ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5204

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION;
ANTHONY FOXX, SECRETARY OF TRANSPORTATION;
FEDERAL RAILROAD ADMINISTRATION;
SARAH FEINBERG, ADMINISTRATOR, FEDERAL
RAILROAD ADMINISTRATION,

Defendants-Appellees.

On Remand From The Supreme Court Of The United States

OPENING BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici:

The Plaintiff-Appellant is the Association of American Railroads ("AAR"). The Defendants-Appellees are the U.S. Department of Transportation; Anthony Foxx, in his official capacity as Secretary of Transportation (replacing Ray LaHood); the Federal Railroad Administration; and Sarah Feinberg, in her official capacity as Administrator of the Federal Railroad Administration (replacing Joseph C. Szabo).

Amici curiae who appeared in the Supreme Court include: All Aboard Ohio; American Council of Trustees and Alumni; Association of Independent Passenger Rail Operators; Cato Institute; Center for Constitutional Jurisprudence; Center for the Rule of Law; Chamber of Commerce of the United States; Environmental Law and Policy Center; John William Pope Center for Higher Education Policy; Judicial Education Project; National Association of Railroad Passengers; National Federation of Independent Business Legal Center; Resolute Forest Products, Inc.; Virginians for High Speed Rail; and Alexander Volokh.

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. AAR represents its member railroads in proceedings before Congress, the courts, and administrative agencies in matters

of common interest, such as the issues that are the subject matter of this litigation. AAR has no parent company, and no publicly-held company owns 10 percent or more of its stock.

(B) Rulings Under Review:

AAR seeks review of the final judgment entered on May 31, 2012, by the U.S. District Court for the District of Columbia (Boasberg, J.) and the Memorandum Opinion entered that same date. *See* 865 F. Supp. 2d 22.

(C) Related Cases:

This case was previously before this Court, *see* 721 F.3d 666, and the Supreme Court, *see* 135 S. Ct. 1225 (2015). Counsel are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Thomas H. Dupree, Jr.
Thomas H. Dupree, Jr.

CORPORATE DISCLOSURE STATEMENT

Appellant states as follows:

1. The Association of American Railroads is a trade association. Its members are railroads that are affected by the statute challenged in this case and by the regulations promulgated pursuant to that statute.

2. The Association of American Railroads has no parent company and is a nonstock corporation.

/s/ Thomas H. Dupree, Jr.

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GLOSSARY

AAR	Association of American Railroads
FRA	Federal Railroad Administration
PRIIA	Passenger Rail Investment and Improvement Act of 2008
STB	Surface Transportation Board

STATEMENT OF JURISDICTION

The district court had federal subject-matter jurisdiction under 28 U.S.C. § 1331 as this case presents federal questions. The court entered final judgment on May 31, 2012. JA 420. The Association of American Railroads ("AAR") timely filed a notice of appeal on June 22, 2012. JA 3. This Court has jurisdiction under 28 U.S.C. § 1291 as this appeal seeks review of the district court's final order.

STATEMENT OF THE ISSUES

This is a constitutional challenge to a statute that grants Amtrak—a Government-chartered, for-profit corporation—rulemaking power over private companies in the same industry. The statute further provides that if Amtrak does not exercise its rulemaking power, a private arbitrator may step in and issue the federal regulations.

In its prior opinion, this Court struck down Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) as an impermissible delegation of rulemaking power to a private corporation. *See Ass'n Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013). The Supreme Court vacated and remanded for further proceedings on the premise that Amtrak should be deemed a Government entity "for purposes of determining the validity of the metrics and standards"—the regulations jointly issued by Amtrak and the Federal

Railroad Administration pursuant to Section 207. *See Dep't of Transp. v. Ass'n Am. R.R.*, 135 S. Ct. 1225, 1228 (2015).

"Although Amtrak's actions here were governmental," the Court stated, "substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause—may still remain in the case" and "should be addressed in the first instance on remand." 135 S. Ct. at 1228, 1234 (citation omitted). The Court specifically identified the Appointments Clause challenge to the composition of Amtrak's Board; the nondelegation challenge to Section 207's arbitration provision; and the argument that "Congress violated the Due Process Clause by giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry." *Id*. at 1234 (quotation marks omitted). Two Justices issued concurring opinions to provide additional guidance on remand. *See id*. at 1240 (Alito, J., concurring) (discussing nondelegation and Appointments Clause concerns and stating: "The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded."); *id*. at 1254 (Thomas, J., concurring in the judgment) (discussing nondelegation problems and concluding that "Section 207 . . . violates the Constitution" and therefore "the metrics and standards promulgated under this provision are invalid").

The following issues remain live and are properly presented for this Court's review:

1. Whether PRIIA § 207 violates the Due Process Clause by permitting regulatory authority to be exercised by a for-profit Government corporation that participates in the very industry it is empowered to regulate and that stands to commercially benefit from the regulations it issues.

2. Whether PRIIA § 207 violates the nondelegation principle and the separation of powers because Amtrak—even though it is a Government entity—is not constitutionally eligible to exercise executive power through rulemaking.

3. Whether PRIIA § 207 violates the nondelegation principle and the separation of powers by allowing a private arbitrator to write federal regulations.

STATUTES AND REGULATIONS

The relevant text of PRIIA is reproduced in the Addendum at the back of this brief. The regulations promulgated by Amtrak and the FRA are reproduced at JA 23-56 (proposed metrics and standards) and JA 59-97 (final metrics and standards).

STATEMENT OF THE CASE

1. The Origin of Amtrak

In 1970, Congress established the National Railroad Passenger Corporation, better known as Amtrak, to engage in the commercial enterprise of providing

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

Congress provided that Amtrak "is not a department, agency, or instrumentality of the United States Government," but rather "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2)-(3). Designating Amtrak as a private corporation was consistent with historic practice, as "[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not . . . government[ ]." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 686 (1982). Amtrak is governed by a nine-member Board of Directors, one of whom is the Secretary of Transportation and seven of whom are appointed to the Board by the President and confirmed by the Senate. 49 U.S.C. § 24302(a)(1). These eight Board members, in turn, select the ninth board member—Amtrak's president. *Id.* §§ 24302(a)(1)(B), 24303(a).

Amtrak began offering passenger service on May 1, 1971. *Atchison*, 470 U.S. at 456. Because essentially all of the Nation's rail infrastructure was owned at the time by the freight railroads, the only viable option was to operate Amtrak's

passenger trains over the freight railroads' tracks. The same is true today: 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. JA 155; *see also Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 410 (1992) ("Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads.").[1]

The tracks used by Amtrak trains are also used by host railroads to move freight traffic. Just as an air-traffic controller manages departures and landings at a busy airport, the freight railroads must carefully schedule and manage the timing and sequencing of the passenger and freight trains operating on their tracks to minimize back-ups and delays. JA 257, 265, 272, 280. Amtrak trains limit the host railroad's ability to move freight and serve their customers. Thus, while Amtrak and the freight railroads do not compete for customers, they do compete for a limited resource: capacity, or the ability to operate trains within the limited slots available on a rail line. *Ass'n Am. R.R.*, 721 F.3d at 675.

Amtrak has entered into contracts with the freight railroads that host its trains. These contracts—commonly known as operating agreements—are painstakingly negotiated documents that were executed soon after Amtrak's

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[1] The exception is the Northeast Corridor—the route connecting Washington, D.C. to Boston—which consists of tracks almost entirely owned by Amtrak.

creation and have been amended or renegotiated over the years. JA 256-83. The operating agreements establish the agreed-upon conditions governing Amtrak's use of the freight railroads' tracks, and spell out the rights and duties of the parties. *Atchison*, 470 U.S. at 455.

2. The Passenger Rail Investment and Improvement Act

Congress enacted the Passenger Rail Investment and Improvement Act in 2008. *See* Pub. L. No. 110-432, Division B, 122 Stat. 4848, 4907 (codified generally in Title 49). Section 207(a) of PRIIA provides:

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

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

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

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

Section 213(a) further provides: "If the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation," as required by 49

U.S.C. § 24308(c), "the Board may award damages against the host rail carrier" and "prescrib[e] such other relief to Amtrak as it determines to be reasonable and appropriate." In fashioning a remedy, the Board may consider the need for compensation as well as deterrence, and may "order the host rail carrier to remit the damages awarded under this subsection to Amtrak." PRIIA § 213(a).

3. The Metrics and Standards

Amtrak and the FRA published proposed metrics and standards on March 13, 2009, JA 23-56, and "jointly issu[ed]" their final rule on May 6, 2010. JA 59-97. The final rule stated that "the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service," and designated both an FRA official and an Amtrak employee as the contacts for further information. JA 59. The rule also stated that the FRA had prepared its responses to the comments on the proposed rule "with Amtrak's concurrence." JA 61. With regard to concerns expressed by several commenters about Amtrak's role in developing the metrics and standards, Amtrak and the FRA responded that the statute left them no choice. They explained that "PRIIA, the statutory basis for these performance measures, directly incorporates Amtrak into their creation by stating that FRA and Amtrak 'shall jointly' develop the Metrics and Standards" and "establishes no completely independent agency or funding mechanism for gathering and analyzing the relevant data." JA 64.

The final rule provided that Amtrak's on-time performance for each of its routes be assessed by reference to three metrics, each of which must be met for on-time performance to be deemed satisfactory: Effective Speed, Endpoint On-Time Performance, and All-Stations On-Time Performance. JA 84-85. These standards and performance requirements differ from, and are more demanding than, provisions in the existing contracts between Amtrak and the host freight railroads. *See, e.g.*, JA 258, 261, 265, 269, 281.

• Effective Speed is the distance of the route divided by the average time it actually takes for Amtrak trains on the route to get from origin to destination. To be deemed satisfactory, a route's Effective Speed must be equal to or better than the route's Effective Speed in Fiscal Year 2008. JA 23 & n.2; JA 35-36; JA 84.

• Endpoint On-Time Performance measures how often trains on the route arrive on time at the destination. JA 24 & n.3; JA 36; JA 84. To be deemed satisfactory, Endpoint OTP must be at least 80 percent (increasing to 85 and 90 percent in future years). JA 84.

• All-Stations On-Time Performance measures how often the trains on the route arrive on-time at each station on the route. To be deemed satisfactory, All-Stations OTP must be at least 80 percent (increasing to 85 and 90 percent in future years). JA 24; JA 36; JA 85.

Thus, to satisfy the On-Time Performance metric, a route must maintain an Effective Speed equal to or better than the route's Effective Speed in Fiscal Year 2008, and it must maintain an 80 percent Endpoint and All-Stations On-Time Performance (increasing to 85 and 90 percent in future years). Amtrak and the FRA have emphasized that their On-Time Performance metric "is all the more important because deficiencies in performance could subject host railroads to fines administered by the Surface Transportation Board." JA 28.

The final rule also addresses permissible delays. It allows the host freight railroad no more than 900 minutes of delays per 10,000 route miles. JA 86. Amtrak and the FRA have explained that whether a particular delay will be attributable to Amtrak or the host railroad will be determined by Amtrak's Conductor Delay Reports. *See* JA 37 (minutes of delay "is derived from conductor reports"); JA 86 n.23 (defining "Host-responsible" delays as determined by "Amtrak Conductor Delay Reports"). These are reports prepared by the conductor of the delayed Amtrak train and are based solely on what Amtrak's conductor personally observes or assumes. In many cases, the conductor must complete the report and assign fault based on very limited information, *e.g.*, when the train is stopped for reasons unknown to the Amtrak conductor. In other cases, the conductor may lack full understanding of the reason for a delay, *e.g.*, in a case where the host railroad directs the Amtrak train to stop in order to permit the FRA

to inspect the track, the conductor may not realize that the delay was prompted by the Government or Amtrak itself rather than the host railroad. Consequently, in many instances, the conductor misidentifies the true root cause of a delay. *See* JA 168; JA 191; JA 257-58.

4. The Metrics and Standards Substantially Burden Freight Railroad Operations.

The freight railroads are already burdened by their obligation to host Amtrak trains. Amtrak operates its trains on routes that are used for freight traffic, many of which are at or near capacity. JA 280-81. Amtrak trains consume a disproportionate share of the limited capacity or "train slots" available on a line. That is because (among other things) passenger trains travel at higher speeds than freight trains, thus requiring the freight trains to pull aside to allow the Amtrak trains to pass. JA 257; JA 265; JA 272-73; JA 281.

Section 207 and the metrics and standards exacerbate these burdens in many respects. The metrics and standards place greater demands on the host freight railroads and adversely affect their operations and ability to serve their customers. As one railroad official explained, efforts "to achieve the Metrics and Standards will come at the expense of our freight traffic, which in many cases must be delayed." JA 267. "For this reason, the Metrics and Standards adversely affect our business by making it more difficult to serve our freight customers and to operate an efficient freight rail network." *Id.*; *see also* JA 262; JA 266; JA 273-74; JA 281.

Indeed, the very day that Amtrak and the FRA issued their regulations, a senior Amtrak official emailed a copy of the regulations to a Union Pacific official, and stated: "These Metrics and Standards will have a big impact on UP and Amtrak." JA 283.

That prediction was accurate. The freight railroads have taken many steps in an effort to meet the metrics and standards, including modifying freight train schedules to accommodate Amtrak trains, rescheduling maintenance work, rerouting freight traffic, and diverting internal resources. *See* JA 258-60; JA 266-68; JA 273-75; JA 281-82; *Ass'n Am. R.R.*, 721 F.3d at 672 n.6 ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take.").

Notwithstanding the freight railroads' extensive efforts, FRA reports demonstrate that the metrics and standards are not being met on numerous routes. The metrics and standards became effective on May 11, 2010. JA 98. In February 2011, the FRA issued its first quarterly report identifying the freight railroads' lines on which the metrics and standards were not being met. JA 193-255. In a cover letter accompanying the report, the FRA Administrator acknowledged that Amtrak has "provided the data necessary to populate this report." JA 194. The report determined that the metrics and standards were not achieved on most of Amtrak's routes during the July-September 2010 period. The FRA issued

subsequent quarterly reports based upon Amtrak's data reflecting the same conclusion: the metrics and standards were not being met on most routes. *See* JA 257-258, 266, 273, 281; District Court ECF No. 8, Attachment Nos. 16, 17, 18 (FRA Quarterly Performance Reports from April, July and September 2011). Armed with such evidence, Amtrak filed a petition for relief with the STB against Canadian National, claiming that the freight railroad "refused to adopt measures necessary to satisfy the standards developed pursuant to Section 207." JA 377.

The metrics and standards affect the freight railroads in another way. PRIIA § 207(c) directs the freight railroads to "incorporate the metrics and standards . . . into their access and service agreements" with Amtrak "[t]o the extent practicable." Amtrak has stated that it expects the freight railroads to amend their operating agreements to incorporate the metrics and standards pursuant to Section 207. JA 275-76.

5. Prior Proceedings in the District Court and This Court

The Association of American Railroads (AAR) challenged PRIIA § 207 as unconstitutional. The parties agreed that discovery was unnecessary and that the case could be resolved through cross-motions for summary judgment.

The district court upheld the statute, rejecting AAR's constitutional challenges on the merits. While the court acknowledged that "AAR is correct that this scheme in a sense makes Amtrak the FRA's equal—as opposed to its

subordinate"—in the rulemaking process, JA 438, it held that Section 207 was nonetheless constitutional because "the government retains ultimate control over the promulgation of the Metrics and Standards." JA 436.

This Court reversed. It held that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity." *Ass'n Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 667 (D.C. Cir. 2013). The Court began "with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity." *Id.* at 670. It then concluded that because "Amtrak is a private corporation with respect to Congress's power to delegate regulatory authority," Section 207 effected an unconstitutional delegation. *Id.* at 677.

The Court also considered AAR's challenge to Section 207(d)'s provision giving an arbitrator the power to write the regulation if Amtrak and the FRA could not agree, and concluded that the arbitration provision "polluted the rulemaking process over and above the other defects besetting the statute." 721 F.3d at 673-74 & n.7. The Court observed that the arbitration provision made it "entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government." *Id.* at 674.

The Court explained that because it had resolved the appeal on nondelegation grounds, it "need not reach AAR's separate argument that Amtrak's

involvement in developing the metrics and standards deprived its members of due process." 721 F.3d at 677.

The Court denied the Government's petition for rehearing en banc.

6. Proceedings in the Supreme Court

The Supreme Court vacated and remanded. It concluded that this Court's decision rested on the incorrect "premise" that Amtrak is a private entity "for purposes of determining the validity of the metrics and standards." *Dep't of Transp. v. Ass'n Am. R.R.*, 135 S. Ct. 1225, 1228 (2015). The Court remanded for adjudication of AAR's remaining constitutional challenges in light of its determination that Amtrak should be treated as a governmental actor. *Id*. The Court stated:

> Although Amtrak's actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U.S. Const., Art. II, § 2, cl. 2—may still remain in the case. As those matters have not yet been passed upon by the Court of Appeals, this case is remanded.

Id.

At the end of its opinion, the Court identified several of AAR's arguments that, assuming they remain live, "should be addressed in the first instance on remand." 135 S. Ct. at 1234. The Court specifically noted AAR's Appointments Clause challenge to the composition of Amtrak's Board; its challenge to Section

207's arbitration provision; and its argument that "Congress violated the Due Process Clause by giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry." *Id*. (quotation marks omitted). The Court remanded "for further proceedings consistent with this opinion." *Id*.

Justice Alito concurred. He explained that "[r]ecognition that Amtrak is part of the Federal Government raises a host of constitutional questions." 135 S. Ct. at 1234 (Alito, J., concurring). He began by observing that Amtrak's board members do not take an oath of office, noting that "[b]ecause Amtrak is the Government, those who run it need to satisfy basic constitutional requirements." *Id*. (citation omitted). He recognized that the metrics and standards are "obviously regulatory," because "private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts" with Amtrak; moreover, he explained, "[b]ecause obedience to the metrics and standards materially reduces the risk of liability [in an enforcement action], railroads face powerful incentives to obey." *Id*. at 1235-36. Justice Alito then focused on Section 207's arbitration provision. He stated that "[n]o one disputes . . . that the arbitration provision is fair game for challenge," and that "it is hard to imagine how delegating 'binding' tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional." *Id*. at 1236, 1238. Finally, he stated that while "Amtrak

must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution" because "Amtrak's president has not been appointed by the President and confirmed by the Senate." *Id*. at 1239-40.

Justice Thomas concurred in the judgment only, writing separately "to describe the framework that . . . should guide our resolution of delegation challenges and to highlight serious constitutional defects in [PRIIA] that are properly presented for the lower courts' review on remand." 135 S. Ct. at 1240 (Thomas, J., concurring). He explained that "[a] determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so." *Id*. at 1253. Accordingly, he reasoned, "the Court of Appeals must . . . determine whether Amtrak is constitutionally eligible to exercise executive power." *Id*. at 1254. He stated that Section 207 "raises serious constitutional questions to which the majority's holding that Amtrak is a governmental entity is all but a non sequitur" and that "[t]hese concerns merit close consideration by the courts below and by this Court if the case reaches us again." *Id*. He concluded:

> We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional

> structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

Id. at 1254-55. In Justice Thomas's view, "Section 207 . . . violates the Constitution" and therefore "the metrics and standard promulgated under this provision are invalid." *Id*. at 1254.

SUMMARY OF ARGUMENT

I. (a) Section 207 violates due process because it gives Amtrak regulatory power over the very industry in which it is a for-profit commercial actor. Due process requires that those exercising sovereign rulemaking power be neutral, even-handed and "disinterested." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Amtrak cannot be a disinterested regulator of the railroad industry because it is a market participant with strong incentives to wield its regulatory power for its own commercial benefit and to disadvantage its competitors. The Supreme Court's determination that Amtrak must be deemed a governmental entity does not change the fact that Amtrak is engaged in a commercial enterprise and has financial interests directly adverse to those it is regulating. Indeed, federal law provides that Amtrak "shall be operated and managed as a for-profit corporation," 49 U.S.C. § 24301(a)(2), and Amtrak officials—whose compensation is directly linked to Amtrak's profitability, *see id*. § 24303(b)—have publicly stated that they run Amtrak like a business, not like a

neutral regulatory agency. Due process prohibits self-interested rulemaking, yet that is exactly what happened here: Amtrak issued regulations that have forced the freight railroads to delay freight traffic in order to benefit Amtrak's for-profit business.

(b) Section 207 also violates the nondelegation principle and the separation of powers because Amtrak is not constitutionally eligible to exercise executive power by issuing regulations. Only "Officers of the United States," appointed in conformity with the Appointments Clause, may issue regulations, *Buckley v. Valeo*, 424 U.S. 1, 140-43 (1976), yet Amtrak's president, who exercises rulemaking power under Section 207, is not so appointed. Moreover, the Executive Branch lacks constitutionally sufficient control over Amtrak: the President of the United States does not appoint Amtrak's president; Amtrak employees are not federal employees and federal law prohibits the President from treating Amtrak as an "instrumentality" or "agency" of the Government, *see* 49 U.S.C. § 24301(a)(3); Amtrak board members do not take an oath of office and are not commissioned by the President; and the Government has conceded that the Executive Branch "does not control Amtrak's day-to-day operations." U.S. CADC Br. at 29 (Nov. 8, 2012). In addition, the President, Congress and Amtrak have publicly denied that Amtrak is a Government agency, thereby frustrating attempts

to hold the Government accountable for Amtrak's actions and further underscoring that Amtrak is not a constitutionally permissible recipient of delegated authority.

II. Section 207 violates the nondelegation principle in another respect: it empowers a potentially private arbitrator to draft and promulgate federal regulations if Amtrak and the FRA reach an impasse, thus excluding the Government from the rulemaking process entirely. The Government has urged this Court to construe the statute as requiring the appointment of a *Government* arbitrator, but the statutory text contains no such requirement, and courts do not rewrite statutes, even to avoid constitutional issues. *See United States v. Stevens*, 559 U.S. 460, 480-81 (2010). The ordinary meaning of the word "arbitrator" refers to a private adjudicator, and in those instances where Congress intends to require a Government arbitrator, it says so expressly. *See, e.g.*, 7 U.S.C. § 1359ff(a)(2)(A). Accepting the Government's reading of the statute would defy basic rules of statutory construction and would give rise to a host of new constitutional problems, including an Appointments Clause violation, because the arbitrator has the power to issue regulations but is not Presidentially-appointed and Senate-confirmed. The fact that the arbitration provision was not invoked is immaterial because parties cannot cure an unconstitutional delegation of power simply "by declining to exercise some of that power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2006).

ARGUMENT

The Supreme Court has identified several "substantial" constitutional questions for this Court to consider on remand. 135 S. Ct. at 1228. These questions include whether Section 207 violates due process, the nondelegation principle, and the separation of powers by vesting Amtrak with rulemaking authority, as well as whether Section 207 unconstitutionally empowers a private arbitrator to issue federal regulations. *Id.* at 1228, 1234. Other than articulating the correct premise for analyzing these issues—that Amtrak should be treated as a Government entity—the Supreme Court did not question any other aspect of this Court's decision, and two Justices in concurrences strongly endorsed this Court's reasoning and conclusions.

All of these challenges remain live notwithstanding the Supreme Court's ruling that Amtrak is a Government actor for purposes of this case. As Justice Thomas stated in his concurrence, which exhaustively analyzed the nondelegation and separation of powers problems arising from the grant of rulemaking power to Amtrak, "I write separately . . . to highlight serious constitutional defects in [Section 207] *that are properly presented for the lower courts' review on remand*."

Ass'n Am. R.R., 135 S. Ct. at 1240 (Thomas, J., concurring) (emphasis added). Likewise, AAR's challenge to the arbitration provision remains live, as it is unaffected by the determination that Amtrak is the Government. This Court addressed the arbitration provision in its prior opinion, *see* 721 F.3d at 673-74, and in the Supreme Court "[n]o one dispute[d] . . . that the arbitration provision is fair game for challenge." 135 S. Ct. at 1236 (Alito, J., concurring). In fact, during argument the Chief Justice suggested that AAR's challenge to the arbitration provision would remain live even if the Court held that Amtrak should be deemed a government entity. *See* S. Ct. Tr. at 5-6 (Dec. 8, 2014) ("CHIEF JUSTICE ROBERTS: I was just going to say your argument that Amtrak is governmental for purposes of – that doesn't get you to the finish line, right? I mean, if you had a law that said the Department of Defense and the Department of State will consult and jointly issue regulations and if they don't, this private individual resolved it for them, that would still present the same problems.").

AAR's due process claim also remains live. AAR has argued at every stage of this case that Section 207 violates due process even if Amtrak is deemed a Government entity.[2] In its prior opinion, this Court expressly recognized "AAR's

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[2] In the district court, AAR argued that "even if Amtrak were somehow deemed a Government agency, PRIIA § 207 would still be unconstitutional" because

[Footnote continued on next page]

separate argument that Amtrak's involvement in developing the metrics and standards deprived its members of due process," but declined to reach the due process challenge because it resolved the case on different grounds. *See* 721 F.3d at 677. To be sure, the Government at times has suggested—echoing the district court's erroneous belief—that AAR's due process challenge was based only on the claim that Amtrak was a private actor. But in oral argument before the Supreme Court, when Justice Scalia described AAR's due process challenge as alleging that "*even if [Amtrak] is a governmental entity*, there are some things governmental entities can't do," the Government seemingly agreed with his characterization, and conceded that the argument "certainly was raised below":

> JUSTICE SCALIA: … [I]t doesn't resolve the – the other issue in the case, which is due process. That is to say, even if [Amtrak] is a governmental entity, there are some things that governmental entities

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"regardless of how Amtrak is characterized, it was created to operate as a business to compete in the market for intercity passenger transportation—a role that is incompatible with the role of a disinterested federal regulator of the freight railroad industry." ECF No. 12, at 15. In this Court, AAR argued that the "fundamental due process protection against self-interested rulemaking applies *regardless* of whether Amtrak is deemed a public for-profit corporation, a private for-profit corporation, or something in between." AAR CADC Opening Br. at 18. And in the Supreme Court, AAR argued that "[n]either Government officials nor corporations vested with governmental authority may issue regulations when they have a commercial self-interest in the subject of the regulation," and stated that its due process challenge did *not* "depend[ ] on a determination that Amtrak is a private actor." Resp. S. Ct. Br. at 43, 49-50.

> can't do. And, indeed, I think the case law in this area relies on the due process clause more than on the distinction simply between public and private entities.
>
> THE GOVERNMENT: … [W]e would be surprised if the Court wanted to decide the due process issue here since it wasn't decided by the court of appeals.
>
> JUSTICE SCALIA: It was raised.
>
> THE GOVERNMENT: It certainly was raised.
>
> JUSTICE SCALIA: And it's – and it's argued here.
>
> THE GOVERNMENT: It – it has been argued in the red brief here. And we do think that we're correct on the merits with respect to the due process issue . . . .

S. Ct. Tr. at 6-7. The Government ultimately persuaded the Supreme Court to remand the due process challenge on the basis that while it had been raised below, this Court had not yet decided it. Having convinced the Supreme Court of the wisdom of that approach, the Government should not now be heard to argue that the due process challenge no longer remains live.

I. PRIIA § 207 IS UNCONSTITUTIONAL BECAUSE IT VESTS AMTRAK WITH REGULATORY POWER.

Section 207's grant of regulatory power to Amtrak violates the Constitution in two ways. First, it violates due process because it empowers Amtrak to regulate the very industry in which it is a for-profit commercial actor—the very antithesis of a neutral and disinterested regulator. Second, it violates the separation of

powers and the nondelegation principle because Amtrak is not an entity that is constitutionally eligible to exercise executive power through rulemaking.

A. Section 207 Violates Due Process Because It Empowers Amtrak To Regulate The Same Industry In Which It Is A For-Profit Commercial Actor.

Congress's power to enter the commercial sphere by creating federally chartered, statutorily "private" corporations is firmly established. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386-91 (1995). Likewise, Congress's power to delegate regulatory authority to federal agencies is well settled. *See Touby v. United States*, 500 U.S. 160, 165 (1991). But due process does not permit Congress to *blend* the two—to give a federally chartered, for-profit corporation regulatory authority over its own industry. An arrangement of this type violates due process because it allows rulemaking power to be exercised *not* by a neutral and "presumptively disinterested" regulator, but by a for-profit corporation that is an industry participant and has a direct commercial interest in the substance of its regulations. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936). For that reason, Section 207 violates the Due Process Clause of the Fifth Amendment.

1. A For-Profit Government Corporation Cannot Be A Disinterested Regulator Of Its Own Industry.

Neither Government officials nor Government corporations vested with governmental authority may issue regulations when they have a commercial self-

interest in the subject of the regulation. This ensures that Government power is exercised in a neutral and disinterested manner.

Carter Coal applied this due process principle to delegations of rulemaking power to corporations. The Court held that granting a corporation "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311-12 (collecting cases). Because a regulator must be "presumptively disinterested," Congress could not give selected coal companies the power to issue regulations governing the rest of the industry in light of the risk that they would regulate in their own self-interest. *Id*. at 311. Due process requires that regulators be neutral and evenhanded, and act in the public interest rather than for their own commercial benefit.

A statute empowering Coca-Cola to regulate Pepsi would violate due process. That result should not change just because the regulating entity is a federally chartered corporation: the for-profit Government Cola Corporation should not be allowed to regulate Coke and Pepsi. Regardless of whether the regulator is a private company or a Government entity, due process is violated where the regulator has commercial "interests [that] may be and often are adverse to the interests of others in the same business," *Carter Coal*, 298 U.S. at 311, and

thus has an incentive to wield sovereign power in a way that disadvantages its market competitors.[3]

Whether they be private entities, as in *Carter Coal*, or Government-chartered corporations, those exercising governmental power must be free from bias and self-interest. "Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quotation marks omitted).

The Supreme Court has applied this fundamental due process principle in a variety of contexts. For example, in *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Court held that a Government optometry board, created by statute and consisting of unaffiliated optometrists, could not exercise regulatory authority over optometrists employed by corporations. The Court explained that board members had "substantial pecuniary interests" in the adjudication at issue, noting the district court's finding that the board could wield its regulatory power in a way that would

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[3] Although statements by Justices during oral argument do not reflect the views of the Court, it is noteworthy that Justice Scalia stated: "[W]hat difference does it make whether [Amtrak is] a governmental entity or not, so long as it is operating on a for-profit basis and . . . is given the last word on some regulatory matters that disadvantage its competitors, there's a violation of due process." S. Ct. Tr. at 37.

harm competitors and benefit its own business interests. *Id*. at 571, 579 ("the court found as a fact that Lee Optical Co. did a large business in Alabama, and that if it were forced to suspend operations the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business"). In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), the Court held that due process bars a statutory scheme in which the adjudicator—in that case, a mayor adjudicating violations of Prohibition-era laws—received a portion of the fine, and thus had a financial stake in the outcome. Likewise, in *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), the Court invalidated on due process grounds a similar scheme, in which the mayor—with "executive responsibilities for village finances"—adjudicated traffic violations with fines payable to the village. *See also Young v. U.S. ex rel. Vuitton et Fils S.A*., 481 U.S. 787, 805 (1987) (explaining that partiality is forbidden in the exercise of sovereign authority, and warning of the mere "*potential* for private interest to influence the discharge of public duty").

Permitting Government corporations to regulate private corporations in the same industry would give Government corporations an immense and unfair competitive advantage in the market, violating the rule that when the Government chooses to enter the commercial sphere and compete against private companies, it must compete on a level playing field. *See Cooke v. United States*, 91 U.S. 389, 398 (1875) ("If [the federal government] comes down from its position of

sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."); *Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907-08 (1824) ("As a member of a corporation, a government never exercises its sovereignty."); *see also Library of Cong. v. Shaw*, 478 U.S. 310, 317 n.5 (1986) (sovereign immunity "inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise") (abrogated on other grounds).

The Supreme Court has long respected the "fundamental" distinction between market participant and market regulator. *See Carter Coal*, 298 U.S. at 311 ("The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a government function . . . ."). It follows that Congress cannot, consistent with due process, create a corporation that simultaneously acts as a for-profit commercial actor *and* as a regulator of its own industry.

2. Giving Amtrak Regulatory Authority Over Its Private Competitors Violates Due Process.

Section 207 gives Amtrak co-equal rulemaking power with the Federal Railroad Administration. Yet Amtrak cannot be a "presumptively disinterested" regulator of the railroad industry, *Carter Coal*, 298 U.S. at 311, for the same reason that Coca-Cola could not be a disinterested regulator of the soft drink industry: it has strong incentives to regulate in its own self-interest—and

disadvantage its competitors—rather than regulate for the common good. The Supreme Court's ruling that Amtrak must be deemed a Government entity does not change the fact that Amtrak is a commercial actor that has every incentive to wield its regulatory power to advance its own business interests.

Amtrak operates under a statutory for-profit mandate and has commercial interests that are directly at odds with the freight railroads' commercial interests. "Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce track." *Ass'n Am. R.R.*, 721 F.3d at 675. Amtrak and the freight railroads alike want their trains to run on time, but because only one train can occupy a slot on a rail line, granting that slot to an Amtrak train means that freight traffic must be delayed. Adjusting freight operations to satisfy the metrics and standards imposes significant costs and burdens on the freight railroads, in addition to the costs and burdens of having to host the Amtrak trains in the first place. *See* JA 262; JA 266-67; JA 273-74; JA 281. Under these circumstances, Section 207 impermissibly "grants Amtrak a distinct competitive advantage: a hand in limiting the freight railroads' exercise of their property rights over an essential resource." *Ass'n Am. R.R.*, 721 F.3d at 675.

In addition, Amtrak competes with many private passenger railroads for customer service. The Association of Independent Passenger Rail Operators, in an amicus brief filed in this case, has explained that its members "compete head-to-

head for customers" with Amtrak, and that "Section 207 gives Amtrak a distinct, direct, and unfair advantage in that competition by making it the regulator for the entire industry, of which it is but one member." S. Ct. Brief of Association of Independent Passenger Rail Operators as *Amicus Curiae* in Support of Respondent, at 4.

Amtrak had every reason to wield its regulatory power to seize a commercial advantage—and harm its competitors—because its directors are required by federal law to make decisions in a way that increases Amtrak's profits. *See* 49 U.S.C. § 24301(a)(2). Congress has specifically directed Amtrak *not* to conduct itself like a neutral and disinterested regulatory agency, but rather to "use its best business judgment" in generating profit for Amtrak by "improving its contracts with operating rail carriers," and by "undertak[ing] initiatives . . . designed to maximize [Amtrak's] revenues." *Id*. § 24101(c)-(d). To be sure, Amtrak is *also* required to pursue various "public" goals, such as providing passenger rail service. But this does not mean that Amtrak is capable of regulating the railroad industry in the "public interest." The public interest necessarily encompasses *all* market participants—including the freight railroads that serve shippers and consumers of goods throughout the United States. Nothing in Amtrak's charter or composition requires it to take the freight railroads' interests into account or to regulate through anything other than an Amtrak-focused lens. In issuing the metrics and standards,

Amtrak was motivated to regulate the railroad industry with the goal of benefiting a single corporation within that industry—Amtrak—just as any commercial actor would if Congress happened to grant it regulatory power over its own industry.

The danger of self-interested rulemaking materialized here. The metrics and standards were drafted in ways that are commercially favorable to Amtrak and unfavorable to the freight railroads. They impose on-time performance standards that the freight railroads cannot meet without modifying their operations and further delaying freight traffic. On many routes, the standards simply cannot be achieved as a practical matter, thus exposing the freight railroads to mandatory investigations (at Amtrak's request) and the possibility of financial penalties payable directly to Amtrak. *See, e.g.*, JA 265. Amtrak has already filed an action against Canadian National, claiming that the freight railroad "refused to adopt measures necessary to satisfy the standards developed pursuant to Section 207" and demanding an order directing payments to Amtrak. JA 377.

The regulations are further skewed in Amtrak's favor because they provide that Amtrak will create and supply the evidence that will be used to prove violations. The metrics and standards rely on Amtrak-generated "Conductor Delay Reports" to assign responsibility for particular delays. *See* JA 37; JA 86 n.23. These are notoriously unreliable reports that are prepared by the Amtrak conductor on the delayed train, who may have very limited information about the true cause

of the delay. Not surprisingly, Amtrak's Conductor Delay Reports often wrongly blame the freight railroads for delays actually caused by other parties or Amtrak itself. *See* JA 258 ("[T]he data generated by Amtrak through their Conductor Delay Reports to measure compliance with the Metrics and Standards fail to reliably indicate the cause or responsibility for delays, and . . . this failure often results in the erroneous assignment of responsibility to the host railroads for events outside of their control.").

The entire regulatory scheme enables Amtrak to wield sovereign authority to advance Amtrak's for-profit business and harm its private-sector competitors. Section 207(c) requires that the freight railroads amend their contracts with Amtrak to incorporate the metrics and standards to the extent practicable. Congress launched Amtrak into the commercial sphere to negotiate these contracts with the freight railroads in its role as a statutorily private corporation. *See Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 470 (1985) (contracts between freight railroads and Amtrak "are contracts not between the railroads and the United States but simply between the railroads and the nongovernmental corporation, Amtrak"). Now, Congress has attempted to empower Amtrak to assume the mantle of a Government regulator and amend these contracts, achieving through regulatory fiat what it could not achieve through

arm's-length negotiation. It would violate due process to force the freight railroads to amend their contracts with Amtrak to incorporate Amtrak-drafted language.

Under Section 207, Amtrak co-authors the rules, triggers the investigation, provides the evidence, and then reaps the financial penalties for use in its own for-profit business. The statute provides that any penalties imposed on the freight railroads may be paid directly to Amtrak, rather than to the United States Treasury. As this Court previously observed, "[p]erverse incentives abound" because "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Ass'n Am. R.R.*, 721 F.3d at 676.

Amtrak's officers not only had a commercial interest in the substance of their own regulations, they had a *personal* financial interest as well. Under federal law, Amtrak's officers may receive pay greater than "the general level of pay for officers of rail carriers with comparable responsibility" for any year in which Amtrak does not receive federal assistance, 49 U.S.C. § 24303(b), thus giving Amtrak officials a strong private financial incentive to maximize Amtrak's profits, reduce the federal subsidy, and receive a higher salary in return. Likewise, Congress encouraged Amtrak's Board "to develop an incentive pay program for Amtrak management employees." *See* PRIIA § 223. The Board did so, providing management employees with the opportunity "to receive monetary awards based

on the company achieving pre-determined financial and customer service goals." *See* Amtrak Office of Inspector Gen., Audit Report OIG-A-2015-009, *Human Capital: Incentive Awards Were Appropriate, But Payment Controls Can Be Improved* 1 (2015). In sum, the potential for financial self-interest affecting the regulatory decisions of Amtrak managers is not just theoretical—it is built into federal law and the compensation structure established by Amtrak's Board. *See Gibson*, 411 U.S. at 578 (due process violated where "success in the Board's efforts would possibly redound to the personal benefit of members of the Board").[4]

The Supreme Court's determination that Amtrak must be deemed a Government actor does not change the fact that Amtrak is engaged in a commercial enterprise—operating a for-profit passenger railroad—and is constrained by statutory requirements (such as the for-profit mandate and the fiduciary duties imposed by corporate law) that *prevent* it from acting as an evenhanded government regulator. Amtrak itself has publicly stated that its officers and

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

directors run Amtrak like a business, not like a regulatory agency that considers competing perspectives and pursues the common good. In its *Lebron* brief, Amtrak explained that

> Amtrak's directors—like the directors of any other private corporation—assume a fiduciary duty to the corporation and its shareholders, common and preferred. That duty is not to operate Amtrak as part of the government, but "as a for-profit corporation." It is not to discharge a governmental function, but to oversee a commercial one. The board's duty is to maximize revenues and minimize costs, so as to protect the economic interests of all of the corporation's investors. It is, in short, the duty of a corporate director, not that of a government official.

Amtrak Br. in No. 93-1525, 1994 WL 488299, at *28-29 (citation and footnote omitted). When AAR reproduced the preceding quotation in its brief to the Supreme Court, the Government did not dispute a word of it or suggest that Amtrak's understanding of its duties had changed. Indeed, to this day, Amtrak's website states that "Amtrak is operated as a for-profit company, rather than a public authority."[5]

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5 *See* "Amtrak National Facts," *available at* www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1246041980246 (last visited June 25, 2015).

Historic practice is a touchstone for due process, *see Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994), and the Government has never identified a similar statute—one that vests a federally-chartered, for-profit corporation with regulatory authority over other companies in the same industry. As this Court discussed with counsel during the prior oral argument in this case:

> JUDGE BROWN: Well, assuming that Amtrak is a governmental entity, just for the sake of argument, assuming that that's true, is there any other government entity that regulates its market competitors in the same way as under 207?
>
> GOVERNMENT COUNSEL: I'm not sure I'm aware of any.

CADC Tr. of Oral Arg. at 25 (Feb. 19, 2013). This is another strong indicator that Section 207 is unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.") (internal quotation marks omitted). Indeed, Congress's attempt to vest Amtrak with rulemaking power is directly at odds with the way Amtrak has operated since its creation. *See Held v. Nat'l R.R. Passenger Corp.*, 101 F.R.D. 420, 423 (D.D.C. 1984) ("Amtrak has no rulemaking authority."); *see also* Amtrak Br. in *Lebron*, No. 93-1525, 1994 WL 488299, at *24 ("Amtrak does not in any sense 'govern'; it runs a commercial railroad.").

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

B. Amtrak Is Not Constitutionally Eligible To Exercise Regulatory Power.

Section 207's delegation of regulatory authority to Amtrak violates the Constitution in another respect: Amtrak is not an entity that is constitutionally eligible to promulgate regulations. Amtrak was designed to conduct its affairs like a private business and it lacks the structural protections necessary for it to exercise executive power. For that reason, Section 207 violates the nondelegation principle and the separation of powers.

As the Supreme Court majority emphasized, the "exercise of governmental power" under Section 207 "must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers." *Ass'n Am. R.R.*, 135 S. Ct. at 1233. The concurring Justices also underscored this point. *See id.* at 1254 (Thomas, J.) (explaining that, on remand, "the Court of

Appeals must . . . determine whether Amtrak is constitutionally eligible to exercise executive power"); *id*. at 1235 (Alito, J.) ("Because Amtrak is the Government, those who run it need to satisfy basic constitutional requirements.") (citation omitted); *see also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct., 1932, 1957-58 (2015) (Roberts, C.J., dissenting, joined by Scalia, J.) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions," because "[s]uch delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised.") (citing *Association of American Railroads* concurrences of Thomas and Alito, JJ.).

Agency rulemakings "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power,'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (quoting U.S. Const. art. II, § 1), yet Amtrak is not constitutionally eligible to exercise executive power through rulemaking. "[R]ulemaking" power may "be exercised only by 'Officers of the United States,' appointed in conformity with" the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 140-43 (1976). However, Amtrak's president—who exercises rulemaking power along with the other board members—is *not* so appointed. Rather, Amtrak's president is appointed by the other board members. *See* 49 U.S.C. § 24302(a)(1)(B); *id*. § 24303(a) (providing for nine-member

Amtrak Board of Directors, including the Secretary of Transportation, the president of Amtrak, and seven other members appointed by the President and confirmed by the Senate). Section 207 thus unconstitutionally enables an individual not appointed in conformity with the Appointments Clause to exercise rulemaking power, either by participating in rulemaking decisions or by casting the tiebreaking vote. *See Ass'n Am. R.R.*, 135 S. Ct. at 1228 (noting "substantial questions" concerning the Appointments Clause); *id*. at 1234 (noting Appointments Clause challenge); *id*. at 1239-40 (Alito, J., concurring) (analyzing Appointments Clause challenge).

Not only does the President lack the power to appoint all Amtrak Board members, federal law bars the President, or any executive branch officer, from directing Amtrak's day-to-day operations or otherwise treating Amtrak like an "instrumentality" or "agency" of the Government. *See* 49 U.S.C. § 24301(a)(3). To be sure, Congress sets Amtrak's goals, provides the funding necessary to Amtrak's survival, and conducts oversight hearings. *See Ass'n Am. R.R.*, 135 S. Ct. at 1232. But there is constitutionally inadequate control by the executive branch; the President does not have "the general administrative control of those executing the laws" when it comes to Amtrak. *Myers v. United States*, 272 U.S. 52, 164 (1926). Amtrak employees are not federal employees, and the

Government has admitted that the President "does not control Amtrak's day-to-day operations." U.S. CADC Br. at 29.

Moreover, Amtrak's board members do not take an oath to support the Constitution, as do Article II officers vested with rulemaking authority. Article VI, clause 3 provides that "all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution." Because Amtrak board members do not take an oath, they cannot exercise rulemaking power as executive officers. Likewise, Article II, section 3 provides that the President "shall Commission all the Officers of the United States," but he does not commission Amtrak board members. As corporate directors, Amtrak board members' fiduciary duties run to the corporation, not the Constitution. For that reason, "the fact that the President has appointed the bulk of the Board does nothing to exonerate its management from its fiduciary duty to maximize company profits." *Ass'n Am. R.R.*, 721 F.3d at 676.

Government accountability for Amtrak's actions is diluted in another key respect: the President, Congress and Amtrak itself have all denied that Amtrak is part of the Government.[6] An entity that the executive and legislative branches

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6 *See* Executive Office of the President, OMB, *Budget of the U.S. Government (FY 2013)*, app. at 1014 ("Amtrak is not an agency or instrument of the U.S.

[Footnote continued on next page]

publicly deny responsibility for is not a permissible recipient of delegated rulemaking authority. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984) (nondelegation doctrine protects "principles of political accountability"); *see also Loving v. United States*, 517 U.S. 748, 758 (1996) ("The clear assignment of power to a branch [of the Government] . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.").

Allowing regulatory power to be exercised by a for-profit corporation that all interested parties have denied is the Government defies the transparent structure the Founders envisioned, and strays far from Article I's plain language that "All legislative Powers herein granted shall be vested in a Congress of the United States." When citizens cannot identify the source of regulations that govern their lives and businesses, the Government can evade blame and avoid having to answer to the public. As Justice Alito stated: "This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a vital constitutional principle must not be forgotten: Liberty requires accountability." 135 S. Ct. at 1234 (Alito, J., concurring).

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Government."); 49 U.S.C. § 24301(a)(3) (Amtrak "is not a department, agency, or instrumentality of the United States Government."); www.amtrak.com, *supra.*

II. PRIIA § 207 IS UNCONSTITUTIONAL BECAUSE IT PERMITS A PRIVATE ARBITRATOR TO WRITE FEDERAL REGULATIONS.

Section 207(d) provides that if Amtrak and the FRA fail to reach agreement on the content of the metrics and standards, or for whatever reason do not timely promulgate the metrics and standards, "any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." That extraordinary provision—which empowers an unspecified and potentially private arbitrator to issue federal regulations—in and of itself renders Section 207 unconstitutional. As Justice Alito concluded, "it is hard to imagine how delegating 'binding' tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional." *Ass'n Am. R.R.*, 135 S. Ct. at 1238 (Alito, J., concurring).

The Supreme Court has held that a delegation of rulemaking authority to a private party "is legislative delegation in its most obnoxious form." *Carter Coal*, 298 U.S. at 311; *see also Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (noting that the challenged statute did not "delegate regulatory power to private individuals"); *Ass'n Am. R.R.*, 721 F.3d at 671 ("Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.").

The Government has never disputed that Section 207 would be unconstitutional if it allows a private arbitrator to write federal regulations. *See Ass'n Am. R.R.*, 721 F.3d at 670 ("both sides agree" that "Federal lawmakers cannot delegate regulatory authority to a private entity"). The Government has contended, however, that Section 207(d) should be construed as requiring the appointment of a *Government* arbitrator. But the statute itself does not say this, and a court "will not rewrite a law to conform it to constitutional requirements." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (internal quotation marks and alteration omitted).

As this Court observed in its prior decision, "[t]he statute's text precludes the government's suggestion that we construe the open-ended language 'an arbitrator' to include only federal entities." 721 F.3d at 673 n.7. In fact, the ordinary meaning of the word "arbitrator" refers to a *nongovernmental* actor. *See, e.g.*, *Gordon v. United States*, 74 U.S. (7 Wall.) 188, 194 (1868) (relying on legal dictionary's definition of "arbitrator" as "'a private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same'") (citation and emphasis omitted); *The Constitutional Separation of Powers Between the President & Congress*, 20 Op. O.L.C. 124 (1996), 1996 WL 876050, at *15 ("Typically, arbitrators are private individuals chosen by the parties to the dispute."); *Constitutional Limitations on Federal Government Participation in*

Binding Arbitration, 19 Op. O.L.C. 208 (1995), 1995 WL 917140, at *5 (arbitrators who resolve disputes involving the federal government "are manifestly private actors who are, at most, independent contractors to, rather than employees of, the federal government"). The arbitration program currently administered by the Surface Transportation Board contemplates that the arbitrator will not be a Government official. *See* 49 C.F.R. § 1108.6. When Congress intends to specify a Government arbitrator, it does so expressly. *See, e.g.*, 7 U.S.C. § 1359ff(a)(2)(A) (providing for Secretary of Agriculture to serve as arbitrator). It did not do so here.

Nor do principles of constitutional avoidance require adopting the Government's strained reading. The Supreme Court has repeatedly declined to apply "the canon of avoidance" to "bypass [a] constitutional issue" if doing so would require it to "rewrite the statute, not interpret it." *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (internal quotation marks and alteration omitted); *see also*, *e.g.*, *Stevens*, 559 U.S. at 481; *Salinas v. United States*, 522 U.S. 52, 59-60 (1997); *United States v. Monsanto*, 491 U.S. 600, 611 (1989). As the Court has explained, to do so "would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481 (citations and quotation marks omitted).

Moreover, "redraft[ing] the statute" to require the appointment of a Government arbitrator would itself "raise independent constitutional concerns

whose adjudication is unnecessary to decide this case." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995). Specifically, reading Section 207(d) to require a Government arbitrator would give rise to an Appointments Clause problem. Unless the Government arbitrator were appointed by the President and confirmed by the Senate, he or she would be constitutionally prohibited from exercising rulemaking power under *Buckley*, 424 U.S. at 140-43. Moreover, for the Surface Transportation Board's appointment to be constitutionally valid, the Government arbitrator would need to be removable at will by the Board, *see Free Enterprise Fund*, 130 S. Ct. at 3162-64; 49 U.S.C. § 701(b)(3), yet Section 207(d) does not address the Board's removal power. In addition, it is doubtful that the Constitution would allow even a Government arbitrator to issue what the statute calls "binding" regulations that would bind the Executive Branch over the President's objection. All of these constitutional concerns would require this Court to insert *additional* limitations and requirements that do not appear in the statutory text.

Finally, it is immaterial that the arbitration provision has not yet been invoked. The nondelegation inquiry turns on the delegation itself—*i.e.*, the authority that Congress conferred by statute—rather than how the delegated authority was actually exercised. Parties cannot cure an unconstitutional delegation of power simply "by declining to exercise some of that power."

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001); *see also Ass'n Am. R.R.*, 135 S. Ct. at 1236 (Alito, J., concurring) ("The D.C. Circuit is correct that when Congress enacts a compromise-forcing mechanism, it is no good to say that the mechanism cannot be challenged because the parties compromised.").[7]

Because the arbitration provision made it "entirely possible for metrics and standards to go into effect that had not been assented to by a single representative of the government," 721 F.3d at 674, Section 207 violates the nondelegation principle.

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[7] The arbitration clause is not severable from the remainder of Section 207: PRIIA does not contain a severability clause; Section 207 would not remain "fully operative" absent the dispute-resolution provision because there would be no method for resolving an impasse between Amtrak and the FRA; and there is no basis for concluding that Congress would have enacted Section 207 absent that provision. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-87 (1987).

CONCLUSION

The Government has never identified another statute that vests a for-profit Government corporation with rulemaking power over other companies in the same industry, let alone a statute that empowers a private arbitrator to draft and issue federal regulations. The judgment below should be reversed.

Respectfully submitted,

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1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 10,793 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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ADDENDUM

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the appropriated amounts for each area of expenditure in a given fiscal year, in the following 2 accounts:

(1) The Amtrak Operating account.

(2) The Amtrak General Capital account.

Amtrak may not transfer such funds to another account or expend such funds for any purpose other than the purposes covered by the account in which the funds are deposited without approval by the Secretary.

Deadlines.

(c) REVIEW AND APPROVAL.—

(1) 30-DAY APPROVAL PROCESS.—The Secretary shall complete the review of a grant request (including the disbursement schedule) and approve or disapprove the request within 30 days after the date on which Amtrak submits the grant request.

Notification.

If the Secretary disapproves the request or determines that the request is incomplete or deficient, the Secretary shall include the reason for disapproval or the incomplete items or deficiencies in a notice to Amtrak.

(2) 15-DAY MODIFICATION PERIOD.—Within 15 days after receiving notification from the Secretary under the preceding sentence, Amtrak shall submit a modified request for the Secretary's review.

(3) REVISED REQUESTS.—Within 15 days after receiving a modified request from Amtrak, the Secretary shall either approve the modified request, or, if the Secretary finds that the request is still incomplete or deficient, the Secretary shall identify in writing to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate the remaining deficiencies and recommend a process for resolving the outstanding portions of the request.

49 USC 24101 note.

SEC. 207. METRICS AND STANDARDS.

Deadline.

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

Publication.

(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.

SEC. 208. METHODOLOGIES FOR AMTRAK ROUTE AND SERVICE PLANNING DECISIONS.

Deadlines. 49 USC 24101 note. Recommendations.

(a) METHODOLOGY DEVELOPMENT.—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration shall obtain the services of a qualified independent entity to develop and recommend objective methodologies for Amtrak to use in determining what intercity passenger routes and services it will provide, including the establishment of new routes, the elimination of existing routes, and the contraction or expansion of services or frequencies over such routes. In developing such methodologies, the entity shall consider—

(1) the current or expected 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;

(2) connectivity of a route with other routes;

(3) the transportation needs of communities and populations that are not well served by intercity passenger rail service or by other forms of intercity transportation;

(4) Amtrak's and other major intercity passenger rail service providers in other countries' methodologies for determining intercity passenger rail routes and services; and

(5) the views of the States and other interested parties.

(b) SUBMITTAL TO CONGRESS.—Within 1 year after the date of enactment of this Act, the entity shall submit recommendations developed under subsection (a) to Amtrak, the Committee on Transportation and Infrastructure of the House of Representatives, and the Committee on Commerce, Science, and Transportation of the Senate.

(c) CONSIDERATION OF RECOMMENDATIONS.—Within 90 days after receiving the recommendations developed under subsection (a) by the entity, the Amtrak Board of Directors shall consider the adoption of those recommendations. The Board shall transmit a report to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate explaining its reasons for adopting or not adopting the recommendations.

Reports.

SEC. 209. STATE-SUPPORTED ROUTES.

49 USC 24101 note. Deadline.

(a) IN GENERAL.—Within 2 years after the date of enactment of this Act, the Amtrak Board of Directors, in consultation with the Secretary, the governors of each relevant State, and the Mayor

(B) an analysis of any significant obstacles that would hinder such an achievement;

(C) a detailed description and cost estimate of the specific infrastructure and equipment improvements necessary for such an achievement; and

(D) an initial assessment of the infrastructure and equipment improvements, including an order of magnitude cost estimate of such improvements, that would be necessary to provide regular high-speed service—

(i) between Washington, District of Columbia, and New York, New York, in 2 hours and 15 minutes; and

(ii) between New York, New York, and Boston, Massachusetts, in 3 hours.

(3) REPORT.—Within 1 year after the date of enactment of this Act, Amtrak shall submit the report required under this subsection to—

(A) the Committee on Commerce, Science, and Transportation of the Senate;

(B) the Committee on Appropriations of the Senate;

(C) the Committee on Transportation and Infrastructure of the House of Representatives;

(D) the Committee on Appropriations of the House of Representatives; and

(E) the Federal Railroad Administration.

(e) REPORT ON NORTHEAST CORRIDOR ECONOMIC DEVELOPMENT.—Within 2 years after the date of enactment of this Act, the Northeast Corridor Infrastructure and Operations Advisory Commission shall transmit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the role of Amtrak's Northeast Corridor service between Washington, District of Columbia, and New York, New York, in the economic development of the Northeast Corridor region. The report shall examine how to enhance the utilization of the Northeast Corridor for greater economic development, including improving—

(1) real estate utilization;

(2) improved intercity, commuter, and freight services; and

(3) optimum utility utilization.

SEC. 213. PASSENGER TRAIN PERFORMANCE.

(a) IN GENERAL.—Section 24308 is amended by adding at the end the following: 49 USC 24308.

"(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.

Recommendations.

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

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

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

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

"(4) USE OF DAMAGES.—The Board shall, as it deems appropriate, order the host rail carrier to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service. Such damages shall be used for capital or operating expenditures on the routes over which delays or failures to achieve minimum standards were the result of a rail carrier's failure to provide preference to Amtrak over freight transportation as determined in accordance with paragraph (2).".

49 USC 24308 note.

(b) FEES.—The Surface Transportation Board may establish and collect filing fees from any entity that files a complaint under section 24308(f)(1) of title 49, United States Code, or otherwise requests or requires the Board's services pursuant to this division. The Board shall establish such fees at levels that will fully or partially, as the Board determines to be appropriate, offset the costs of adjudicating complaints under that section and other requests or requirements for Board action under this division. The Board may waive any fee established under this subsection for any governmental entity as determined appropriate by the Board.

Waiver authority.

(c) AUTHORIZATION OF ADDITIONAL STAFF.—The Surface Transportation Board may increase the number of Board employees by up to 15 for the 5 fiscal year period beginning with fiscal year 2009 to carry out its responsibilities under section 24308 of title 49, United States Code, and this division.

49 USC 24308.

(d) CHANGE OF REFERENCE.—Section 24308 is amended—

(1) by striking "Interstate Commerce Commission" in subsection (a)(2)(A) and inserting "Surface Transportation Board";

(2) by striking "Commission" each place it appears and inserting "Board";

(3) by striking "Secretary of Transportation" in subsection (c) and inserting "Board"; and

(4) by striking "Secretary" the last 3 places it appears in subsection (c) and each place it appears in subsections (d) and (e) and inserting "Board".

SEC. 214. ALTERNATE PASSENGER RAIL SERVICE PILOT PROGRAM.

(a) IN GENERAL.—Chapter 247, as amended by section 210, is amended by adding at the end thereof the following:

"§ 24711. Alternate passenger rail service pilot program

"(a) IN GENERAL.—Within 1 year after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008, the Federal Railroad Administration shall complete a rulemaking proceeding to develop a pilot program that— Deadline. Regulations.

"(1) permits a rail carrier or rail carriers that own infrastructure over which Amtrak operates a passenger rail service route described in subparagraph (B), (C), or (D) of section 24102(5) or in section 24702 to petition the Administration to be considered as a passenger rail service provider over that route in lieu of Amtrak for a period not to exceed 5 years after the date of enactment of the Passenger Rail Investment and Improvement Act of 2008;

"(2) requires the Administration to notify Amtrak within 30 days after receiving a petition under paragraph (1) and establish a deadline by which both the petitioner and Amtrak would be required to submit a bid to provide passenger rail service over the route to which the petition relates; Notification. Deadlines.

"(3) requires that each bid describe how the bidder would operate the route, what Amtrak passenger equipment would be needed, if any, what sources of non-Federal funding the bidder would use, including any State subsidy, among other things;

"(4) requires the Administration to select winning bidders by evaluating the bids against the financial and performance metrics developed under section 207 of the Passenger Rail Investment and Improvement Act of 2008 and to give preference in awarding contracts to bidders seeking to operate routes that have been identified as one of the five worst performing Amtrak routes under section 24710;

"(5) requires the Administration to execute a contract within a specified, limited time after the deadline established under paragraph (2) and award to the winning bidder—

"(A) the right and obligation to provide passenger rail service over that route subject to such performance standards as the Administration may require, consistent with the standards developed under section 207 of the Passenger Rail Investment and Improvement Act of 2008; and

"(B) an operating subsidy—

"(i) for the first year at a level not in excess of the level in effect during the fiscal year preceding the fiscal year in which the petition was received, adjusted for inflation;

"(ii) for any subsequent years at such level, adjusted for inflation; and

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

Service was accomplished on the following by the CM/ECF system:

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