No. 23-577

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Surface Transportation Board must authorize an interstate railroad's acquisition of control over another railroad, after which operation of the subsidiary generally is exempt from the antitrust laws and other laws as necessary to allow the acquirer to exercise that control. See 49 U.S.C. 11321(a), 11323; 49 C.F.R. 1180.4(d)(3). Petitioner's corporate family acquired a majority of the ownership interests in a certain subsidiary in 1982, and those interests passed to petitioner through internal corporate reorganizations in 1991 and 1998. The district court in this case referred to the Board the question whether acquisition of control over the subsidiary had been authorized in 1982. The Board issued an order finding that the 1982 acquisition of control over the subsidiary had not been authorized, and further found that such authorization had not been tacitly granted as a result of the 1991 and 1998 internal corporate reorganizations. Petitioner sought review of the Board's order in the court of appeals, but challenged only the findings with respect to the 1991 and 1998 transactions. The questions presented are:

1. Whether the court of appeals correctly upheld the Surface Transportation Board's conclusion that acquisition of control over the subsidiary was not authorized in 1991 or 1998.

2. Whether the court of appeals had jurisdiction to review the Surface Transportation Board's order, see 28 U.S.C. 2321(a), or whether the district court had exclusive jurisdiction in light of the referral, see 28 U.S.C. 1336(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 72 F.4th 297. The order of the Surface Transportation Board (Pet. App. 23a-57a) is available at 2022 WL 2191932.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2023. On September 12, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 30, 2023. On October 17, 2023, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including November 27, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Railroads have been subject to "comprehensive federal regulation" since at least 1887. *United Transportation Union* v. *Long Island Rail Road Co.*, 455 U.S. 678, 687 (1982); see Interstate Commerce Act, ch. 104, 24 Stat. 379. In that year, Congress created the Interstate Commerce Commission (ICC) to oversee a "comprehensive regulatory regime over the rail industry." Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission*, 95 Marq. L. Rev. 1151, 1161 (2012); see Interstate Commerce Act § 11, 24 Stat. 383; *United Transportation Union*, 455 U.S. at 687-688. The ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 10101 *et seq.*), abolished the ICC and, among other things, vested regulatory authority over rail transportation in the newly created Surface Transportation Board (STB or Board). See ICCTA §§ 101, 102(a), 201(a), 109 Stat. 804, 807, 932-934.[1] Like the ICC, the Board exercises "exclusive" jurisdiction over interstate rail transportation. 49 U.S.C. 10501(b).

As relevant here, an interstate railroad may not merge with or acquire control over another railroad without "the approval and authorization of the Board." 49 U.S.C. 11323(a). If such a transaction is approved and authorized, the involved railroads are "exempt from the antitrust laws and from all other law * * * as necessary to * * * carry out the transaction" and to "exercise control or franchises acquired through the transac-

[1] The Board was initially a decisionally independent entity within the Department of Transportation. ICCTA § 201(a), 109 Stat. 932 (49 U.S.C. 701(a) (Supp. I 1995)). The Board is now an independent agency. See Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 3(b), 129 Stat. 2229 (49 U.S.C. 1301(a)).

tion." 49 U.S.C. 11321(a). In deciding whether to authorize a proposed transaction, the Board must consider several statutory factors, including whether the transaction "would have an adverse effect on competition." 49 U.S.C. 11324(b)(5); see 49 U.S.C. 11324(b)(1)-(5) and (d).

The Board has established procedures for considering proposed transactions. Those procedures accommodate different levels of review depending on whether the proposed transaction is "major," "significant," "minor," or "exempt." 49 C.F.R. 1180.2(a)-(d); see 49 C.F.R. 1180.4(a)-(g). A transaction is "exempt," and thus amenable to the most streamlined procedures and review, if it is within one of nine specified categories set forth in Section 1180.2(d). See 49 C.F.R. 1180.2(d)(1)-(9), 1180.4(g). Based on its experience, the "Board has found that its prior review and approval of these transactions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and is of limited scope or unnecessary to protect shippers from market abuse." 49 C.F.R. 1180.2(d). One of those nine class exemptions is for "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. 1180.2(d)(3).

"To qualify for an exemption under § 1180.2(d), a railroad must file a verified notice of the transaction," which is then published in the Federal Register, describing the transaction and attesting that it satisfies the requirements for the class exemption. 49 C.F.R. 1180.4(g)(1). In such cases, the Board undertakes further investigation only if another party challenges the

representations in the notice of exemption or if there are technical problems with the notice.

2. Petitioner is an interstate railroad. Pet. App. 2a. In 1980, petitioner's parent, a noncarrier holding company, applied for ICC authorization to acquire both petitioner (then called Southern Railway Company) and the Norfolk and Western Railway Company, including the subsidiaries of those two railroads that were identified in the application. *Id.* at 8a. At the time, those two railroads each held a minority interest in the Norfolk & Portsmouth Belt Line Railroad Company (Belt Line), which had been "established in 1896 as a joint venture of eight railroads to provide switching services in Norfolk, Portsmouth and Chesapeake, Virginia." *Id.* at 7a. Together, the two railroads held a 57.14% ownership interest in the Belt Line. The holding company's application, however, made almost no mention of the Belt Line and did not seek authorization to acquire control of the Belt Line. *Id.* at 8a. The ICC approved the holding company's acquisition of the two railroads in 1982. *Ibid.*

In 1991, the ICC authorized petitioner to acquire Norfolk and Western as a subsidiary. Pet. App. 8a-9a. Because both were owned by the holding company, the railroads invoked the exemption for "[t]ransactions within a corporate family." 49 C.F.R. 1180.2(d)(3). The notice of exemption did not, however, mention the Belt Line. Pet. App. 9a. In 1998, the Board authorized the merger of Norfolk and Western into petitioner, its corporate parent. *Ibid.* Once again, the railroads invoked the corporate-family exemption in Section 1180.2(d)(3); and once again, the notice of exemption did not mention the Belt Line. *Id.* at 10a.

Intervenor-respondent is an interstate railroad that holds the remaining 42.86% of the Belt Line. Pet. App.

7a-8a. In 2018, it sued petitioner and the Belt Line in federal district court, raising antitrust, conspiracy, and contract claims arising out of petitioner's operation of the Belt Line. See *id.* at 10a. Petitioner moved to dismiss, claiming that the ICC had authorized its acquisition of control over the Belt Line in 1982, and that its operation of the Belt Line was thus exempt from the antitrust laws and other laws under 49 U.S.C. 11321(a). See Pet. App. 10a-11a. The district court referred the "'discrete question' to the Board" whether "the 1982 consolidation * * * involve[d] the ICC/STB granting [the holding company] 'approval' to control Belt Line, and if so, did such authorized 'control' render it necessary for antitrust and/or state conspiracy laws to yield." *Id.* at 11a (citation omitted).

3. The Board issued an order holding that the ICC had not authorized petitioner's corporate family to acquire control over the Belt Line in 1982, and further holding that the ICC and Board had not authorized the corporate family to acquire control over the Belt Line when the agencies approved the 1991 and 1998 internal corporate reorganizations. Pet. App. 23a-57a.

As to the 1982 transaction, the Board described at length how the application filed by petitioner's parent, the holding company, "made no mention of [the Belt Line] except in a chart attached as Appendix 2 to Volume 2 of the Application," and did not otherwise inform the ICC that the holding company sought authorization to acquire control over the Belt Line. Pet. App. 30a; see *id.* at 30a-31a. Indeed, the Board observed that in an earlier 1980 petition, the holding company expressly "sought a waiver to exclude information" about certain subsidiaries, including the Belt Line, from its forthcoming application. *Id.* at 26a; see *id.* at 26a-29a. "Taken

together," the Board explained, "these statements clearly demonstrate that [the holding company] was not asking the ICC to review and approve its acquisition of control of * * * the unmentioned [Belt Line], but was arguing that submission of information should not be required because no review was, in fact, required or sought." *Id.* at 41a.

Consistent with that reading, the Board observed that the ICC's 1982 order authorizing the holding company's acquisition of Norfolk and Western and Southern included a list of their respective subsidiary companies in an appendix, but "[the Belt Line] was not listed in that appendix" and "was not referenced anywhere else in the decision." Pet. App. 31a. "The only logical reading" of those events, the Board explained, is that the Belt Line was "outside the scope of the control authority being requested." *Id.* at 43a-44a. The Board rejected petitioner's contrary reading, "developed more than 40 years after the event," as "implausible." *Id.* at 42a. The Board observed that if petitioner's arguments were accepted, its application would have been false or misleading and thus "void ab initio" under 49 C.F.R. 1182.2(d). Pet. App. 45a; see *id.* at 45a-54a (rejecting petitioner's other arguments with respect to the 1982 transaction).

In its briefing before the Board, petitioner had raised the additional argument that the approvals of its 1991 and 1998 internal corporate reorganizations under the corporate-family exemption in 49 C.F.R. 1180.2(d)(3) granted it (or its parent) authorization to control the Belt Line. See Pet. App. 37a-38a. The Board rejected that argument, explaining that "[i]t is implicit in 49 C.F.R. § 1180.2(d)(3)'s requirement that the transaction be 'within a corporate family' that the

member of the corporate family whose ownership is changing as a result of the transaction was previously authorized to be controlled by a member of the corporate family." *Id.* at 55a. The Board explained that petitioner's contrary view "would allow the corporate family exemption to effectively nullify other Board requirements since parties could acquire control of a carrier without" obtaining the required authorization and "then cure that unauthorized acquisition by reorganizing the corporate family and seeking a corporate family transaction exemption." *Ibid.*

Petitioner petitioned for review of the Board's order in the court of appeals, but challenged only the rulings with respect to the 1991 and 1998 transactions.

4. The court of appeals denied the petition for review. Pet. App. 1a-22a.

a. The court of appeals first held, contrary to the position of the government, that the court had jurisdiction to entertain petitioner's petition for review. Pet. App. 15a-18a. The court explained that under 28 U.S.C. 2321(a) and 2342(5), final orders of the Board generally are reviewable in courts of appeals. Pet. App. 15a. The court acknowledged that in 28 U.S.C. 1336(b), "Congress has excepted from this type of review questions referred by a district court to the Board." Pet. App. 15a. That provision states that "[w]hen a district court * * * refers a question or issue to the Surface Transportation Board for determination, the court which referred the question or issue shall have exclusive jurisdiction" to review "any order of the Surface Transportation Board arising out of such referral." 28 U.S.C. 1336(b). The court explained that, "[p]ut simply, 'review of orders of the STB that "arise" out of a referral

from a district court are within that court's exclusive jurisdiction.'" Pet. App. 16a (citation omitted).

Relying on its previous decision in *McCarty Farms* v. *STB*, 158 F.3d 1294 (D.C. Cir. 1998), the court of appeals held that it had jurisdiction notwithstanding the referral in this case because the district court "referred only the 'discrete question' whether 'the 1982 consolidation' authorized control of the Belt Line." Pet. App. 17a. Accordingly, the court of appeals felt itself "free to decide the effect, if any, of the 1991 and 1998 transactions on the Belt Line control issue." *Ibid.* The court explained that *McCarty Farms* had interpreted Section 1336(b) to mean that "'*issues*' not 'expressly set out in the district court's referral order' are to be reviewed by the court of appeals." *Ibid.* (citation omitted).

b. On the merits, the court of appeals held that the Board correctly rejected petitioner's argument that the 1991 and 1998 approvals silently and retroactively authorized acquisition of control over the Belt Line. Pet. App. 18a-22a. The court explained that it would interpret the regulation setting forth the corporate-family exemption in 49 C.F.R. 1180.2(d)(3) by "'apply[ing] all traditional methods of interpretation,'" and that "[t]ext comes first." Pet. App. 19a (quoting *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2419 (2019) (plurality opinion)). The court then held that under that exemption, "the carrier of which control authority is sought must be 'lawfully within' or already authorized within the corporate family." *Ibid.* The court observed that "the reading [petitioner's contrary] construction would compel—that the corporate-family exemption can cure a previously unauthorized acquisition of control—would effectively override the specific Board approval procedures for control acquisitions." *Id.* at 20a. The court thus concluded that

the Board's interpretation "is compelled by the [statute's] regulatory framework," observing that petitioner's contrary view represents "an absurd interpretation" of the regulation. *Id.* at 20a-21a.

ARGUMENT

Petitioner renews its contention (Pet. 24-32) that the Board erred in finding that authorization of the 1991 and 1998 corporate reorganizations did not effect an exemption from the antitrust laws for petitioner's operation of the Belt Line. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. That factbound issue thus does not warrant further review. Petitioner also seeks this Court's review (Pet. 19-24) of whether the court of appeals had jurisdiction to review the Board's order. Although the court of appeals erred in finding that it had jurisdiction, it was petitioner that sought review in the court of appeals and prevailed on the jurisdictional issue below. Petitioner thus is not well positioned to seek certiorari on that question.

1. a. The court of appeals correctly upheld the Board's determination that petitioner's governance of the Belt Line was not exempted from the antitrust laws or other laws because the acquisition of control over the Belt Line by petitioner's corporate family had never been authorized in the first place. Petitioner no longer disputes that the ICC did not authorize its corporate family to acquire control over the Belt Line in 1982, and petitioner recognizes that authorization is a statutory prerequisite for immunity from the antitrust laws and other laws. See 49 U.S.C. 11321(a), 11323; Pet. App. 40a (observing that "[petitioner] does not claim here that explicit approval for its control of [the Belt Line] was

ever sought, that either the ICC or the Board ever specifically considered the implications of such control, or that either agency issued a decision that expressly approved [petitioner's] control of [the Belt Line]"). As a result, petitioner's position necessarily rests on the premise that the ICC and Board's respective authorizations of the 1991 and 1998 internal corporate reorganizations under 49 C.F.R. 1180.2(d)(3) somehow silently cured the failure to secure the requisite authorization in 1982. That argument lacks merit and is foreclosed by the text of Section 1180.2(d)(3).

Section 1180.2(d)(3) expressly applies only to "[t]ransactions within a corporate family." 49 C.F.R. 1180.2(d)(3). Congress has made clear that two railroads that are not within the same corporate family can lawfully come within the same corporate family only with the Board's approval and authorization. 49 U.S.C. 11323(a)(3) ("Acquisition of control of a rail carrier by any number of rail carriers" "may be carried out only with the approval and authorization of the Board."). It follows that if the Board does not approve a railroad's acquisition of control over a subsidiary, control over the acquired subsidiary is not lawfully located within the same corporate family in the first place—at least not for purposes of this statutory and regulatory scheme.

Here, the Board found as a factual matter that the acquisition of control over the Belt Line had *not* been authorized in 1982, Pet. App. 40a-54a, and petitioner did not challenge that finding in the court of appeals. Therefore, the Belt Line is not lawfully "within a corporate family" for purposes of this regulatory scheme, and Section 1180.2(d)(3) is inapplicable by its plain terms. As a result, the 1991 and 1998 authorizations for *other* transactions within the corporate family (namely, inter-

nal corporate reorganizations) could not have silently authorized petitioner's acquisition of control over, and its concomitant operation of, the Belt Line.

Petitioner's contrary interpretation of Section 1180.2(d)(3) would effectively allow it to launder the *concededly unlawful* acquisition of a majority ownership interest in the Belt Line in 1982 into an antitrust exemption today. That interpretation of the regulation not only would be senseless, but would contravene the *statutory* requirement that a transaction be "approved by or exempted by the Board" to qualify for "exempt[ion] from the antitrust laws" in the first place. 49 U.S.C. 11321(a). As the Board explained, petitioner's view would "effectively nullify other Board requirements" for acquisitions because it would permit parties to unlawfully acquire another railroad and then "cure that unauthorized acquisition by reorganizing the corporate family" later on. Pet. App. 55a. The court of appeals rightly rejected as "absurd" a reading of the statutory and regulatory scheme that would permit such naked circumvention. *Id.* at 21a.

Petitioner attempts (Pet. 24) to recharacterize the Board's ruling as "inserting an atextual prior-authorization requirement into 49 C.F.R. § 1180.2(d)(3)." That characterization lacks merit. As explained above and by the court of appeals (Pet. App. 19a), the Board in effect interpreted the phrase "transactions within a corporate family" in that regulation to mean transactions *lawfully* within a corporate family. That is the only reasonable interpretation of the regulatory language because it is the only one that avoids undermining the rest of the statutory and regulatory scheme. See *Id.* at 18a; cf. *Roberts* v. *Sea-Land Services, Inc.*, 566 U.S. 93, 100 (2012) (emphasizing that text should be in-

terpreted in a way that makes the provision at issue "a working part of the statutory scheme," "supplies an administrable rule," and "avoids gamesmanship").

Petitioner contends (Pet. 28-32) that the court of appeals contravened *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), by deferring to the Board's interpretation of Section 1180.2(d)(3). That contention lacks merit because it seriously mischaracterizes the court's opinion. The court did not defer to the Board at all. The court cited *Kisor* for the propositions that "a court 'must apply all traditional methods of interpretation' to the regulations" at the outset and that "[t]ext comes first." Pet. App. 19a (quoting *Kisor*, 139 S. Ct. at 2419 (plurality opinion)). The court then applied those traditional methods of textual interpretation to reach its own independent conclusions about the meaning of the regulation within the statutory and regulatory scheme. *Id.* at 19a-21a. Although the court favorably noted its agreement with the Board's interpretation, *id.* at 20a, it did not purport to do so out of deference. Unsurprisingly, petitioner does not identify any language in the court's opinion that even suggests it deferred to the Board.

Petitioner likewise errs in contending (Pet. 29) that the court of appeals violated *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), by relying "on a reason the agency didn't give" for its ruling, namely, that "the STB and interested parties will not have *notice* of the new control authorization." The court upheld the Board's determination not on a notice rationale, but because "the reading [petitioner's] construction would compel—that the corporate-family exemption can cure a previously unauthorized acquisition of control—would effectively override the specific Board approval procedures for control acquisitions." Pet. App. 20a. The court then reiterated

that its reading of Section 1180.2(d)(3) "is compelled by the [statute's] regulatory framework." *Ibid.* Only then did the court even refer to notice—and it did so by directly quoting the Board itself, which belies any *Chenery* argument. See *ibid.* ("And as the Board reasonably emphasized, 'the Board and the public must be able to clearly understand the control authority sought and granted.'") (brackets and citation omitted). Petitioner's contention that the court relied on a notice rationale—and that the Board did not—is thus doubly mystifying.

Finally, petitioner contends (Pet. 31-32) that the Board's reasoning "consisted only of policy justifications" and effectively amounts to "a retroactive rule." Those contentions are meritless. The Board reached its holding based on the text and context of Section 1180.2(d)(3), see Pet. App. 54a-55a, as did the court of appeals, see *id.* at 19a-21a. And when agencies and courts are tasked with interpreting regulations that govern a given controversy before them, the resulting interpretations are not retroactive in the relevant sense. Cf. *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). Indeed, the text of Section 1180.2(d)(3) was promulgated many decades ago, see 45 Fed. Reg. 62,991, 62,999 (Sept. 23, 1980) (49 C.F.R. 1111.5(c)(3) (1980)), and petitioner has not identified any prior interpretation of that regulation by the ICC or Board at odds with the Board's interpretation in this case. The application of that regulation to the circumstances here thus cannot plausibly be deemed retroactive.

b. Petitioner does not contend that the factbound decision below conflicts with any decision of another court of appeals. Indeed, the government is unaware of any other appellate court decision addressing the mean-

ing of Section 1180.2(d)(3). That is further reason to deny review of the question presented.

2. Petitioner also seeks certiorari on the question whether the court of appeals had jurisdiction to review the Board's order. See Pet. 19-24. But petitioner prevailed on that issue below, and is thus poorly positioned to seek this Court's review of that issue. Even if this Court were to resolve the jurisdictional issue in petitioner's favor, petitioner would not be entitled to relief in this case unless it then also prevailed on the merits question. But the court of appeals correctly resolved that issue, which does not warrant this Court's review for the reasons set forth above. If anything, the fact that the court of appeals improperly exercised jurisdiction makes this case a particularly poor vehicle in which to address that merits question.

a. The court of appeals erred in holding that it had jurisdiction to review the Board's order. A proceeding to enjoin or suspend an order of the Board "shall be brought in the court of appeals" unless "otherwise provided by an Act of Congress." 28 U.S.C. 2321(a); see 28 U.S.C. 2342(5). Congress provided one such exception in 28 U.S.C. 1336(b), which states that "[w]hen a district court * * * refers a question or issue to the Surface Transportation Board for determination, the court which referred the question or issue shall have exclusive jurisdiction" to review "any order of the Surface Transportation Board arising out of such referral."

The Board's order here arose out of the district court's referral, and the district court thus had exclusive jurisdiction to review it. As this Court has recognized in other contexts, "arising out of" is a broad standard that simply "asks about causation." *Ford Motor Co.* v. *Montana Eighth Judicial District Court*,

141 S. Ct. 1017, 1026 (2021); see *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639, 652 n.4 (2022); *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, 455 U.S. 608, 615 (1982). It is indisputable that the district court's referral here was the cause (both but-for and proximate) of the Board's order; indeed, petitioner itself expressly petitioned the Board to institute proceedings "to address the issues referred to the Board" by the district court. Pet. App. 23a. It follows that the district court had "exclusive jurisdiction" to review the resulting Board order. 28 U.S.C. 1336(b).

The court of appeals reached a different conclusion by relying on its own precedent adopting a "'strict construction'" of the statute under which "'*issues* expressly set out in the district court's referral order' fall under section 1336(b) but 'the court of appeals reviews all other issues'" contained in the Board's order. Pet. App. 16a-17a (emphasis added; brackets and citation omitted); see Pet. 20 (arguing that "the jurisdictional question turns on *issues*"). That view conflates "issues" and "orders," and thus cannot be squared with the plain text of the statute. Section 1336(b) provides that "the court which referred the *question or issue* shall have exclusive jurisdiction" to review "*any order* of the Surface Transportation Board arising out of such referral." 28 U.S.C. 1336(b) (emphases added). The text thus draws a distinction between questions and issues, on the one hand, and orders, on the other. And Congress made clear that the referring court's exclusive jurisdiction is over the *order*—not merely the questions or issues that were referred to the Board.

In other jurisdictional contexts, this Court has recognized that where Congress grants jurisdiction to re-

view an "order," jurisdiction lies over the entire order—not just discrete issues within the order—even when the order addresses issues that would not themselves provide a jurisdictional basis for review. See, *e.g.*, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 593 U.S. 230, 237-239 (2021) (holding that 28 U.S.C. 1447(d) grants jurisdiction to review all grounds for removal in a remand order, not just the federal-officer ground that establishes the jurisdictional basis for review); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) (holding that 28 U.S.C. 1292(b) grants jurisdiction to "address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court'") (citation omitted). The same principle should govern here.

b. Petitioner correctly observes (Pet. 22-23) that the Third and Eighth Circuits have held, contrary to the decision below, that when the Board issues an order arising out of a referral, the referring district court has jurisdiction to review both issues in the Board's order that were expressly referred and issues in the order that were not expressly referred. See *Union Pacific Railroad* v. *Ametek, Inc.*, 104 F.3d 558, 561 (3d Cir. 1997); *Railroad Salvage & Restoration, Inc.* v. *STB*, 648 F.3d 915, 919 (8th Cir. 2011). But the decision below simply applied prior circuit precedent established in *McCarty Farms, Inc.* v. *STB*, 158 F.3d 1294 (D.C. Cir. 1998), and thus did not deepen that 2-1 circuit conflict. And this case would be an inappropriate case in which to review that conflict because petitioner prevailed on the issue below, and thus would not be entitled to any relief in this case even if the Court were to resolve that issue in its favor. Petitioner could get relief in this case only if it

then also prevailed on the merits question of whether the ICC or Board authorized the acquisition of control over the Belt Line—a factbound issue that, as discussed above, does not warrant further review. If anything, the presence of the jurisdictional issue makes this case a poor vehicle in which to litigate that merits issue.

Nor is the jurisdictional issue one in which petitioner retains a continued personal stake. Cf. *Camreta* v. *Greene*, 563 U.S. 692, 702-703 (2011) (observing that an officer who prevailed on qualified-immunity grounds may have a continued personal stake in seeking review of an adverse ruling on the underlying constitutional question). Petitioner asserts (Pet. 20) that the circuit conflict "create[s] uncertainty" for it because it "operates in circuits that interpret the statute differently," but petitioner provides no reason to believe that it is or imminently will be a party to a lawsuit in which the district court refers a question to the Board and the Board issues an order addressing both that question and additional ones. Indeed, although Congress enacted Section 1336(b) nearly sixty years ago, see Act of Aug. 30, 1964, Pub. L. No. 88-513, 78 Stat. 695, to the government's knowledge the jurisdictional question presented in this case has arisen in only a small handful of other published appellate decisions. See, *e.g.*, *Railroad Salvage*, *supra*; *McCarty Farms*, *supra*; *Union Pacific*, *supra*. In the unlikely event that petitioner becomes involved in another case presenting the jurisdictional issue, and that issue is resolved against petitioner, petitioner can present the issue for the Court's review at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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