *Id.* § 24101(d). Yet § 207 directs Amtrak and its host carriers to incorporate the metrics and standards in their Operating Agreements. *See id.* § 24101(c) note. So to summarize: Amtrak must negotiate contracts that will maximize its profits; those contracts generally must, by law, include certain terms; and Amtrak has the power to define those terms. Perverse incentives abound. Nothing 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. And that is the very essence of the public-private distinction when a claim of unconstitutional delegation arises.

No discussion of Amtrak's status as a private or public institution would be complete, however, without an examination of the Supreme Court's decision in *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995).[8] There the Court held that Amtrak "is part of the Government for purposes of the First Amendment." *Id.* at 400, 115 S. Ct. 961. Otherwise, the majority cau-

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[8] Strangely, the government's brief places almost no emphasis on *Lebron.* Perhaps this indicates the government's agreement with AAR's reading of the case. Whatever the reason for this near-silence, we think it important to address the Supreme Court's most explicit discussion of Amtrak's status.

tioned, the government could "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.* at 397, 115 S. Ct. 961. What the Court did not do in *Lebron* was conclude that Amtrak counted as part of the government for all purposes. On some questions—Does the Administrative Procedure Act apply to Amtrak? Does Amtrak enjoy sovereign immunity from suit?—Congress's disclaimer of Amtrak's governmental status is dispositive. *See id.* at 392, 115 S. Ct. 961; *Totten,* 380 F.3d at 491-92. This makes sense: Congress has the power to waive certain governmental privileges, like sovereign immunity, that are within its legislative control; but it cannot circumvent the Bill of Rights by simply dubbing something private.

Whether § 207 effects an unconstitutional delegation is a constitutional question, not a statutory one. But just because *Lebron* treated Amtrak as a government agency for purposes of the First Amendment does not dictate the same result with respect to all other constitutional provisions. To view *Lebron* in this way entirely misses the point. In *Lebron,* viewing Amtrak as a strictly private entity would have permitted the government to avoid a constitutional prohibition; in this case, deeming Amtrak to be just another governmental entity would allow the government to ignore a constitutional obligation. Just as it is impermissible for Congress to employ the corporate form to sidestep the First Amendment, neither may it reap the benefits of delegating regulatory authority while absolving the federal government of all responsibility for its exercise. The federal government cannot have its cake and eat it too. In any event, *Lebron's* holding

was comparatively narrow, deciding only that Amtrak is an agency of the United States for the purpose of the First Amendment. 513 U.S. at 394, 115 S. Ct. 961. It did not opine on Amtrak's status with respect to the federal government's structural powers under the Constitution—the issue here.

This distinction is more than academic. When *Lebron* contrasted "the constitutional obligations of Government" from "the 'privileges of the government,'" it was not drawing a distinction between questions that are constitutional from those that are not. Any "privilege" of the federal government must also be anchored in the Constitution. *Id.* at 399, 115 S. Ct. 961. As our federal government is one of enumerated powers, the Constitution's structural provisions are the source of Congress's power to act in the first place. *See United States v. Lopez,* 514 U.S. 549, 552, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995); THE FEDERALIST NO. 45 (James Madison). And, generally speaking, these provisions authorize action without mandating it. Congress's power to regulate interstate commerce, for example, does not dictate the enactment of this or that bill within its proper scope. By contrast, individual rights are "affirmative prohibitions" on government action that become relevant "only where the Government possesses authority to act in the first place." *Nat'l Fed'n of Ind. Bus.,* 132 S. Ct. at 2577. While often phrased in terms of an affirmative prohibition, Congress's inability to delegate government power to private entities is really just a function of its constitutional authority not extending that far in the first place. In other words, rather than proscribing what Congress *cannot* do, the doctrine defines the limits of

what Congress *can* do. And, by designing Amtrak to operate as a private corporation—to seek profit on behalf of private interests—Congress has elected to deny itself the power to delegate it regulatory authority under § 207. *Cf.* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4 (requiring, beyond what the Constitution mandates, that the federal government "not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the restriction satisfies strict scrutiny).

We therefore hold that Amtrak is a private corporation with respect to Congress's power to delegate regulatory authority. Though the federal government's involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive. Skewed incentives are precisely the danger forestalled by restricting delegations to government instrumentalities. And as a private entity, Amtrak cannot be granted the regulatory power prescribed in § 207.

III

We conclude § 207 of the PRIIA impermissibly delegates regulatory authority to Amtrak. We need not reach AAR's separate argument that Amtrak's involvement in developing the metrics and standards deprived its members of due process. Accordingly, the judgment of the district court is

*Reversed.*

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Civil Action No. 11-1499 (JEB)

ASSOCIATION OF AMERICAN RAILROADS, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., FEFENDANTS

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***MEMORANDUM OPINION***

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JAMES E. BOASBERG, District Judge.

We all know Amtrak—the federally chartered corporation that has provided intercity and commuter train service to Americans for more than forty years. But what *is* Amtrak? Is it a private entity? Or is it part of the government? While courts have previously addressed these questions in various other contexts, it is on their resolution that much of this case hinges.

Section 207 of The Passenger Railroad Investment and Improvement Act of 2008 (PRIIA) requires the Federal Railroad Administration (FRA) and Amtrak to "jointly" develop standards to evaluate the performance of Amtrak's intercity passenger trains. Con-

sistent with this mandate, the FRA and Amtrak issued Metrics and Standards for measuring Amtrak's on-time performance and minutes of delay. In this suit, Plaintiff Association of American Railroads (AAR)—an organization whose members include freight railroads that own tracks and facilities on and through which Amtrak's trains operate—contends that § 207 both unconstitutionally delegates rulemaking authority to a private entity and violates its members' due-process rights. Each side has now moved for summary judgment.

The Court concludes that the statute survives both of Plaintiff's constitutional challenges. Because the Supreme Court has held that Amtrak is to be considered a governmental entity for the purpose of constitutional individual-rights claims, Plaintiff's due-process challenge, which is premised on Amtrak's status as an interested private party, cannot prevail. The non-delegation claim, however, poses a closer question. Ultimately, though, the Court need not decide whether Amtrak should be considered a governmental entity or a private party for purposes of that issue. Even if Amtrak is a private entity, the government is sufficiently involved as to render § 207's delegation constitutional. The Court, therefore, will grant Defendants' Motion for Summary Judgment and deny Plaintiff's.

**I. Background**

By the middle of the twentieth century, the once-robust intercity passenger-train industry had fallen on hard times. Formerly the primary means of intercity

travel, the railroads faced crippling competition from the burgeoning air-travel industry and the new interstate highway system. *See* Def.'s Mot. & Opp., Exh. 1 (Congressional Budget Office, "The Past and Future of U.S. Passenger Rail Service" (Sept. 2003)) at 5-7. In an attempt "to avert the threatened extinction of passenger trains in the United States," *Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374, 383, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995), Congress passed the Rail Passenger Service Act of 1970, 84 Stat. 1327, 45 U.S.C. § 501 *et seq.* Among other things, the Act established the National Railroad Passenger Corporation, better known as Amtrak. *See id.* § 401(a) (codified at 45 U.S.C. §§ 561-66) (repealed and incorporated in sections of 49 U.S.C. subtit. V, part C).

Amtrak, which was set up to function as a "private, for-profit corporation," 49 U.S.C. § 24301(a), began operation in May 1971. *See Nat'l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Corp.,* 470 U.S. 451, 454, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985). Then, as now, Amtrak's passenger trains ran primarily on tracks owned by freight railroads. *See* Pl.'s Mot., Decl. of Thomas Dupree, Exh. H (AAR Comment on Proposed Metrics and Standards) at 2; *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 410, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992) ("Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads."). To ensure the continued vitality of passenger rail service, accordingly, Congress obligated the freight railroads to lease their tracks and facilities to Amtrak. *See* 49 U.S.C. § 24308(a). Congress also provided that

Amtrak's intercity passenger trains would generally take "preference over freight transportation in using a rail line, junction, or crossing." *Id.* § 24308(c). Consistent with these statutory mandates, the freight railroads entered into contracts with Amtrak—commonly known as operating agreements—that set out the rates Amtrak pays in exchange for use of the railroads' tracks. *See* Pl.'s Mot, Decl. of Paul LaDue, ¶ 12; Pl.'s Mot., Decl. of Virginia Beck, ¶ 13; Pl.'s Mot., Decl. of Mark Owens, ¶ 12; Pl.'s Mot., Decl. of Peggy Harris, ¶ 12; *see also* Dupree Decl., Exh. G (Report of the Inspector General, U.S. Dep't of Transp., "Amtrak Cascades and Coast Starlight Routes" (Sept. 23, 2010)) at 29.

Although Congress has specified that Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a), the government remains heavily involved in its operations. Of the nine directors who sit on Amtrak's board, eight are directly appointed by the President, with the advice and consent of the Senate. *See* 49 U.S.C. § 24302. The ninth board member is selected by the other eight. *Id.* Amtrak is required to submit annual reports to Congress and the President, *see id.* §§ 24315(a)-(b), and the government owns more than 90% of Amtrak's stock. *See* Def.'s Mot., Exh. 2 (Nat'l R.R. Pass. Corp. and Sub., Consolidated Financial Statements for the Years Ended Sept. 30, 2011 and 2010 (Dec. 2011)) at 17-18. Because Amtrak has never managed to become self-sufficient, moreover, the corporation depends on substantial federal subsidies to continue its operations. *See id.* at 6; Dupree Decl.,

Exh. Q (Katherine Shaver, "At 40, Amtrak Struggles to Stay Up to Speed," *Wash. Post* (May 15, 2011)) at C1.

The statute that is the subject of this suit, The Passenger Railroad Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 11-432, is the latest of several pieces of legislation intended to improve Amtrak's financial health and the quality of its service. At issue is § 207 of that Act, which provides, in relevant part:

> [T]he 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 [, *inter alia*,] . . . on-time performance and minutes of delay. . . .

PRIIA, § 207(a) (codified at 49 U.S.C. § 24101, note). The statute provides further details about what those Metrics and Standards should include, and it states that, "[t]o 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." *Id.* § 207(c).

In addition, § 213(a) of the PRIIA empowers the Surface Transportation Board (STB), "a quasi-independent

three-member body within the Department of Transportation," *Iowa, Chicago & Eastern R.R. Corp. v. Washington Cnty., Iowa,* 384 F.3d 557, 558-59 (8th Cir. 2004), to initiate an investigation if Amtrak fails to meet the on-time performance standards laid out in the Metrics and Standards. *See* PRIIA § 213(a) (codified at 49 U.S.C. § 24308(f)). If the STB concludes 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." *Id.* § 213(a). If "appropriate," furthermore, the STB may order that those damages be remitted to Amtrak. *See id.*

Consistent with § 207's mandate, the FRA and Amtrak issued proposed Metrics and Standards on March 13, 2009, *see* Dupree Decl., Exh. B (Proposed Metrics and Standards for Intercity Passenger Rail Service (Mar. 13, 2009)), accepted comments from interested parties, *see* 74 Fed. Reg. 10983 (Mar. 13, 2009), and ultimately published the final version of the Metrics and Standards on May 6, 2010. *See* Dupree Decl., Exh. D (Final Metrics and Standards for Intercity Passenger Rail Service, Docket No. FRA-2009-0016 (May 6, 2010)). The Metrics and Standards provide that Amtrak's on-time performance is to be assessed on a route-by-route basis by reference to three separate metrics. *See id.* at 24-30. In general terms, these metrics address "effective speed," which is the route's distance divided by the average time it takes to traverse it, "endpoint ontime performance," which

measures how often trains arrive on time at the end of the route, and "all-stations on-time performance," which measures how often trains arrive on time at each station along the route. *See id.* The Metrics and Standards also set limits on permissible delays, capping the delays for which a host railroad may be responsible at 900 minutes per 10,000 route miles. *See id.* at 27-28.

These Metrics and Standards went into effect on May 12, 2010. *See id.* at 1. Since then, the freight railroads have already made efforts to achieve the goals set forth therein. *See* LaDue Decl., ¶¶ 5-11; Beck Decl., ¶ 11; Owens Decl., ¶ 9; Harris Decl., ¶¶ 8-10. The FRA's quarterly reports have, nevertheless, consistently concluded that the Metrics and Standards are not being met on many of Amtrak's routes. *See generally* Dupree Decl., Exhs. M-P (FRA's February, April, July, and September 2011 Quarterly Reports); LaDue Decl., ¶ 5; Beck Decl., ¶ 8; Owens Decl., ¶ 7; Harris Decl., ¶ 7. While neither party has presented evidence that freight railroads have yet been fined as a result of these shortcomings, at least one petition has been filed by Amtrak against a railroad based on its alleged failure to meet the requirements of the Metrics and Standards. *See generally* Pl.'s Opp. & Reply, Decl. of Porter Wilkinson, Exh. A (Petition for Relief by Amtrak, Docket No. NOR 42134).

Plaintiff in this case, the Association of American Railroads (AAR), "is a nonprofit trade association whose members include all of the Class I freight railroads (the largest freight railroads), as well as some

smaller freight railroads and Amtrak." Compl., ¶ 10. It brings this case on behalf of its Class I-member freight railroads, all of which own tracks on which Amtrak trains are operated. *See id.,* ¶¶ 10-11. Because they are required to incorporate the Metrics and Standards into their operating agreements where "practicable" and because they could be subject to penalties if Amtrak's failure to live up to those standards is found to have been caused by their failure to prioritize Amtrak trains, AAR maintains that these railroads are directly harmed by § 207 of the PRIIA and the Metrics and Standards promulgated in accordance therewith. *See id.,* ¶¶ 11-13. In the instant suit, AAR claims that § 207 of the PRIIA, which empowers the FRA and Amtrak to "jointly" develop Metrics and Standards, violates the constitution in two ways. *See id.,* ¶¶ 47-54. Both sides now seek summary judgment.

**II. Legal Standard**

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Holcomb v. Powell,* 433 F.3d 889, 895 (D.C. Cir. 2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *Holcomb,* 433 F.3d at 895; *Liberty Lobby, Inc.,* 477 U.S. at 248, 106 S. Ct. 2505. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris,* 550 U.S. 372, 380,

127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *Liberty Lobby, Inc.,* 477 U.S. at 248, 106 S. Ct. 2505; *Holcomb,* 433 F.3d at 895. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record." Fed R. Civ. P. 56(c)(1)(A).

The party seeking summary judgment "bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987). When a motion for summary judgment is under consideration, "the evidence of the non-movant[s] is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Liberty Lobby, Inc.,* 477 U.S. at 255, 106 S. Ct. 2505; *see also Mastro v. PEPCO,* 447 F.3d 843, 850 (D.C. Cir. 2006); *Aka v. Washington Hospital Center,* 156 F.3d 1284, 1288 (D.C. Cir. 1998) (*en banc*). On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." *Czekalski v. Peters,* 475 F.3d 360, 363 (D.C. Cir. 2007).

The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The nonmovant is required to provide evidence that would permit a reasonable jury to find in its favor. *Laningham v. United States Navy,* 813 F.2d 1236, 1242 (D.C. Cir. 1987). If the nonmovant's evi-

dence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Liberty Lobby, Inc.,* 477 U.S. at 249-50, 106 S. Ct. 2505.

**III. Analysis**

This case presents two constitutional challenges to § 207 of the PRIIA. But before discussing these, the Court preliminarily notes that AAR, as a representative of the freight railroads that have operating agreements with Amtrak, has established—and Defendant has not challenged—its standing to bring them. *See, e.g., Lee's Summit v. Surface Transp. Bd.,* 231 F.3d 39, 41 (D.C. Cir. 2000) (courts must ensure plaintiff has constitutional standing, "*sua sponte* if need be"). The freight railroads own tracks on which Amtrak trains are operated, and they are required by statute to incorporate the Metrics and Standards into their operating agreements where "practicable." PRIIA, § 207(c). If Amtrak's trains fail to achieve the goals set out in the Metrics and Standards, moreover, the freight railroads can be penalized. *See id.,* § 213(a). Representatives of the railroads have attested that the Metrics and Standards currently affect their business operations. *See* La-Due Decl., ¶¶ 5-11; Beck Decl., ¶ 11; Owens Decl., ¶ 9; Harris Decl., ¶¶ 8-10. Plaintiff has shown, accordingly, that its members have been injured by the Metrics and Standards promulgated under § 207 and that such injury would be redressed by the relief it seeks. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (reciting the three elements of constitutional standing: injury, causation, and injury); *Friends of the Earth, Inc. v. Laidlaw Environ-*

*mental Servs., Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (organization has standing to bring suit on its members' behalf when members would otherwise have standing, interests at stake are related to organization's purpose, and member participation unnecessary). As there appear to be no other jurisdictional or procedural barriers to the resolution of Plaintiff's claims, the Court will proceed directly to these challenges.

AAR first contends that § 207 "violates the nondelegation doctrine and the separation of powers principle" by delegating legislative power to Amtrak, a private entity. See Compl., ¶ 51. Second, it argues that § 207 violates the Due Process Clause of the Fifth Amendment by "empower[ing] Amtrak," an "interested private part[y]," "to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants." *Id.*, ¶¶ 53-54. Although these claims are brought under two different provisions of the Constitution, both involve the same alleged flaw in the statute: the delegation of rulemaking authority to Amtrak. Both, furthermore, are premised upon Amtrak's status as a private entity. Whether Amtrak, a federally chartered corporation, should in fact be considered a private entity for purposes of Plaintiff's constitutional claims is thus the necessary jumping-off point.

Because the answer to that question is clearer (and, indeed, decisive) with respect to the due-process claim, the Court will begin there. Concluding that Amtrak is a governmental entity for purposes of constitutional individual-rights claims and that AAR's due-process

claim falls neatly within that category, the Court will on that ground grant Defendants' Motion with respect to that issue. Turning to the nondelegation claim, though, Amtrak's status as a governmental or private entity is less clear. Fortunately, however, the Court need not resolve that question. Instead, it finds that, even if Amtrak is a private entity, § 207's delegation survives AAR's nondelegation challenge because the government retains control over the promulgation of the Metrics and Standards. The Court will thus grant Defendants' Motion with respect to that claim as well.

A. *Due Process Claim*

The Fifth Amendment's Due Process Clause prohibits interested private parties from wielding regulatory authority. *See Carter v. Carter Coal Co.,* 298 U.S. 238, 311, 56 S. Ct. 855, 80 L. Ed. 1160 (1936) (holding that "the power to regulate the business of another, and especially of a competitor," is "a denial of rights safeguarded by the due process clause"); *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 805, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987) ("potential for private interest to influence the discharge of public duty" violates due process); *Gibson v. Berryhill,* 411 U.S. 564, 578-79, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (due process violated when governmental authority exercised by parties with "substantial pecuniary interest in legal proceedings"). Amtrak, AAR argues, is a private entity that competes for commercial position with the freight railroads. Because PRIIA endows Amtrak with rulemaking authority, AAR maintains that the statute contaminates the reg-

ulatory process with the potential for bias and, accordingly, violates its members' due-process rights.

AAR's contention that § 207 violates its members' due-process rights thus assumes that Amtrak is a private entity. *See* Compl., ¶¶ 53-54. In light of Congress's clear statement 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)(3), that assumption is certainly not baseless. Indeed, the D.C. Circuit has previously held that "Amtrak is not the Government" in the context of a False Claims Act claim. See *United States ex rel. Totten v. Bombardier Corp.,* 380 F.3d 488, 490 (D.C. Cir. 2004).

In *Lebron v. National Railroad Passenger Corporation,* 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995), however, the Supreme Court addressed Amtrak's status as a governmental or private entity in the context of a First Amendment claim. The Court stated that Congress's statements that Amtrak is not the government are "assuredly dispositive of Amtrak's status . . . for purposes of matters that are within Congress's control—for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities, such as the Administrative Procedure Act." *Id.* at 392, 115 S. Ct. 961 (citing 45 U.S.C. § 541 (repealed, revised, and incorporated at 49 U.S.C. § 24301(a))). For purposes of matters that are outside of Congress's control, however, the Court emphasized that "it is not for Congress to make the final determination of Amtrak's status as a Government entity. . . ." *Id.* "If Amtrak is, by

its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment." *Id.* "It surely cannot be," the Court stressed, "that government . . . is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.* at 396, 115 S. Ct. 961.

The Court, therefore, undertook a functional analysis to determine whether Amtrak should be considered a governmental entity in the context of the constitutional claim presented in that case. *See id.* at 393-400, 115 S. Ct. 961. Noting that Amtrak "was created . . . explicitly for the furtherance of federal governmental goals" and that "six of the corporation's eight externally named directors . . . are appointed directly by the President," *id.* at 397-98, 115 S. Ct. 961, the Court found that the government exercises permanent control over Amtrak not merely "as a creditor[,] but as a policy maker." *Id.* at 399, 115 S. Ct. 961. It held, accordingly, that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394, 115 S. Ct. 961.

This discussion in *Lebron* plainly dictates the outcome of AAR's due-process claim, which falls squarely in the category of constitutional individual-rights claims. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro,* — U.S. —, 131 S. Ct. 2780, 2786, 180 L. Ed. 2d 765 (2011) ("The Due Process Clause protects an individu-

al's right to be deprived of life, liberty, or property only by the exercise of lawful power.") (plurality opinion). The two hallmarks of government control that the *Lebron* Court found decisive—namely, that Amtrak was created by special law for the furtherance of governmental objectives and that the government retained the authority to appoint a majority of directors —moreover, have not changed. Indeed, when *Lebron* was decided, the President appointed only six of Amtrak's nine directors, *see Lebron,* 513 U.S. at 397, 115 S. Ct. 961; he now appoints eight of the nine. *See* 49 U.S.C. § 24302(a). The government, moreover, retains more than 90% of Amtrak's stock, *see* Consolidated Financial Statements at 17-18, appropriates for Amtrak more than a billion dollars annually, see PRIIA, § 101, and sets salary limits for Amtrak's employees. *See* 49 U.S.C. § 24303(b). In addition, Amtrak is required to submit annual reports to Congress and the President. *See id.* §§ 24315(a)-(b); *cf. Rocap v. Indiek,* 539 F.2d 174, 180 n.12 (D.C. Cir. 1976) (considering need to report to Congress as an indicator of federal control for purpose of determining FDIC's governmental status under a federal statute).

AAR's attempts to distinguish *Lebron* fall short of their mark. Plaintiff, for example, stresses that Congress removed Amtrak from the list of mixed-ownership government corporations after *Lebron* was decided. *See* Pl.'s Mot. at 27-28 (citing Pub. L. No. 105-134, § 415(2)). The inference it would have the Court draw, it seems, is that this changed circumstance should affect the outcome. The Supreme Court, however, clearly stated that Congress's *ipse*

*dixit* cannot change Amtrak's nature for purposes of constitutional individual-rights claims. *See Lebron,* 513 U.S. at 392, 396, 115 S. Ct. 961. Just as Congress's plain statement that Amtrak should be regarded as a private corporation does not make it such in the eyes of the Constitution, *see id.* at 392, 115 S. Ct. 961, its removal of Amtrak's name from a list of mixed-ownership corporations, *a fortiori,* similarly does not alter its nature. It was the still-unchanged facts that Amtrak was created "by special law . . . for the furtherance of governmental objectives" and that the government "retains for itself permanent authority to appoint a majority of [its] directors"—not the presence of Amtrak's name on a statutory list—moreover, that were decisive in *Lebron*. *See id.* at 400, 115 S. Ct. 961. And while AAR is correct that Amtrak has some private shareholders, that was the case at the time *Lebron* was decided and did not alter its analysis.

In addition, even if Plaintiff is right that Amtrak is a private entity *for purposes of PRIIA,* which it argues was intended "to boost the bottom-line of a for-profit corporation," Pl.'s Mot. at 28, that does not change its status *for purposes of the Constitution. See Lebron,* 513 U.S. at 392, 115 S. Ct. 961 (concluding that Congress can determine Amtrak's status for the purpose of "matters that are within Congress's control," like other federal statutes, but not for matters outside its control, like the Constitution); *see also Totten,* 380 F.3d at 492 (concluding Amtrak is the government for purposes of the False Claims Act because "False Claims Act coverage is . . . a matter within Congress's control"). Again, Congress can only deter-

mine Amtrak's status for the purpose of issues it has the power to control. *See Lebron,* 513 U.S. at 392, 115 S. Ct. 961. Because AAR contends that PRIIA violates the *Constitution*—not that Amtrak or any other entity violated PRIIA—it is, of course, Amtrak's status for purposes of constitutional individual-rights claims, not PRIIA claims, that controls.

As Plaintiff emphasizes, furthermore, "[T]he *Lebron* Court explained that while Amtrak is part of the Government for purposes of the constitutional *obligations* of 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." Pl.'s Opp. & Reply at 8 (emphases in original). AAR's due-process challenge plainly belongs in the former camp. Just as the Government is obligated to respect individuals' First Amendment rights, *see Lebron,* 513 U.S. at 399, 115 S. Ct. 961, so too is it constitutionally required to respect their due-process rights. Consistent with the standard Plaintiff itself enumerates, then, Amtrak is a governmental entity in the context of this claim. *See id.* (holding that Amtrak "is an agency of the Government . . . for purposes of the constitutional obligations of Government").

Perhaps recognizing that *Lebron* poses an insurmountable barrier to its argument that Amtrak is a private entity for purposes of its due-process claim, AAR attempts to raise two alternative arguments in its Opposition and Reply. *See* Pl.'s Opp. & Reply at 15-17. First, it contends that § 207 violates its members' due-process rights even if Amtrak is a governmental

entity. *See id.* at 15-16. Amtrak's pecuniary incentives, it argues, are so significant as to constitute a due-process violation even if Amtrak is not a private party. *See id.* (distinguishing, *e.g.*, *Marshall v. Jerrico,* 446 U.S. 238, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980), which held that an agency's having a "remote" financial interest in proceedings did not violate due process, *id*. at 243-52, 100 S. Ct. 1610). Second, AAR suggests that finding Amtrak to be a governmental entity renders its structure unconstitutional under the Appointments Clause. *See id.* at 16-17.

Neither argument, however, was raised in AAR's initial brief, and both are outside the scope of its Complaint, which premises its due-process claim on Amtrak's status as a private entity. *See* Compl., ¶¶ 53-54. Especially given that these arguments are raised only cursorily and that one is a new constitutional claim, the Court declines to address them. *See, e.g., Jo v. Dist. Of Columbia,* 582 F. Supp. 2d 51, 64 (D.D.C. 2008) ("It is well-established in this district that a plaintiff cannot amend his Complaint in an opposition to a defendant's motion for summary judgment."); *Quick v. U.S. Dep't of Commerce,* 775 F. Supp. 2d 174, 183 (D.D.C. 2011). In passing, however, the Court notes that, in light of the FRA's and STB's involvement and Amtrak's political accountability, *see* Section III.B., *infra*, the potential for bias appears remote, and the scheme, accordingly, would likely pass muster under the Due Process Clause. *See Marshall,* 446 U.S. at 243, 100 S. Ct. 1610. Concluding that Amtrak is to be considered part of the government for purposes of Plaintiff's due-process claim, furthermore,

does not necessarily implicate the Appointments Clause issues AAR highlights, which seem to relate more to the nondelegation challenge than the due-process claim. In any event, the Court here goes no further than *Lebron's* clear holding that Amtrak is the government in the context of claims that invoke the Constitution's guarantees of individual rights.

In the end, because Amtrak is a governmental entity for purposes of Plaintiff's due-process challenge, the Court will grant Defendants' Motion and deny Plaintiff's with respect to that claim.

B. *Nondelegation Claim*

Plaintiff's next challenge asserts that Congress unconstitutionally delegated lawmaking authority to Amtrak, a nongovernmental entity, when it gave Amtrak joint responsibility for issuing the Metrics and Standards. This claim thus also takes as its premise that Amtrak is a private entity. *See* Compl., ¶¶ 48-49. Whether *Lebron* dictates Amtrak's status for purposes of this claim, though, is less clear. On the one hand, the structural constitutional principles from which AAR's nondelegation claim derives are distinct—both legally and logically—from the document's guarantees of individual rights. *Lebron,* in fact, approached the question of Amtrak's status with the assumption that its answer could be different with respect to different kinds of claims. Its explicit holding that Amtrak is the government "for the purpose of individual rights guaranteed against the Government by the Constitution," *Lebron,* 513 U.S. at 394, 115 S. Ct. 961, fairly implies that Amtrak's status might be different in the

context of other kinds of constitutional claims—perhaps especially those invoking structural principles in an attempt to limit Congress's ability to utilize private forms.

On the other hand, it is possible to conceive of the nondelegation doctrine, especially when invoked by private parties, as a guarantor of individual rights. *See, e.g., Bond v. United States,* — U.S. —, 131 S. Ct. 2355, 2365, 180 L. Ed. 2d 269 (2011) ("The structural principles secured by the separation of powers protect the individual as well [as the branches of government]."). Looked at this way, AAR's nondelegation claim might fall into the category of individual-rights claims for purposes of which *Lebron* held Amtrak to be a governmental entity. Indeed, given the similarity of AAR's two claims, it would seem strange to consider Amtrak the government for purposes of due process but a private entity for purposes of nondelegation. Alternatively, *Lebron* can be read as holding that Amtrak should be considered part of the government for purposes of *any* constitutional claim. If the Court's logic was that Congress can designate an entity's status for the purpose of things it can control (like other statutes), but cannot change its nature for the purpose of things it cannot control (like the Constitution), *Lebron's* conclusion that Amtrak "is, by its very nature, what the Constitution regards as the Government," *id.* at 392, 115 S. Ct. 961, would appear to apply equally to a nondelegation claim.

The Court, however, need not decide Amtrak's status in the context of AAR's nondelegation challenge. Even if Amtrak is a private entity, as Plaintiff con-

tends, the government retains ultimate control over the promulgation of the Metrics and Standards. Section 207's delegation, accordingly, passes constitutional muster.

Article I of the Constitution provides that "All legislative Powers . . . shall be vested in a Congress of the United States." Art. I, § 1, cl. 1. The Supreme Court, nevertheless, has long interpreted the Constitution to permit Congress to delegate legislative power to executive agencies within certain constraints. *See, e.g., Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 41, 6 L. Ed. 253 (1825); *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 398, 60 S. Ct. 907, 84 L. Ed. 1263 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."); *Mistretta v. United States,* 488 U.S. 361, 372, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Courts have also upheld delegations of rulemaking authority to nongovernmental entities, but such delegations are subject to more significant strictures. *See Sunshine Anthracite,* 310 U.S. at 388, 399, 60 S. Ct. 907; *Pittston Co. v. United States,* 368 F.3d 385, 394 (4th Cir.2004); *United States v. Frame,* 885 F.2d 1119, 1128-29 (3d Cir. 1989) (abrogated on other grounds). A delegation to a private party without sufficient government oversight, the Supreme Court has held, is "legislative delegation in its most obnoxious form." *Carter Coal,* 298 U.S. at 311, 56 S. Ct. 855.

A series of cases in the Supreme Court and the Courts of Appeals has partially illuminated the limits of delegations to private entities. In *Sunshine An-*

*thracite*, for example, the Court upheld a statutory scheme that permitted groups of coal producers to set prices for coal on the ground that those prices would become effective only when approved by the National Bituminous Coal Commission, a government agency. *See* 310 U.S. at 388, 399, 60 S. Ct. 907. In concluding that the delegation was constitutional, the Court emphasized that the private parties "function[ed] subordinately" to the government. *Id.* at 399, 60 S. Ct. 907. In *Pittston,* the Fourth Circuit rejected a challenge to a statute that permitted a private entity to decide whether to refer coal companies to the Secretary of Treasury for an enforcement action. *See* 368 F.3d at 397. Because the private entity's role was merely "advisory" and the Secretary made the ultimate decision as to whether a penalty would be imposed, the court found that the statute complied with constitutional separation-of-powers principles. *See id.* Finally, in *Frame,* a private group of cattle ranchers and importers collected assessments from others in the cattle industry and took "the initiative in planning how those funds [would] be spent." 885 F.2d at 1123, 1128. Because "the amount of government oversight . . . [was] considerable," however, the Third Circuit upheld the statutory provision. *See id.* at 1128-29.

These cases—upon which both parties rely—confirm that Congress cannot delegate to a private party absolute power to enact regulations that will carry the force of law. *See also Carter Coal,* 298 U.S. at 311, 56 S. Ct. 855. A private party may play a role in the rulemaking process, but the Constitution re-

quires that the government retain ultimate control. Section 207 passes this test. Not only is the FRA co-author of the Metrics and Standards—and, as a result, Amtrak could not have promulgated them without the FRA's approval—but the STB also retains control over their enforcement. And even if the involvement of these agencies is not enough to ensure the constitutionality of § 207's delegation, the government retains structural control over Amtrak itself. Taken together, the FRA's and STB's roles and the government's control over Amtrak render the statutory scheme constitutional.

Section 207 of the PRIIA provides that the FRA and Amtrak shall "jointly" develop the Metrics and Standards. While the AAR is correct that this scheme in a sense makes Amtrak the FRA's equal—as opposed to its subordinate—Amtrak cannot promulgate the Metrics and Standards without the agency's approval. In an important sense, this renders the delegation effected by § 207 similar to that upheld in *Sunshine Anthracite*. There, the Court held that a delegation was constitutional because the prices set by the private entity would not be effective unless the government acted to adopt them. *See Sunshine Anthracite,* 310 U.S. at 388, 399, 60 S. Ct. 907. Although the use of language ("jointly") that appears to endow the governmental entity and the private party with equal responsibility for the promulgation of rules makes this scheme appear to constitute a more significant delegation than that upheld in Sunshine Anthracite, that is not necessarily so. In one case, the government acts as a rubber stamp to approve regulations

proposed by a private entity; in the other, the government serves as a coauthor of the regulations and, absent a circumstance not present here, must approve them before they have the effect of law. Why is the latter (the scheme at issue here) a more problematic delegation than the former (*Sunshine Anthracite's* statutory scheme)?

Of course, as AAR repeatedly emphasizes, the coequal roles played by Amtrak and the FRA also entails that the FRA could not enact the Metrics and Standards without *Amtrak's* approval. Conditioning regulation on a private party's assent, however, is not constitutionally problematic. *See, e.g., Currin v. Wallace,* 306 U.S. 1, 15, 59 S. Ct. 379, 83 L. Ed. 441 (1939) (upholding a statute that provided agency could not take particular action unless two-thirds of industry participants favored it). Indeed, the Supreme Court has reasoned that through such schemes the government "merely place[s] a restriction upon its own" ability to regulate. *Id.; see also United States v. Rock Royal Cooperative,* 307 U.S. 533, 577, 59 S. Ct. 993, 83 L. Ed. 1446 (1939) ("requirement of [private party's] approval would not be an invalid delegation"); *Frame,* 885 F.2d at 1127-28.

Looking at the bigger picture, moreover, just as the FRA remains involved with the Metrics and Standards' promulgation, the STB is the entity ultimately responsible for their enforcement. While AAR's challenge is to the delegation of rulemaking authority—not the delegation of enforcement authority—its papers repeatedly reference the Metrics and Standards' enforcement and penalties scheme and question the fun-

damental fairness of Amtrak's role therein. That the STB retains control over the enforcement mechanisms, accordingly, merits mention. True, Amtrak has the power to initiate an investigation by the STB where its on-time performance falls below 80%. *See* 49 U.S.C. § 24308(f)(1). As in *Pittston,* however, it is the governmental entity (here, the STB) that performs the investigation and may ultimately impose penalties. *See Pittston,* 368 F.3d at 397. Merely granting a private party the power of referral—a power, as it happens, that the freight railroads also possess, *see* 49 U.S.C. § 24308(f)(1)—does not pose a constitutional problem. *See Pittston,* 368 F.3d at 397.

All that said, Plaintiff may ultimately be correct that Amtrak plays a larger role in the promulgation of rules under § 207 than the private entities did in the cases on which Defendants rely. Under § 207, the FRA retains equal responsibility for the promulgation of the Metrics and Standards and the STB, not Amtrak, has the ultimate power to enforce them. But, the involvement of the FRA and the STB notwithstanding, the statute's choice of the word "jointly" undoubtedly makes it difficult to characterize Amtrak's role as "subordinate[]," *Sunshine Anthracite*, 310 U.S. at 399, 60 S. Ct. 907, or merely "advisory." *Pittston,* 368 F.3d at 398; *Frame,* 885 F.2d at 1129. If the FRA and STB's involvement were the sum total of the government's control, accordingly, this may have been a more difficult question.

That, however, that is not the case. While the Court assumed for purposes of this discussion that Amtrak is technically a private entity, that does not

mean it assumes away the facts on the ground. The Court hardly need reiterate the indicia of the government's control over Amtrak that it discussed in Section III.A, *supra,* but, in brief: Amtrak was created by special law for the furtherance of governmental objectives, and the government sets its goals; the President appoints eight of the nine directors; Amtrak is required to submit annual reports to Congress and the President; the government owns more than 90% of Amtrak's stock; Amtrak relies on more than a billion dollars in congressional appropriations annually; and Congress sets salary limits for Amtrak's employees. While Congress has declared that Amtrak is to be operated as a "for-profit corporation" and should not be considered "a department, agency, or instrumentality of the United States Government," 49 U.S.C. § 24301(a), the government clearly retains control of the organization. *Cf. Frame,* 885 F.2d at 1128-29 (considering government's structural controls over the private entity as relevant to nondelegation claim); *see also Lebron,* 513 U.S. at 397-400, 115 S. Ct. 961.

Taken together, the involvement of the FRA in promulgating the regulations, the role of the STB in their enforcement, and the government's structural control over Amtrak itself more than suffice. That an entity that shares some characteristics with private corporations is involved in the rulemaking process does not offend the separation-of-powers principle. In the end, § 207 establishes a scheme in which government entities retain control over an entity that, even if technically private, is itself controlled by the government. The Constitution requires no more.

**IV. Conclusion**

For the foregoing reasons, the Court will issue a contemporaneous Order granting Plaintiffs' Motion for Summary Judgment and denying Defendant's.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Case No. 12-5204

ASSOCIATION OF AMERICAN RAILROADS, APPELLANT

*v.*

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., APPELLEES

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[Filed: Oct. 11, 2013]

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**ORDER**

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Before: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, and SRINIVASAN, Circuit Judges

Appellees' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

**ORDERED** that the petition be denied.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark
Deputy Clerk

**APPENDIX D**

1. 49 U.S.C. 24101 note (Supp. V 2011) provides in pertinent part:

AMTRAK REFORM AND OPERATIONAL IMPROVEMENTS

Pub. L. 110-432, div. B, title II, §§ 203-209, Oct. 16, 2008, 122 Stat. 4912-4917, provided that:

* * * * *

"SEC. 207. METRICS AND STANDARDS.

"(a) IN GENERAL.—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. 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.

* * * * *

2. 49 U.S.C. 24301 provides in pertinent part:

**Status and applicable laws**

(a) STATUS.—Amtrak—

(1) is a railroad carrier under section 20102(2)[1] 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.

(b) PRINCIPAL OFFICE AND PLACE OF BUSINESS.—The principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the United States in a civil action.

(c) APPLICATION OF SUBTITLE IV.—Subtitle IV of this title shall not apply to Amtrak, except for sections 11123, 11301, 11322(a), 11502, and 11706. Notwithstanding the preceding sentence, Amtrak shall continue to be considered an employer under the Railroad Retire-

[1] So in original. Does not conform to section catchline.

ment Act of 1974, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act.

(d) APPLICATION OF SAFETY AND EMPLOYEE RELATIONS LAWS AND REGULATIONS.—Laws and regulations governing safety, employee representation for collective bargaining purposes, the handling of disputes between carriers and employees, employee retirement, annuity, and unemployment systems, and other dealings with employees that apply to a rail carrier subject to part A of subtitle IV of this title apply to Amtrak.

(e) APPLICATION OF CERTAIN ADDITIONAL LAWS.—Section 552 of title 5, this part, and, to the extent consistent with this part, the District of Columbia Business Corporation Act (D.C. Code § 29-301 et seq.) apply to Amtrak. Section 552 of title 5, United States Code, applies to Amtrak for any fiscal year in which Amtrak receives a Federal subsidy.

* * * * *

3. 49 U.S.C. 24302 (Supp. V 2011) provides:

**Board of directors**

(a) COMPOSITION AND TERMS.—

(1) The Amtrak Board of Directors (referred to in this section as the "Board") is composed of the following 9 directors, each of whom must be a citizen of the United States:

(A) The Secretary of Transportation.

(B) The President of Amtrak.

(C) 7 individuals appointed by the President of the United States, by and with the advice and consent of the Senate, with general business and financial experience, experience or qualifications in transportation, freight and passenger rail transportation, travel, hospitality, cruise line, or passenger air transportation businesses, or representatives of employees or users of passenger rail transportation or a State government.

(2) In selecting individuals described in paragraph (1) for nominations for appointments to the Board, the President shall consult with the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority leader of the Senate, and the minority leader of the Senate and try to provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak.

(3) An individual appointed under paragraph (1)(C) of this subsection shall be appointed for a term of 5 years. Such term may be extended until the individual's successor is appointed and qualified. Not more than 5 individuals appointed under paragraph (1)(C) may be members of the same political party.

(4) The Board shall elect a chairman and a vice chairman, other than the President of Amtrak, from among its membership. The vice chairman shall serve as chairman in the absence of the chairman.

(5) The Secretary may be represented at Board meetings by the Secretary's designee.

(b) PAY AND EXPENSES.—Each director not employed by the United States Government or Amtrak is entitled to reasonable pay when performing Board duties. Each director not employed by the United States Government is entitled to reimbursement from Amtrak for necessary travel, reasonable secretarial and professional staff support, and subsistence expenses incurred in attending Board meetings.

(c) TRAVEL.—(1) Each director not employed by the United States Government shall be subject to the same travel and reimbursable business travel expense policies and guidelines that apply to Amtrak's executive management when performing Board duties.

(2) Not later than 60 days after the end of each fiscal year, the Board shall submit a report describing all travel and reimbursable business travel expenses paid to each director when performing Board duties to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(3) The report submitted under paragraph (2) shall include a detailed justification for any travel or reimbursable business travel expense that deviates from Amtrak's travel and reimbursable business travel expense policies and guidelines.

(d) VACANCIES.—A vacancy on the Board is filled in the same way as the original selection, except that an individual appointed by the President of the United

States under subsection (a)(1)(C) of this section to fill a vacancy occurring before the end of the term for which the predecessor of that individual was appointed is appointed for the remainder of that term. A vacancy required to be filled by appointment under subsection (a)(1)(C) must be filled not later than 120 days after the vacancy occurs.

(e) QUORUM.—A majority of the members serving shall constitute a quorum for doing business.

(f) BYLAWS.—The Board may adopt and amend bylaws governing the operation of Amtrak. The bylaws shall be consistent with this part and the articles of incorporation.

4. 49 U.S.C. 24303 provides:

**Officers**

(a) APPOINTMENTS AND TERMS.—Amtrak has a President and other officers that are named and appointed by the board of directors of Amtrak. An officer of Amtrak must be a citizen of the United States. Officers of Amtrak serve at the pleasure of the board.

(b) PAY.—The board may fix the pay of the officers of Amtrak. An officer may not be paid more than the general level of pay for officers of rail carriers with comparable responsibility. The preceding sentence shall not apply for any fiscal year for which no Federal assistance is provided to Amtrak.

(c) CONFLICTS OF INTEREST.—When employed by Amtrak, an officer may not have a financial or employment relationship with another rail carrier, except that holding securities issued by a rail carrier is not deemed to be a violation of this subsection if the officer holding the securities makes a complete public disclosure of the holdings and does not participate in any decision directly affecting the rail carrier.

5. 49 U.S.C. 24308 (2006 & Supp. V 2011) provides:

**Use of facilities and providing services to Amtrak**

(a) GENERAL AUTHORITY.—(1) Amtrak may make an agreement with a rail carrier or regional transportation authority to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree. The terms shall include a penalty for untimely performance.

(2)(A) If the parties cannot agree and if the Surface Transportation Board finds it necessary to carry out this part, the Board shall—

(i) order that the facilities be made available and the services provided to Amtrak; and

(ii) prescribe reasonable terms and compensation for using the facilities and providing the services.

(B) When prescribing reasonable compensation under subparagraph (A) of this paragraph, the Board shall consider quality of service as a major factor when

determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.

(C) The Board shall decide the dispute not later than 90 days after Amtrak submits the dispute to the Board.

(3) Amtrak's right to use the facilities or have the services provided is conditioned on payment of the compensation. If the compensation is not paid promptly, the rail carrier or authority entitled to it may bring an action against Amtrak to recover the amount owed.

(4) Amtrak shall seek immediate and appropriate legal remedies to enforce its contract rights when track maintenance on a route over which Amtrak operates falls below the contractual standard.

(b) OPERATING DURING EMERGENCIES.—To facilitate operation by Amtrak during an emergency, the Board, on application by Amtrak, shall require a rail carrier to provide facilities immediately during the emergency. The Board then shall promptly prescribe reasonable terms, including indemnification of the carrier by Amtrak against personal injury risk to which the carrier may be exposed. The rail carrier shall provide the facilities for the duration of the emergency.

(c) PREFERENCE OVER FREIGHT TRANSPORTATION.—Except in an emergency, intercity and commuter rail passenger transportation provided by or for

Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.

(d) ACCELERATED SPEEDS.—If a rail carrier refuses to allow accelerated speeds on trains operated by or for Amtrak, Amtrak may apply to the Board for an order requiring the carrier to allow the accelerated speeds. The Board shall decide whether accelerated speeds are unsafe or impracticable and which improvements would be required to make accelerated speeds safe and practicable. After an opportunity for a hearing, the Board shall establish the maximum allowable speeds of Amtrak trains on terms the Board decides are reasonable.

(e) ADDITIONAL TRAINS.—(1) When a rail carrier does not agree to provide, or allow Amtrak to provide, for the operation of additional trains over a rail line of the carrier, Amtrak may apply to the Board for an order requiring the carrier to provide or allow for the operation of the requested trains. After a hearing on the record, the Board may order the carrier, within 60 days, to provide or allow for the operation of the requested trains on a schedule based on legally permissible operating times. However, if the Board decides

not to hold a hearing, the Board, not later than 30 days after receiving the application, shall publish in the Federal Register the reasons for the decision not to hold the hearing.

(2) The Board shall consider—

(A) when conducting a hearing, whether an order would impair unreasonably freight transportation of the rail carrier, with the carrier having the burden of demonstrating that the additional trains will impair the freight transportation; and

(B) when establishing scheduled running times, the statutory goal of Amtrak to implement schedules that attain a system-wide average speed of at least 60 miles an hour that can be adhered to with a high degree of reliability and passenger comfort.

(3) Unless the parties have an agreement that establishes the compensation Amtrak will pay the carrier for additional trains provided under an order under this subsection, the Board shall decide the dispute under subsection (a) of this section.

(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 extent 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).

6. 49 U.S.C. 24710 (Supp. V 2011) provides:

**Long-distance routes**

(a) ANNUAL EVALUATION.—Using the financial and performance metrics developed under section 207 of

the Passenger Rail Investment and Improvement Act of 2008, Amtrak shall—

(1) evaluate annually the financial and operating performance of each long-distance passenger rail route operated by Amtrak; and

(2) rank the overall performance of such routes for 2008 and identify each long-distance passenger rail route operated by Amtrak in 2008 according to its overall performance as belonging to the best performing third of such routes, the second best performing third of such routes, or the worst performing third of such routes.

(b) PERFORMANCE IMPROVEMENT PLAN.—Amtrak shall develop and post on its website a performance improvement plan for its long-distance passenger rail routes to achieve financial and operating improvements based on the data collected through the application of the financial and performance metrics developed under section 207 of that Act. The plan shall address—

(1) on-time performance;

(2) scheduling, frequency, routes, and stops;

(3) the feasibility of restructuring service into connected corridor service;

(4) performance-related equipment changes and capital improvements;

(5) on-board amenities and service, including food, first class, and sleeping car service;

(6) State or other non-Federal financial contributions;

(7) improving financial performance;

(8) anticipated Federal funding of operating and capital costs; and

(9) other aspects of Amtrak's long-distance passenger rail routes that affect the financial, competitive, and functional performance of service on Amtrak's long-distance passenger rail routes.

(c) IMPLEMENTATION.—Amtrak shall implement the performance improvement plan developed under subsection (b)—

(1) beginning in fiscal year 2010 for those routes identified as being in the worst performing third under subsection (a)(2);

(2) beginning in fiscal year 2011 for those routes identified as being in the second best performing third under subsection (a)(2); and

(3) beginning in fiscal year 2012 for those routes identified as being in the best performing third under subsection (a)(2).

(d) ENFORCEMENT.—The Federal Railroad Administration shall monitor the development, implementation, and outcome of improvement plans under this section. If the Federal Railroad Administration determines that Amtrak is not making reasonable progress in implementing its performance improvement plan or, after the performance improvement plan is implemented under subsection (c)(1) in accordance

with the terms of that plan, Amtrak has not achieved the outcomes it has established for such routes, under the plan for any calendar year, the Federal Railroad Administration—

(1) shall notify Amtrak, the Inspector General of the Department of Transportation, the Committee on Transportation and Infrastructure of the House of Representatives, and the Committee on Commerce, Science, and Transportation of the Senate of its determination under this subsection;

(2) shall provide Amtrak with an opportunity for a hearing with respect to that determination; and

(3) may withhold appropriated funds otherwise available to Amtrak for the operation of a route or routes from among the worst performing third of routes currently served by Amtrak on which Amtrak is not making reasonable progress, other than funds made available for passenger safety or security measures.

7. 49 U.S.C. 24902 provides in pertinent part:

**Goals and requirements**

(a) MANAGING COSTS AND REVENUES.—Amtrak shall manage its operating costs, pricing policies, and other factors with the goal of having revenues derived each fiscal year from providing intercity rail passenger transportation over the Northeast Corridor route between the District of Columbia and Boston, Massa-

chusetts, equal at least the operating costs of providing that transportation in that fiscal year.

(b) PRIORITIES IN SELECTING AND SCHEDULING PROJECTS.—When selecting and scheduling specific projects, Amtrak shall apply the following considerations, in the following order of priority:

(1) Safety-related items should be completed before other items because the safety of the passengers and users of the Northeast Corridor is paramount.

(2) Activities that benefit the greatest number of passengers should be completed before activities involving fewer passengers.

(3) Reliability of intercity rail passenger transportation must be emphasized.

(4) Trip-time requirements of this section must be achieved to the extent compatible with the priorities referred to in paragraphs (1)-(3) of this subsection.

(5) Improvements that will pay for the investment by achieving lower operating or maintenance costs should be carried out before other improvements.

(6) Construction operations should be scheduled so that the fewest possible passengers are inconvenienced, transportation is maintained, and the on-time performance of Northeast Corridor commuter rail passenger and rail freight transportation is optimized.

(7) Planning should focus on completing activities that will provide immediate benefits to users of the Northeast Corridor.

(c) COMPATIBILITY WITH FUTURE IMPROVEMENTS AND PRODUCTION OF MAXIMUM LABOR BENEFITS.—Improvements under this section shall be compatible with future improvements in transportation and shall produce the maximum labor benefit from hiring individuals presently unemployed.

(d) AUTOMATIC TRAIN CONTROL SYSTEMS.—A train operating on the Northeast Corridor main line or between the main line and Atlantic City shall be equipped with an automatic train control system designed to slow or stop the train in response to an external signal.

(e) HIGH-SPEED TRANSPORTATION.—If practicable, Amtrak shall establish intercity rail passenger transportation in the Northeast Corridor that carries out section 703(1)(E) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94–210, 90 Stat. 121).

(f) EQUIPMENT DEVELOPMENT.—Amtrak shall develop economical and reliable equipment compatible with track, operating, and marketing characteristics of the Northeast Corridor, including the capability to meet reliable trip times under section 703(1)(E) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210, 90 Stat. 121) in regularly scheduled revenue transportation in the Corridor, when the Northeast Corridor improvement program is completed. Amtrak must decide that equipment complies with this subsection before buying equipment

with financial assistance of the Government. Amtrak shall submit a request for an authorization of appropriations for production of the equipment.

* * * * *