No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

ASSOCIATION OF AMERICAN RAILROADS

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

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The court of appeals has held a federal statutory provision unconstitutional because it requires the Federal Railroad Administration (FRA) to work jointly with the National Railroad Passenger Corporation (Amtrak)—a government-created, government-controlled, and government-subsidized corporation—when developing the metrics and standards that are used to measure Amtrak's own performance. In the court's (and respondent's) view, that constitutes an impermissible delegation of "regulatory" authority to a "private" entity. See Pet. App. 8a-9a; Br. in Opp. 15. But this Court has sustained the constitutionality of statutes that provided that even truly private entities must approve or propose even truly regulatory measures. The authority here, however, is not regulatory. And, in any event, Amtrak is not a private entity for purposes of the constitutional analysis here. The

decision below warrants this Court's review and reversal.

A. The Government's Control Over The Development And Application Of The Amtrak-Performance Metrics And Standards Avoided Nondelegation Concerns

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907, provided that the FRA and Amtrak "shall jointly * * * develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." 49 U.S.C. 24101 note.[1] As explained in the certiorari petition (at 5), the resulting metrics and standards were to be used by Amtrak for various internal purposes and to be incorporated, "[t]o the extent practicable," into the "access and service agreements" between Amtrak and the rail carriers whose tracks Amtrak uses. 49 U.S.C. 24101 note (PRIIA § 207(c)). The PRIIA also provided that a sustained failure by Amtrak to meet the standards governing its own performance could play a role in triggering an investigation by the Surface Transportation Board (STB) into whether a freight railroad (such as one of the railroads represented by respondent) had violated the independent and long-standing statutory requirement that Amtrak's passenger trains be given "preference over freight transportation in using a rail line, junction, or crossing." 49 U.S.C. 24308(c) and (f)(1); see Pet. 3, 5-6. Those statutorily prescribed mechanisms for developing and applying the Amtrak-

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

performance metrics and standards do not violate constitutional nondelegation principles. See Pet. 12-20.

1. Respondent contends (Br. in Opp. 13-14) that the applicable strand of the nondelegation doctrine prevents Congress from allowing a private entity to serve "more than a 'ministerial' or 'advisory' role in the exercise of Government power." In respondent's view, that limitation was exceeded because Section 207(a) permitted Amtrak to "veto the FRA's preferred approach." *Id.* at 15.

As the petition has already explained (at 14), however, this Court has previously approved statutory schemes under which regulatory standards were subject to private parties' veto powers. See *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 547-548, 577-578 (1939); *Currin* v. *Wallace*, 306 U.S. 1, 6, 15-16 (1939). Respondent seeks (Br. in Opp. 17) to distinguish those cases as ones in which "private parties were given the ability to *opt out* of the exercise of coercive state power" but not "to *wield* coercive state power over their business competitors." But that mistakes the circumstances of both cases, where the relevant rules could not become effective without the agreement of a certain portion of an industry group (tobacco growers in a local market in *Currin* and milk producers in a marketing area in *Rock Royal Co-operative*). Pet. 14. In each case, the regulatory provisions or prices to which an industry super-majority agreed had precisely the effect of binding business competitors who had not consented. Thus, in *Rock Royal Co-operative*, "[v]igorous campaigns were waged by both proponents and opponents of the [Secretary of Agriculture's] Order," which provided

"[c]ompetitive advantages to co-operatives." 307 U.S. at 556-557. When less than 50% of affected milk handlers agreed to the Secretary's price-fixing order, the order was nevertheless allowed to go into effect because three-quarters (*i.e.*, more than the requisite two-thirds) of affected milk producers "approved its terms." *Id.* at 559, 577. And in *Currin*, some North Carolina tobacco growers desired to sell at a local market that was subject to a federal inspection-and-certification regime, while others did not; and the warehousemen in the markets that were subject to the federal regime "compet[ed] for patronage among the same growers" with the warehousemen in other markets in the State that were exempt from that regime. 306 U.S. at 8-9, 13, 19. There is accordingly no basis for respondent's contention that Amtrak is the first entity authorized to exercise a veto power over a federal standard that could affect other market participants.[2]

2. Respondent also errs in describing (Br. in Opp. 14) Amtrak and the FRA "as co-equal partners" in promulgating the Amtrak-performance metrics and standards. As explained in the petition (at 17), Amtrak was ultimately not an equal partner, because any disagreement it had with the FRA would have been resolved by a *government-appointed* arbitrator. 49

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[2] As respondent concedes (Br. in Opp. 15), Amtrak is not really a direct competitor with the freight railroads. Amtrak assumed the passenger-rail-service obligations that other railroads abandoned; in return, the freight railroads are statutorily required to allow Amtrak to use their facilities at rates either agreed to by Amtrak and the host railroads or prescribed by the STB. See 49 U.S.C. 24308(a); *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453-456 (1985).

U.S.C. 24101 note (PRIIA § 207(d)). And, if a private-party arbitrator would present constitutional concerns, then principles of constitutional avoidance would counsel in favor of reading the (never-used) provision as authorizing the STB to appoint only a government arbitrator. Like the court of appeals (Pet. App. 14a-15a), respondent seizes (Br. in Opp. 18-19) on the fact that the statutory text does not *forbid* such an arbitrator from being a private party. But the government-arbitrator reading is a "plausible interpretation[]" of the text. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). And, even if the statute did not have to be construed in that fashion, the STB still could have appointed a government arbitrator.

3. Respondent also exaggerates the reach of the Amtrak-performance metrics and standards, characterizing (Br. in Opp. 16) them as "regulations that require the freight railroads to modify their operations and delay freight traffic in order to benefit Amtrak's for-profit business." In fact, as explained in the petition (at 18), "the metrics and standards serve primarily as tools to measure Amtrak's own performance, not to alter freight railroads' legal rights or obligations." Amtrak's own failure to meet its standards may trigger an STB investigation into a freight railroad's actions affecting Amtrak, 49 U.S.C. 24308(f)(1), but that investigation will not be about the standards. Instead, any sanction imposed on a freight railroad will only be the result of the STB's determination that the freight railroad failed to satisfy the long-standing statutory-preference requirement, which is independent of the metrics and standards. See 49 U.S.C. 24308(f)(2); Pet. 6. In other words, Amtrak's supposed "competitive advantage" (Br. in Opp. 16) over the freight railroads

with respect to the use of railroad tracks inheres in Congress's own prescription—which respondent does not challenge—and not in the performance standards jointly developed by the FRA and Amtrak.

Similarly, respondent errs in contending (Br. in Opp. 16) that Section 207(c) of the PRIIA allows Amtrak to use the performance standards "to pressure the freight railroads to rewrite [their] contracts" with Amtrak. Section 207(c) provides that the metrics and standards shall be incorporated into the access and service agreements between Amtrak and host railroads "[t]o the extent *practicable*." 49 U.S.C. 24101 note (emphasis added). The statute provides no penalty for failure to incorporate the metrics and standards. And, to the extent that Amtrak and a host railroad cannot agree on terms, then the STB shall "prescribe reasonable terms and compensation." 49 U.S.C. 24308(a)(2). Thus, it is the STB, not Amtrak, that determines what terms are reasonable if a host railroad and Amtrak do not agree.

B. Amtrak Is Not A Private Entity For Purposes Of Nondelegation Analysis

The court of appeals further erred in holding that Amtrak is merely "a private corporation" for purposes of nondelegation analysis. Pet. App. 23a. Respondent does not dispute the petition's explanation of the many means of control that the federal government exercises over Amtrak, including Congress's establishment of Amtrak's goals, the President's appointment of eight of the nine members of Amtrak's Board of Directors (who then collectively appoint the ninth member), the government's ownership of the overwhelming majority of Amtrak's stock, and Congress's routine appropria-

tion of more than a billion dollars of annual subsidies. Pet. 22-23.

Instead, respondent emphasizes that Congress and the Executive Branch have said that Amtrak "is not a department, agency, or instrumentality of the United States." Br. in Opp. i, 27 (quoting 49 U.S.C. 24301(a)(3)). But, as this Court has explained, those declarations are "dispositive of Amtrak's status as a Government [or non-Government] entity for purposes of matters that are within Congress's control—for example, whether it is subject to statutes." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995); see also *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010) (relying on *Lebron*'s distinction between statutory and constitutional matters for purposes of Appointments Clause and separation-of-powers challenges). The applicability of the nondelegation doctrine is a constitutional question, not a matter within Congress's control.[3] Accordingly, even assuming *arguendo* that the

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[3] Respondent asserts (Br. in Opp. 24) that the government failed to preserve "its *Lebron* claim before the court of appeals." But reliance on *Lebron* is not a "claim" that can be waived in that fashion. Indeed, in *Lebron* itself, the Court held that whether Amtrak "is part of the Government" was "not a new claim," but merely "a new argument," which was closely related to an argument based on the close ties between Amtrak and the United States. 513 U.S. at 379-380 & n.1; cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). In any event, the government's brief in the court of appeals did invoke *Lebron* for the propositions that Amtrak is "uniquely linked to the federal government," Gov't C.A. Br. 18; that Amtrak is subject to "significant structural control" by the government, *id.* at 29-30; and that "'it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of

nature of the Amtrak-performance metrics and standards, when combined with the FRA's involvement in their promulgation and the STB's exclusive enforcement role, would preclude a private entity's participation in their development, Amtrak is not "private" in the relevant sense.

C. This Court Should Not Address In The First Instance Respondent's Alternative Claim

Respondent contends (Br. in Opp. 20) that the second claim in its complaint—that Section 207 of the PRIIA violates the Due Process Clause—provides "further confirmation that the [court of appeals'] decision is correct." The court of appeals, however, declined to address that "separate argument." Pet. App. 23a. To the extent that respondent nevertheless suggests (Br. in Opp. i) that a due-process question should be added along with any grant of certiorari, this Court should decline that suggestion.[4]

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,*

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citizens affected by its actions,'" *id.* at 30 n.3 (quoting *Lebron*, 513 U.S. at 392).

[4] Professor Alexander Volokh's amicus brief contends (at 11) that "[d]ue process is a better avenue" than the nondelegation doctrine "for scrutinizing delegation to private parties," but it supports (at 1-2, 14) a remand for consideration by the court of appeals rather than a decision on that ground by this Court.

Inc., 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Adhering to that general practice would be particularly appropriate here, because the basis for respondent's alternative constitutional argument has markedly shifted since it was rejected by the district court. The district court held that respondent's due-process claim lacks merit because, 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. in Opp. 23 n.4) 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. To that end, respondent quotes one sentence of its complaint, which said "Section 207 of PRIIA violates the due process rights of the freight railroads" by vesting power in Amtrak. *Ibid.* (quoting C.A. App. 21 (Compl. ¶ 54)). While that sentence did not specify whether Amtrak was a government or private entity, the preceding sentence in the complaint articulated the legal rule respondent invoked, making it clear that the due-process claim was predicated on Amtrak's purported status as a private party. C.A. App. 21 (Compl. ¶ 53) ("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 Amendment to the United States Constitution.") (emphasis added). Both of the briefs that respondent filed in the district court at the summary-judgment stage also stated the applicable legal principle in terms involving "private" parties.[5]

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[5] See Resp. Mem. in Supp. of Its Mot. for Summ. J. 32, D. Ct. Doc. 8 (Dec. 2, 2011) ("Delegations to private parties are unconsti-

Accordingly, if this Court were to grant review and reverse the court of appeals' holding with respect to respondent's nondelegation claim, the next appropriate step would not be to consider the current iteration of respondent's due-process claim in the first instance, but instead to remand for further proceedings in which respondent could pursue any claim, apart from the nondelegation claim, that it has preserved. See *United States* v. *Comstock*, 560 U.S. 126, 149-150 (2010) (reversing court of appeals' holding that a federal statute violated the Necessary and Proper Clause; declining to reach other constitutional claims; noting that the respondents could pursue on remand any other claims they had preserved). The court of appeals could then consider any such claim in light of the Court's analysis of the operation of Section 207 and its consideration of Amtrak's status and the nondelegation issue.

D. The Court Of Appeals' Invalidation Of A Federal Statutory Provision On Nondelegation Grounds Warrants This Court's Review

As noted in the petition (at 24), this Court's general practice is to review decisions that hold federal statutes unconstitutional, especially when review is sought

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tutional for the additional and independent reason that such delegations violate the due process rights of regulated third parties."); 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) ("The Supreme Court has held that granting 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* v. *Carter Coal Co.*, 298 U.S. 238, 311-312 (1936)); see also Pet. App. 41a (district court decision noting that respondent's due-process claim is premised on Amtrak's private status).

by the United States. Such review is appropriate where, as here, the court of appeals has relied upon principles that this Court has not invoked to invalidate an Act of Congress in almost 80 years, and it has done so in a manner that is inconsistent with this Court's subsequent cases. Moreover, in this instance, there will be no further percolation of the question in the lower courts, and, under respondent's view, the decision below not only requires the Amtrak-performance metrics and standards to be vacated, but also requires the nullification of all actions that the FRA and the Department of Transportation have taken pursuant to them since 2010. Pet. 8, 25. This Court should grant review to prevent such needless disruption of Congress's important efforts to provide for the improvement of passenger-rail service in the United States.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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