No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

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

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Congress required the Federal Railroad Administration (FRA) to work "jointly" with Amtrak in developing or improving the metrics and standards that would be used to evaluate Amtrak's own performance and trigger investigations by the Surface Transportation Board (STB). 49 U.S.C. 24101 note. Repeating the court of appeals' principal errors, respondent contends (Br. 13) that Section 207 impermissibly delegated "rulemaking power" to a "private corporation." But the authority here was not "rulemaking power," and Amtrak is not a "private" entity for nondelegation purposes. Moreover, this Court has sustained the constitutionality of statutes that gave private entities an effective veto power over agency proposals. The Court should therefore reverse the court of appeals' nondelegation

decision. If the Court chooses to address, in the first instance, a constitutional question outside the scope of the question presented, it should also reject respondent's due-process claim.

A. Section 207 Did Not Delegate "Rulemaking" Power To Amtrak

As explained in our opening brief (at 19-37), the government retained sufficient control over the development, adoption, and application of the Amtrak-performance metrics and standards. Section 207 therefore avoids nondelegation concerns. Respondent's repeated assertions that Amtrak exercised "rulemaking" authority (Resp. Br. 1, 13, 14, 18, 19, 22, 24, 33, 38, 39, 40, 41) do not make it so. Nor was Section 207 rendered unconstitutional, as respondent contends (Br. 26-30), by its never-invoked provision for using a government-appointed arbitrator to resolve any impasse between the FRA and Amtrak.

1. Amtrak's effective veto authority over the metrics and standards did not constitute an impermissible delegation

a. Echoing the court of appeals, respondent contends that Section 207 was fatally flawed because it made the FRA "powerless to issue a regulation that Amtrak opposed." Resp. Br. 19; see also Pet. App. 10a ("§207 leaves [the FRA] impotent to choose its version without Amtrak's permission"). But, as explained in our opening brief (at 21-24), even assuming *arguendo* that the metrics and standards were tantamount to regulations, this Court has previously approved statutory schemes under which true regulatory standards were subject to private parties' veto powers.

Respondent does not even attempt to distinguish *St. Louis, Iron Mountain & Southern Railway* v. *Taylor*, 210 U.S. 281 (1908), which sustained a statute that authorized a private railway association to establish standard heights for drawbars on railroad cars. See *id.* at 286-287; Gov't Br. 20 n.5.[1] And respondent no longer seeks to distinguish *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), and *Currin* v. *Wallace*, 306 U.S. 1 (1939), on the ground that they involved only the power to "*opt out* of the exercise of coercive state power." Gov't Br. 23 (quoting Br. in Opp. 17). But the distinction respondent now advances is no more persuasive. *Currin* explained that Congress could condition the effectiveness of its "own regulation" on the approval of private parties. 306 U.S. at 15; see also *id.* at 16 ("[I]t is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application."). In respondent's view (Br. 20-21), the Court was distinguishing between an instance in which a governmental agency drafts a proposed regulation subject to a private party's veto and one in which the private party has both a final veto authority and the ability to participate in the earlier drafting process. In either case, however, a private entity has

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[1] In *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), the Court did not cast doubt on that decision. Instead, the Court treated it as involving a permissible delegation involving a matter "of a more or less technical nature." *Id.* at 537. The same is true of Section 207. As explained below, the metrics and standards primarily serve to provide information about Amtrak's operations and to describe (and limit) the occasions on which the STB may or will investigate whether a host railroad has failed to comply with the statute requiring Amtrak's trains to receive a preference over freight transportation. See pp. 5-7, *infra*.

the power to decide whether a regulation that the government desires can be "foist[ed]" on "unwilling companies in the same industry." Resp. Br. 21. Whether or not a private party formally shares the pen at the drafting stage, its power to withhold ultimate approval can influence what the agency proposes.

b. Thus, respondent is ultimately forced to contend (Br. 19) that "Section 207 closely resembles the statute struck down in" *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). It is true that the minimum-wage and maximum-hour regulations that the Court invalidated in *Carter Coal* were written by private industry. *Id.* at 283-284, 310-312. The critical flaw there, however, was not public–private co-authorship. Instead, the government had no participation in the process at all; it could not even prevent the industry's proposals from going into effect. *Id.* at 284. Here, by contrast, the metrics and standards could not take effect without both the active participation (during the drafting process) and the independent assent (at the end) of a governmental entity, the FRA. In that regard, Section 207 of PRIIA is materially different from the statutory scheme invalidated in *Carter Coal*.

Section 207 is also more like the co-authorship regime that the Court sustained in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), in which a governmental entity retained the power to approve, disapprove, or modify prices proposed by coal producers. *Id.* at 399 (citing *Currin* in support of the proposition that industry's role was "unquestionably valid"). While PRIIA is not identical to the arrangement at issue in *Sunshine Anthracite*, that decision's reliance on *Currin*—which sustained a statute conferring a

private veto power over the government's proposals—shows that respondent over-reads *Sunshine Anthracite* by suggesting that it supports only statutes in which a private entity is wholly "subordinate[d]" to the government. Resp. Br. 18-19 (quoting *Sunshine Anthracite*, 310 U.S. at 399).

2. The metrics and standards do not reflect "rulemaking" authority or impose "regulatory" effects on host railroads

Amtrak's role in the development of the Amtrak-performance metrics and standards also poses no non-delegation problem because the metrics and standards do not reflect the exercise of "rulemaking" authority (Resp. Br. 1) or permit Amtrak to "regulate other private entities" (Pet. App. 6a).

a. As explained in our opening brief (at 7-9, 30-37), the metrics and standards serve primarily as tools to measure Amtrak's own performance and to establish in part the circumstances under which the STB may investigate whether a host railroad has violated the independent and long-standing statutory requirement that Amtrak's passenger trains receive "preference over freight transportation in using a rail line, junction, or crossing." 49 U.S.C. 24308(c) and (f).

There can be no doubt that Congress may authorize private parties to play a role in triggering a government investigation or adjudicatory proceeding. See Gov't Br. 32-34. As the district court concluded, "[m]erely granting a private party the power of referral * * * does not pose a constitutional problem." Pet. App. 48a. Here, in response to concerns that host railroads were failing to honor the statutory preference requirement, Congress created a mechanism by which Amtrak could seek to have that preference

requirement enforced (or by which others, such as host railroads, could seek a determination that certain delays had *not* been caused by a violation of the statutory preference requirement). That mechanism is an administrative proceeding before an independent governmental entity, the STB. 49 U.S.C. 24308(f). Congress could have given Amtrak the ability to initiate such a proceeding whenever it believed the statutory requirement had been violated. Instead, it provided that the metrics and standards would, in addition to providing useful information to Congress and the public, help determine when Amtrak could—*and when it could not*—trigger a governmental investigation. In the course of any resulting investigation, the actual regulatory (and adjudicatory) authority will be wielded by the STB, not Amtrak. And any sanctions against a host railroad will turn on violations of the long-established statutory preference requirement, not the metrics and standards. See 49 U.S.C. 24308(f)(2). By the same token, any actions that the host railroads might choose to take to avoid potential sanctions—such as "modifying their operations and further delaying freight traffic," Resp. Br. 23—are also attributable to that statutory preference.

The permissibility of that arrangement follows *a fortiori* from *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992), a case that respondent simply ignores. There, the Court found that Congress had not delegated eminent-domain power to Amtrak by authorizing it to initiate a proceeding before the Interstate Commerce Commission (the STB's predecessor) to condemn another railroad's property, even though the statute in question "create[d] a *presumption* in favor of conveyance

to Amtrak." *Id.* at 421 (emphasis added); Gov't Br. 33-34.

b. For similar reasons, respondent is misguided in suggesting (Br. 24) that the metrics and standards impermissibly allow Amtrak to "create[] and suppl[y] the evidence" that will be used in the STB's investigation. In fact, the statute directs the STB to receive information from "all parties" and authorizes the STB to "review the accuracy of the train performance data" to determine what causes actually "contribute[d]" to the underlying "delays" (49 U.S.C. 24308(f)(1)), notwithstanding what the reports of Amtrak's conductors say. See Gov't Br. 34-35 & n.13; see also J.A. 120 (response to comment on proposed metrics and standards, noting that "individual host railroads can use their own data, when practicable following reporting of the delay, to help resolve discrepancies with Amtrak and help identify the incidents that may have contributed to delays"). Indeed, respondent itself has explained that host railroads are creating their own evidence for defensive use in such investigations. J.A. 182, 183, 190, 197, 205. But they cannot claim to have any constitutional immunity from the costs associated with a governmental investigation into their potential statutory violations, whether or not that investigation was triggered by someone they consider a business competitor.

c. Respondent also pins (Br. 24, 31) its attempt to locate a regulatory effect on the requirement in Section 207(c) of PRIIA that the metrics and standards be incorporated, "[t]o the extent practicable," into the "access and service agreements" between Amtrak and host railroads. 49 U.S.C. 24101 note. But those operating agreements are individual contracts that are

subject to the give-and-take of bargaining between Amtrak and the host railroads. Amtrak did not need statutory authority to make demands in the course of those negotiations, and the host railroads are free to reject those demands or, in return for agreeing to incorporate some or all of the metrics and standards, to demand changes to compensation and other terms and conditions that Amtrak might decide are impracticable. Significantly, moreover, any failure by Amtrak and a host railroad to negotiate a contract will be resolved by an independent governmental entity (the STB), which is not required to give any deference to the metrics and standards when it "prescribe[s] reasonable terms and compensation." 49 U.S.C. 24308(a)(2)(A)(ii).

There is accordingly no basis for respondent's contention (Br. 23) that Amtrak's role in developing the metrics and standards permitted it to "use regulatory power to [its] own commercial advantage."

d. Respondent similarly errs in contending (Br. 24-26) that Amtrak's participation in developing the metrics and standards permitted the federal government to evade political accountability for their effects. Even setting aside the extensive governmental control over and ties with Amtrak (see pp. 13-15, *infra*), Section 207 plainly prevents the government from disclaiming responsibility for the metrics and standards, because the FRA itself had to approve them. Moreover, the FRA did so in a transparent process that involved solicitation of, and response to, comments from various stakeholders. See J.A. 11-158 (reprinting proposed metrics and standards, *Federal Register* notices, and published responses to comments). And we have already explained that, to the extent that the

metrics and standards themselves were somehow to become the basis for a future STB order to pay damages, they could be subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. See Gov't Br. 37 n.15.

e. Finally, Section 207 is not rendered unconstitutional, as respondent suggests (Br. 21-22), because Congress has not used the same mechanism in other contexts or because the government has failed to show that joint development of the metrics and standards was the "only" way to achieve Congress's goals. Congress understandably gave Amtrak a greater role than other stakeholders in preparing the metrics and standards that would be used primarily to measure Amtrak's own performance. See Gov't Br. 7-8; cf. *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 552 (1935) (Cardozo, J., concurring) ("When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers."). But the question for this Court is not whether Congress took the only possible course. As in most constitutional contexts, a successful defense of the statute does not require the government "to demonstrate that its [actions] are 'necessary' or the least restrictive means of furthering its interests." *NASA* v. *Nelson*, 131 S. Ct. 746, 760 (2011).

In any event, whether or not it made manifestly better sense at the outset to require joint development rather than mere consultation with Amtrak, it is now obvious that PRIIA's purposes would be much better served if the metrics and standards could be put back into effect without requiring Congress to amend the statute to provide for their adoption through some different mechanism.

3. The potential for a government-appointed arbitrator avoided any nondelegation problem

As discussed above, Section 207(a) of PRIIA provided that the FRA and Amtrak would "jointly * * * develop" the Amtrak-performance metrics and standards. 49 U.S.C. 24101 note. Section 207(d) further provided that, if there were an impasse in promulgating the metrics and standards, *any* party involved in their development could "petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Ibid.* If that provision is construed as referring to a governmental arbitrator, then there would have been no doubt that the last word about the metrics and standards would come from a governmental entity (and not Amtrak). See Gov't Br. 27-29. Respondent, however, contends (Br. 26) that the arbitrator "provision, in and of itself, renders Section 207 unconstitutional," because it must be read as contemplating the appointment of a *private* arbitrator. Respondent's reading is not supported by the statutory text, the context, or applicable principles of statutory construction.

a. Respondent asserts (Br. 27) that "the ordinary meaning of the word 'arbitrator' refers to a *nongovernmental* actor." But the definition in *Black's Law Dictionary* 120 (9th ed. 2009), includes no such limitation, and, with one exception, none of the sources respondent cites even involved a statutory reference to an arbitrator.[2] The exception shows that Congress

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[2] In *Gordon* v. *United States*, 74 U.S. (7 Wall.) 188 (1868), the Court concluded that the Secretary of War had not been an arbitrator because he had not been invested with authority to make a final decision binding on the parties—not, as respondent suggests, because he was not "a private extraordinary judge." *Id.* at 194

can indeed provide for arbitration by a government official. See 7 U.S.C. 1359ff(a)(2)(A) (arbitration by the Secretary of Agriculture of disputes about sugar marketing allotments). And respondent does not deny that PRIIA and other statutes already contemplate that other disputes involving Amtrak will be resolved by the STB rather than a private entity. See Gov't Br. 28. There is therefore no reason to conclude that Section 207(d)'s reference to an "arbitrator" appointed by the STB means a non-governmental actor—especially in light of the presumption against "subdelegations to outside parties," *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir.), cert. denied, 543 U.S. 925 (2004), which respondent does not contest.

(citation omitted). The joint resolution at issue in *Gordon* did not use any form of the term "arbitrator." Res. of June 1, 1860, 12 Stat. 873. Respondent also cites (Br. 27) two opinions of the Office of Legal Counsel. One noted that arbitrators are typically "private individuals chosen by the parties to the dispute," *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 (1996)—a definition that is plainly inapplicable to Section 207(d), where the arbitrator is chosen *by the STB*. The second opinion considered whether a hypothetical statute might "compel [a federal agency's] litigation counsel to enter into binding arbitration" by a private arbitrator. *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 208-209 (1995). But the opinion acknowledged that there are no "universally applicable rules" governing arbitration, *id.* at 209, and it relied on a decision from this Court about a statute that allowed a customs collector to have an import duty jointly appraised either by two private merchants or by *a government appraiser* and a private merchant, *id.* at 217. See *Auffmordt* v. *Hedden*, 137 U.S. 310, 312, 326-327 (1890).

b. At the very least, Section 207(d) cannot be read as unambiguously *precluding* a governmental arbitrator. That eliminates the only basis for respondent's objection (Br. 28-29) to applying the canon of constitutional avoidance in support of the governmental reading.[3] In fact, the Court has long been willing to infer, for constitutional purposes, a limitation that is not expressly contained in the statutory text but is nevertheless a plausible reading. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 682 (2001) (construing statute authorizing detention of certain removable aliens "beyond the removal period" as "contain[ing] an implicit 'reasonable time' limitation"); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70-72 (1994) (discussing Court's willingness to infer or expand scienter requirements to prevent punishment of otherwise-innocent conduct); *The Abby Dodge*, 223 U.S. 166, 173, 177 (1912) (construing "the waters of the Gulf of Mexico or the Straits of Florida" as excluding waters within "the territorial limits of a State"); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (construing the words "any person or persons" as excluding foreign citizens on foreign ships on the high seas).

Here, reading Section 207(d)'s reference to a government-appointed "arbitrator" as being limited to a governmental arbitrator does not "press statutory

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[3] See *Stern* v. *Marshal*, 131 S. Ct. 2594, 2605 (2011) (concluding that "the plain text" left no "room for the canon of avoidance"); *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (finding "[t]he text" to be "unambiguous on the point under consideration"); *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (concluding that "the language is clear and the statute comprehensive"); see also *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (declining to adopt a limiting construction in light of the standards applicable to facial overbreadth challenges in the First Amendment context).

construction to the point of disingenuous evasion." *United States* v. *Locke*, 471 U.S. 84, 96 (1985) (internal quotation marks and citation omitted). It requires no greater departure from the plain text than respondent's own "private arbitrator" reading (Br. 26), and it comports with the Court's established practice of using construction to avoid, rather than create, any constitutional concern.[4]

B. Amtrak Should Not Be Considered A "Private" Entity For Purposes Of Nondelegation Analysis

Respondent's nondelegation claim is fundamentally misguided for the further reason that Amtrak should not be considered a private entity for purposes of nondelegation analysis.

1. Respondent does not deny the federal government's multiple and extensive forms of control over Amtrak. As detailed in our opening brief (at 42-46), Congress has not simply chartered Amtrak and

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[4] There is no merit to respondent's further suggestion (Br. 29) that the use of a governmental arbitrator would violate the Appointments Clause (U.S. Const. Art. II, § 2, Cl. 2). Even assuming that the arbitrator's authority, confined to the single impasse over the metrics and standards, to "assist the parties in resolving their disputes through binding arbitration," 49 U.S.C. 24101 note (PRIIA § 207(d)), would constitute the "performance of a significant governmental duty," *Buckley* v. *Valeo*, 424 U.S. 1, 141 (1976) (per curiam), the limited nature of that duty would allow the arbitrator to be an inferior, rather than principal, officer. See *Edmond* v. *United States*, 520 U.S. 651, 661-662 (1997). While Section 207(d) does not explicitly address the authority to remove the arbitrator (see Resp. Br. 29-30), it is implicit in the appointment power. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010); *Keim* v. *United States*, 177 U.S. 290, 293 (1900). The arbitrator's appointment by the STB would therefore comport with the Appointments Clause.

turned it loose to make profits. It has prescribed Amtrak's mission and various public-interest goals—often at a striking level of detail.[5] Gov't Br. 4-5, 7 n.4; see *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals."). Congress has retained federal ownership of all of Amtrak's preferred stock and has retained governmental control over Amtrak's management by, among other things, providing for presidential appointment (subject to the Senate's advice and consent) of nearly all of Amtrak's Board of Directors. Gov't Br. 43-45.[6] Not least—having long since

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[5] The most recent bill authorizing appropriations for Amtrak, which was favorably reported by the House Committee on Transportation and Infrastructure on September 17, 2014, conforms to Congress's pattern of micromanagement; accompanying provisions would require Amtrak, among other things, to establish a "pilot program that allows passengers to transport domesticated cats or dogs on certain trains." H.R. 5449, 113th Cong., 2d Sess. § 210(a).

[6] Respondent incorrectly suggests (Br. 42) that the selection of Amtrak's directors does not comport with the Appointments Clause. The only one of Amtrak's nine directors who is not appointed by the President with the advice and consent of the Senate is Amtrak's own President, who is appointed by the other eight directors, has his salary fixed by the remaining directors, and "serve[s] at the pleasure of the board." 49 U.S.C. 24303(a) and (b). Amtrak's President is therefore an inferior officer. See *Free Enter. Fund*, 561 U.S. at 510 (noting that "'[t]he power to remove officers' at will and without cause 'is a powerful tool for control' of an inferior") (quoting *Edmond*, 520 U.S. at 664). As such, he may be appointed by the other eight directors. See *id.* at 510-513 (approving appointments by the SEC Commissioners, considered as a collective Head of a Department that is not subordinate to or contained within any other component of the Executive Branch); *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1036-1041 (9th Cir. 1991) (rejecting Appointments Clause challenge to the Board

acknowledged that "Amtrak is not a for-profit corporation," H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978)—Congress has furnished more than $41 billion in subsidies to Amtrak over 43 years. Gov't Br. 45-46.

Respondent cannot avoid those structural and operational realities by pointing to Congress's declaration that Amtrak "shall be operated and managed as a for-profit corporation," or that it is not a federal "department, agency, or instrumentality." 49 U.S.C. 24301(a)(2) and (3). What respondent calls (Br. 39) "Congress's 'statutory disavowal' of Amtrak's agency status" did not, as respondent suggests (Br. 42), require Congress to choose between making Amtrak a traditional agency with rulemaking authority subject to the Administrative Procedure Act and making it a wholly private non-agency. Congress is free to pick and choose among statutory obligations and powers. Thus, the APA is inapplicable to some indisputably governmental entities (like Congress and this Court) and to some legislative rules made by federal agencies. See 5 U.S.C. 551(1), 553(a). And, with respect to Amtrak itself, Congress has expressly exempted it from some of the statutory requirements that generally apply to governmental agencies (such as Title 31 of the United States Code, which includes the False Claims Act) but subjected it to others (such as the Freedom of Information Act and the Inspector General Act). See Gov't Br. 39-40.

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of Postal Governors, which consisted of nine individual Governors (appointed by the President with the advice and consent of the Senate), the Postmaster General (appointed by the nine Governors), and the Deputy Postmaster General (appointed by the nine Governors and the Postmaster General)).

There is accordingly no basis for respondent's contention (Br. 35-36) that Congress's decision to deprive Amtrak of sovereign immunity from suit simultaneously requires it to have made Amtrak a private actor for purposes of participating in the development of the metrics and standards. Congress has waived sovereign immunity for certain entities without also depriving them of their governmental status for purposes of exercising even true regulatory authority. See, *e.g.*, 12 U.S.C. 1701c(a) and 1702 (authorizing the Secretary of Housing and Urban Development to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties," and providing that he may, "in his official capacity," "sue and be sued"); 39 U.S.C. 401(1) and (2) (waiving the Postal Service's sovereign immunity while simultaneously giving it the authority "to adopt, amend, and repeal such rules and regulations * * * as may be necessary in the execution of its function under this title"). Nor is this Court's decision in *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824), to the contrary.[7]

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[7] In *Bank of the United States*, the Court concluded that "[t]he State of Georgia, by giving to [a state-chartered] Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transaction of the Bank, and waives all the privileges of that character." 22 U.S. (9 Wheat.) at 907-908. The Court said the same had been true with respect to "the old Bank of the United States," in which the federal government merely held shares, without otherwise "impart[ing]" to it "the privileges of the government." *Id.* at 908. Neither of those propositions is in tension with the conclusion that a statutorily created entity subject to multiple forms of governmental control can, if Congress wishes, exercise governmental authority subject to Congress's direction.

2. The critical point is that the latitude permitted to Congress under the nondelegation doctrine is defined by the Constitution, not statute. As *Lebron* concluded, Amtrak is a governmental agency or instrumentality for the purpose of individual rights guaranteed by the Constitution. See 513 U.S. at 394. That reasoning extends to the nondelegation doctrine, which, like other structural provisions of the Constitution, also serves to protect individual liberty. Gov't Br. 40-41. If Amtrak is governmental "for purposes of the constitutional *obligations* of the Government" (as respondent concedes, Br. 35), then the Constitution does not prevent Congress from treating it as governmental to the extent that Congress chooses to make an otherwise-permissible grant of authority to it.

C. The Court Should Decline To Decide, Or Should Reject, Respondent's Due-Process Claim

When it granted certiorari, the Court did not include respondent's additional question (Br. in Opp. i, 20-23) about its claim under the Due Process Clause. Nevertheless, respondent again advances (Br. i, 43-50) that claim as an independent basis for invalidating Section 207. The Court should decline to decide that question in the first instance or, in any event, should reject it on the merits.

1. The court of appeals should address respondent's due-process claim in the first instance

As the Court often observes, it is "a court of final review and not first view," and it therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted). That practice carries

special force in the context of constitutional questions that have not been addressed by the court of appeals. See, *e.g.*, *ibid.*; *Bond* v. *United States*, 131 S. Ct. 2355, 2360, 2367 (2011); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In this case, the same result follows from the Court's well-established practice of declining to address issues that are not fairly included within the scope of the questions on which the Court granted certiorari. See *Cutter*, 544 U.S. at 727 n.2 (Thomas, J., concurring); *Lebron*, 513 U.S. at 379; Sup. Ct. R. 14.1(a). The Court did not add respondent's due-process question when it granted the government's petition for certiorari. Cf. *NLRB* v. *Noel Canning*, 133 S. Ct. 2861, 2861-2862 (2013). The Court should again decline the request to address that question.

Adhering to the Court's usual practices would be particularly appropriate in this case, because the basis for respondent's due-process claim has markedly shifted since it was rejected by the district court.[8]

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[8] The district court held that, for purposes of the Due Process Clause, Amtrak is a "governmental entity" rather than a "private entity." Pet. App. 34a-35a. Respondent now contends (Br. 49-50) that its due-process claim does not "depend[] on a determination that Amtrak is a private actor," because the claim "was framed broadly" in its complaint. Respondent quotes one sentence from its complaint, which said that "Section 207 of PRIIA violates the due process rights of the freight railroads" by vesting power in Amtrak. Resp. Br. 50 (quoting J.A. 177). But the complaint's preceding sentence articulated respondent's proposed rule, demonstrating that its due-process claim was predicated on Amtrak's purportedly private status. J.A. 177 ("Vesting the coercive power of the government in interested *private parties* violates the due process rights of regulated third parties, as secured by the Fifth

Accordingly, if this Court reverses the court of appeals' holding with respect to respondent's nondelegation claim (*i.e.*, the question on which it granted certiorari), it should remand for further proceedings in which respondent could pursue its due-process claim in the light shed by the Court's analysis of the operation of Section 207 and of Amtrak's public or private status for nondelegation purposes. See *United States* v. *Comstock*, 560 U.S. 126, 149-150 (2010).

2. If this Court reaches the question, it should reject respondent's due-process claim

In any event, respondent's due-process claim fails on the merits.

a. Relying principally on *Carter Coal*, respondent contends that the Due Process Clause prevents a self-interested entity from wielding "the power to regulate the business of another, and especially of a competitor." Resp. Br. 44 (quoting *Carter Coal*, 298 U.S. at 311). As discussed above (see pp. 5-9, *supra*), however, Amtrak's authority to act jointly with the FRA in developing the metrics and standards is not properly characterized as regulatory power. Nor is Amtrak's position *vis-à-vis* the host railroads like that of a mar-

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Amendment to the United States Constitution.") (emphasis added); see also Resp. Mem. in Supp. of Its Mot. for Summ. J. 32, D. Ct. Doc. 8 (Dec. 2, 2011) ("Delegations to *private parties* are unconstitutional for the additional and independent reason that such delegations violate the due process rights of regulated third parties.") (emphasis added); Resp. Reply in Supp. of Its Mot. for Summ. J. & Opp. to Pet. Mot. for Summ. J. 26, D. Ct. Doc. 13 (Mar. 6, 2012) ("[G]ranting *a private 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.'") (quoting *Carter Coal*, 298 U.S. at 311-312) (emphasis added).

ket competitor. Rather, Amtrak is more like "a customer of a common carrier that cannot refuse to furnish a service to the customer at the approved rate." Gov't Br. 24 n.7. And all else aside, even a self-interested and truly private party may trigger an investigation by an independent and indisputably disinterested governmental agency like the STB without running afoul of the Due Process Clause. Any other rule would proscribe most of the claims that private parties routinely bring before most administrative agencies or courts.

Indeed, to the extent that respondent seeks to differentiate its due-process claim from its nondelegation claim, it does so principally by citing a line of cases in which the Court has been punctilious about requiring *adjudicators* to be disinterested. See Resp. Br. 44 (citing *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973)).[9] As the Court has explained, "[t]he rigid requirements of *Tumey* and *Ward*" were "designed for officials performing judicial or quasi-judicial functions" and were inapplicable to agency officials seeking to enforce the law before an independent adjudicator. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980); see also *Concrete Pipe & Prods. of Calif., Inc.* v. *Construction Laborers Pen-*

[9] Respondent also cites (Br. 44) *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), which relied upon the Court's supervisory power, not the Due Process Clause, and held that the power to prosecute a criminal contempt could not be exercised by someone who was required by principles of legal ethics to represent an interest other than that of the public. *Id.* at 807-809.

sion Trust, 508 U.S. 602, 619 (1993) (reaffirming "[t]he distinction between adjudication and enforcement").

In *Marshall*, the Court rejected the proposition that an agency official was insufficiently disinterested to bring an administrative enforcement action seeking monetary penalties for the unlawful employment of child labor, when any recovery would be retained by the agency to defray administrative costs. 446 U.S. at 241, 246-250. Without determining "with precision" what leeway would be allowed to those bringing an enforcement action before a disinterested adjudicator, the Court concluded that the likelihood that the agency official would act in a biased fashion was sufficiently remote because his salary was fixed and the budgetary consequences for the agency were minimal. *Id.* at 250-252.

b. Here, the only potential adjudicatory body is the STB, which would determine whether a host railroad had failed to provide the statutorily required preference for intercity-passenger-rail traffic (49 U.S.C. 24308(f)(2)), or would "prescribe reasonable terms and compensation" in the event that Amtrak and a host railroad could not agree on new contract terms (49 U.S.C. 24308(a)(2)(A)(ii)). Even assuming that the process of developing the metrics and standards constituted a rulemaking function, it would still satisfy the standard applied in *Marshall*. Although respondent asserts (Br. 45-46) that Amtrak's officers have a "strong private financial incentive to maximize Amtrak's profits," that incentive derives from a statutory provision that would apply only in years during which Amtrak does not receive federal assistance, 49 U.S.C. 24303(b). Given Amtrak's unbroken string of unprofitability, that cannot have been a realistic inducement

to biased decisionmaking. And, to the extent that Amtrak itself might stand to recover damages for a violation of the statutorily required preference, 49 U.S.C. 24308(f)(2), they would not go to the corporation's general fund; they could be used only "for capital or operating expenditures on the routes over which delays" resulted from the statutory breach, 49 U.S.C. 24308(f)(4).

c. Finally, it is noteworthy that—unlike the statute invalidated in *Carter Coal*—Section 207 did not give Amtrak a unilateral ability to adopt the metrics and standards. Their development required the active participation and approval of the FRA, a neutral governmental agency as to which plaintiff makes no claim of bias. Under the circumstances, Amtrak's role in developing the metrics and standards was not at all akin to "[e]mpowering Burger King to regulate McDonald's." Resp. Br. 48. If it decides to reach the question, the Court should reject respondent's due-process claim.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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