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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

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

The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

PARTIES TO THE PROCEEDING

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

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

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on October 11, 2013 (Pet. App. 51a-52a). On December 31, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 7, 2014. On January 28, 2014, the Chief Justice further extended the time to March 10, 2014, and the petition was filed on that date. The petition was granted on June 23, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

1. a. Before 1970, intercity passenger-railroad service in the United States had become unprofitable. *National R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 454 (1985). Nevertheless, railroads, as common carriers, were obligated to continue providing that service unless relieved of the obligation to do so by the Interstate Commerce Commission (ICC) or state regulatory authorities. *Ibid.* Despite railroads' general desires to terminate those services, Congress determined that "the public convenience and necessity require[d] the continuance and improvement" of passenger-rail service. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 101, 84 Stat. 1328. It therefore established the National Railroad Passenger Corporation (known as Amtrak) to serve as the successor to those railroads abandoning passenger-rail service (*id.* §§ 301, 401(a), 84 Stat. 1330, 1334-1335), thereby "avert[ing] the threatened extinction of passenger trains in the United States." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

As a condition of relieving railroads of passenger-rail-service obligations, Congress required, among other things, that they allow Amtrak to use their tracks and facilities, at rates either agreed to by Amtrak and the host railroads or prescribed by the

ICC or, later, the Surface Transportation Board (STB or Board). See 49 U.S.C. 24308(a); *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 410 (1992); *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. at 455. To this day, outside the Northeast Corridor (which runs from Boston to Washington, D.C.), Amtrak's trains operate almost exclusively on infrastructure owned and dispatched by freight railroads.[1] Since 1973, Congress has granted Amtrak a general preference over freight transportation in using those facilities, specifying as follows:

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

49 U.S.C. 24308(c) (emphasis added); see Amtrak Improvement Act of 1973, Pub. L. No. 93-146, § 10(2), 87 Stat. 552 (initial version).

b. Congress has declared that Amtrak is "not a department, agency, or instrumentality of the United

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[1] Office of Inspector Gen., Fed. R.R. Admin., CR-2012-148, *Analysis of the Causes of Amtrak Train Delays* 3 (July 10, 2012), www.oig.dot.gov/sites/dot/files/AMTRAK%20Delays%20Report%5E7-10-12.pdf.

States Government." 49 U.S.C. 24301(a)(3). "As initially conceived, Amtrak was to be 'a for profit corporation.'" *Lebron*, 513 U.S. at 384-385 (quoting § 301, 84 Stat. 1330). But Congress soon modified that language, stating—"less optimistically perhaps," *id.* at 385—that Amtrak "shall be operated and managed as a for-profit corporation," 49 U.S.C. 24301(a)(2). As the Committee responsible for recommending that change explained, the "amendment recognizes that Amtrak is not a for-profit corporation." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978) (*1978 House Report*). Since then, Congress has further specified that Amtrak's core "mission" is "to provide efficient and effective intercity passenger rail mobility" while using its business judgment to "minimize Government subsidies." 49 U.S.C. 24101(b) and (d).

Congress has further required Amtrak to pursue various other public objectives and has prescribed how Amtrak will conduct certain aspects of its operations. For instance, Amtrak must provide reduced fares for the disabled and the elderly. 49 U.S.C. 24307(a). It shall "ensure mobility in times of national disaster or other instances where other travel options are not adequately available" and "ensure equitable access to the Northeast Corridor by intercity and commuter rail passenger transportation." 49 U.S.C. 24101(c)(9) and (10). When it decides which improvements to make in the Northeast Corridor, Amtrak must apply seven "considerations," in a specified "order of priority," and the improvements must "produce the maximum labor benefit from hiring individuals presently unemployed." 49 U.S.C. 24902(b) and (c). Whenever Amtrak purchases at least $1 million of articles, materials, or supplies, they must be mined or produced in the Unit-

ed States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. 49 U.S.C. 24305(f). Congress has even prescribed the minimum average speed on which Amtrak's schedules should be based (60 miles per hour), and required it to develop a plan for restoring service on a particular route (from New Orleans to Sanford, Florida). See 49 U.S.C. 24101(c)(6); Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, § 226, 122 Stat. 4934.

In addition to providing such instructions, Congress has subjected Amtrak to governmental oversight and control through a variety of mechanisms, including the appointment of eight of Amtrak's nine directors by the President with the advice and consent of the Senate (with the ninth director, the President of Amtrak, being appointed by the other eight). 49 U.S.C. 24302(a)(1), 24303(a). And Congress has continually appropriated substantial federal funds to ensure Amtrak's continued operations—more than $30 billion from fiscal year 1971 to 2006, and between $1.3 and $1.5 billion in each of the last eight fiscal years.[2]

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[2] See Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. L, Tit. I, 128 Stat. 591-592; Amtrak, *Fiscal Year 2013 Budget and Comprehensive Business Plan: Operating, Capital Programs and Debt Service Expense Budget* 11-12 (May 2013), www.amtrak.com/ccurl/345/484/AmtrakFY13-Budget-Comprehensive-Business-Plan-w-appx-052413.pdf; Amtrak, *Fiscal Year 2011 Revised Budget and Comprehensive Business Plan: Operating, Capital Programs and Debt Service Expense Budget* 6 (Mar. 2010), www.amtrak.com/ccurl/724/689/AmtrakFY11RevisedBudgetandComprehensiveBusinessPlan.pdf; U.S. Gov't Accountability Office, GAO-07-15, *Intercity Passenger Rail: National Policy and Strat-*

c. Over the decades, Congress has enacted several statutes aimed at improving Amtrak's service and encouraging its long-term viability.[3] This case concerns its most recent effort: the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), *supra*. In the wake of a determination by the Department of Transportation's Inspector General that Amtrak could have saved "almost one-third of its operating budget" if it had "achieved an 85 percent on-time performance outside the Northeast Corridor," PRIIA sought, among other things, to alleviate the "poor service reliability and on-time performance" that resulted from "freight traffic congestion." H.R. Rep. No. 690, 110th Cong., 2d Sess. 36 (2008) (*2008 House Report*). As relevant here, that effort involved three inter-related sets of provisions.

First, Section 207(a) of PRIIA provided that, within 180 days of its October 2008 enactment,

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egies Needed to Maximize Public Benefits from Federal Expenditures 11 (Nov. 2006).

[3] See, *e.g.*, Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548; Amtrak Improvement Act of 1974, Pub. L. No. 93-496, 88 Stat. 1526; Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90; Amtrak Improvement Act of 1976, Pub. L. No. 94-555, Tit. I, 90 Stat. 2613; Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, Tit. I, 93 Stat. 537; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, Tit. XI, Subtit. F, 95 Stat. 687; Amtrak Reauthorization Act of 1985, Pub. L. No. 99-272, Tit. IV, Subtit. A, 100 Stat. 106; Amtrak Reauthorization and Improvement Act of 1990, Pub. L. No 101-322, 104 Stat. 295; Amtrak Authorization and Development Act, Pub. L. No. 102-533, 106 Stat. 3515 (1992); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570.

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

49 U.S.C. 24101 note (emphasis added). Section 207(d) further provided that, if the metrics and standards were not completed within 180 days, "any party involved in the development of those standards [could] petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Ibid.*

Second, Congress specified that, once the metrics and standards had been developed, Amtrak would use them for various purposes, including annual evaluations of its performance, the development of performance improvement plans for long-distance routes, and the development and implementation of a plan to improve on-board service. 49 U.S.C. 24710(a)-(b); 49 U.S.C. 24101 note (PRIIA § 222).[4] Congress similarly

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[4] With respect to the long-distance routes, Congress took care to specify that Amtrak had to focus first on improving the "worst performing" routes, and then the "second best performing" routes, and finally the "best performing routes," 49 U.S.C. 24710(c), without regard to whether it could get a better return on investment by improving a better-performing route first.

provided that the Federal Railroad Administration (FRA) would "publish a quarterly report on the performance and service quality of intercity passenger train operations" addressing the specific elements to be measured by the metrics and standards. 49 U.S.C. 24101 note (PRIIA § 207(b)). And Congress further provided that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards * * * into their access and service agreements," *ibid.* (PRIIA § 207(c)).

Third, PRIIA authorized the STB to "adjudicat[e]" disputes between Amtrak and the freight railroads, including disputes about when Amtrak's "on-time performance problems" stem from the freight railroads' failure to "provide preference to Amtrak over freight trains." S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007) (*2007 Senate Report*). PRIIA therefore provided as follows:

> 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 [PRIIA] fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board * * * may initiate 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.

49 U.S.C. 24308(f)(1). Alternatively, PRIIA provided that the STB "shall initiate such an investigation" "upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service." *Ibid.*

In such an investigation, the Board may "review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays." 49 U.S.C. 24308(f)(1). In making its determination, 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." *Ibid.* Following the investigation, the Board may choose to "award damages" or other appropriate relief against a host railroad if it determines that Amtrak's substandard performance is attributable to the "rail carrier's failure to provide preference to Amtrak over freight transportation as required" by the pre-existing preference provision in 49 U.S.C. 24308(c). 49 U.S.C. 24308(f)(2). If the Board deems it appropriate for damages to be remitted to Amtrak, then Amtrak must use them "for capital or operating expenditures on the routes over which delays" were the result of the host railroad's failure to grant the statutorily required preference to passenger transportation. 49 U.S.C. 24308(f)(4).

2. In March 2009, the FRA and Amtrak, acting pursuant to Section 207(a) of PRIIA, jointly developed a draft version of the metrics and standards, J.A. 11-74, and published a notice in the *Federal Register* seeking comments from the various stakeholders identified in the statute, including freight railroads, J.A.

75-76. After receiving and considering comments, the FRA and Amtrak developed the final version of the metrics and standards, which was issued in May 2010. J.A. 129-144. Some of the metrics involve Amtrak's financial performance, for which the associated standard is that there be "[c]ontinuous year-over-year improvement on a moving eight-quarter average basis." J.A. 130-131. The on-time-performance metrics apply to the ends of each route as well as (at a later date) to all station stops. J.A. 132-135; see 49 U.S.C. 24101(c)(4) (calling for "station stops within 15 minutes of the time established in public timetables"). The standards associated with those metrics require on-time performance, at least 80% to 95% of the time for each route, depending on the route and year. J.A. 133-135. The standards associated with train delays specify a maximum number of "minutes [of delay] per 10,000 Train-Miles," ranging from 265 to 900. J.A. 136-140. Other metrics and standards involve minimum customer-satisfaction rates in surveys, J.A. 141-142, and some metrics (*e.g.*, the percentage of passengers connecting to or from other routes, or the percentage of passenger trips to or from underserved communities) have no associated standards, J.A. 143-144.

3. In August 2011, respondent—an association representing large freight railroads that own tracks on which Amtrak operates—commenced this suit against petitioners in the United States District Court for the District of Columbia. J.A. 5, 161-178; Pet. App. 30a-31a. Respondent advanced two claims. First, it contended that "Section 207 of PRIIA violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in

the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate." J.A. 176-177 (Compl. ¶ 51). Second, respondent contended that Section 207 violates the Fifth Amendment's Due Process Clause by "[v]esting the coercive power of the government" in Amtrak, an "interested private part[y]" given the ability to "enhance its commercial position at the expense of other industry participants." J.A. 177 (Compl. ¶¶ 53-54).

In addition to a declaration of Section 207's unconstitutionality, respondent sought vacatur of the Amtrak-performance metrics and standards, the issuance of an injunction against any action by the Department of Transportation or the FRA pursuant to the metrics and standards or Section 207, a declaration that any such actions previously taken are null and void, and an award of "reasonable costs, including attorney's fees." J.A. 177-178.

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

With respect to respondent's nondelegation claim, the district court held that "[e]ven if Amtrak is a private entity, as [respondent] contends, the government retains ultimate control over the promulgation of the

[m]etrics and [s]tandards," and Section 207 therefore "passes constitutional muster." Pet. App. 43a-44a. The court emphasized that "Amtrak could not have promulgated [the metrics and standards] without the FRA's approval" and that "the STB also retains control over their enforcement." *Id.* at 46a. Moreover, the court concluded that, "even if the involvement of these agencies is not enough to ensure the constitutionality of [Section] 207's delegation, the government retains structural control over Amtrak itself." *Ibid.* The court concluded that "[t]aken together, the involvement of the FRA in promulgating the regulations, the role of the STB in their enforcement, and the government's structural control over Amtrak itself more than suffice" to render the statute constitutional. *Id.* at 49a.

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

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

Despite the FRA's role in devising and approving the Amtrak-performance metrics and standards, the court of appeals noted that the FRA was "impotent to choose its [own] version without Amtrak's permission." Pet. App. 10a. The court found further cause for con-

cern in the provision requiring that any impasse regarding the development of the metrics and standards be resolved by having the STB "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* at 14a (quoting 49 U.S.C. 24101 note (PRIIA § 207(d)). The court rejected the government's suggestion that the statute's reference to "an arbitrator" could be construed, if necessary to avoid serious constitutional concerns, as authorizing the Board to appoint only a governmental official as the arbitrator. *Id.* at 15a n.7.

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

The court of appeals recognized that "[m]any of the details of Amtrak's makeup support the government's position that it is not a private entity of the sort described in" *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the last case in which this Court invalidated an Act of Congress under the nondelegation doctrine. Pet. App. 16a. But the court of appeals found significant Congress's declarations that "Amtrak 'shall be operated and managed as a for-profit corporation' and 'is not a department, agency, or instrumentality of the

United States Government.'" *Id.* at 17a (quoting 49 U.S.C. 24301(a)(2) and (3)).

As a result, the court concluded that Section 207 does not adequately serve what it saw as the "functional purposes" for distinguishing between public and private entities "when it comes to delegating regulatory power." Pet. App. 18a. In particular, the court held that allowing Amtrak to play a role in drafting the metrics and standards for evaluating Amtrak's own performance and service quality fails to serve two such purposes. First, it does not promote "democratic accountability," because Congress has denominated Amtrak a "for-profit corporation" rather than a "department, agency, or instrumentality of the United States Government." *Ibid.* (citations omitted). Second, it does not promote "the public good," because, the court believed, "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id.* at 19a, 20a.

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

SUMMARY OF ARGUMENT

Congress has constitutional authority to permit private entities to play a role in the development, and even the approval, of regulatory provisions. Amtrak, moreover, should not be considered a private entity for purposes of constitutional nondelegation principles. The court of appeals therefore erred in holding that

Section 207 of PRIIA effected an unconstitutional delegation of legislative power to a private entity.

A. The government retained sufficient control over both the development and the future application of the metrics and standards to avoid any nondelegation concerns.

1. Section 207 required the active participation and independent assent of the FRA, and included additional procedural protections, such as consultation with stakeholders like respondent. Those factors thoroughly differentiate Section 207 from the scheme held unconstitutional in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 283-284, 310-312 (1936), in which binding labor standards were devised and approved entirely by private entities without any governmental involvement in their creation or approval. The court of appeals nevertheless believed that Section 207 allowed Amtrak to exercise "unprecedented regulatory powers" because the FRA would have been "impotent to choose its [own] version" of the metrics and standards "without Amtrak's permission." Pet. App. 10a. That is incorrect. This Court has approved statutory schemes under which provisions that would bind various market participants—and favor some more than others—would not become effective unless they were approved by a sufficient, but non-unanimous, portion of the affected industry. See *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939); *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 547-548, 577-578 (1939).

2. The court of appeals further erred in concluding that Section 207(d) of PRIIA compounded the threat of private control over the process of developing the metrics and standards because it provided that any impasse could be resolved by an arbitrator appointed

by the Surface Transportation Board, and Section 207(d) did not affirmatively forbid "the appointment of a private party as arbitrator." Pet. App. 14a-15a. Congress, which knows how to provide for private arbitrators, did not do so here, and several statutes (including PRIIA) contemplate that other disputes involving Amtrak would be resolved by the STB rather than a private entity. If the arbitration provision were actually thought to exacerbate a constitutional threat, the canon of constitutional avoidance would require it to be construed as permitting appointment only of a governmental arbitrator, thus eliminating the hypothetical possibility that Amtrak could combine with a private arbitrator to dominate the development of the metrics and standards.

3. In any event, the metrics and standards impose no binding regulatory requirements on freight railroads. Although the metrics and standards play a role in triggering certain investigations by the STB, private entities commonly, and unobjectionably, have the power to initiate a government enforcement proceeding. Once an STB investigation begins under 49 U.S.C. 24308(f), the Board will gather evidence from all parties, and any sanction will not be based on any violation of the metrics and standards but rather on a determination that the host railroad violated its statutory obligation to provide a preference for passenger-rail transportation.

B. Assuming *arguendo* that the nature of the Amtrak-performance metrics and standards would preclude a private entity's participation in their development, Amtrak is not merely a private corporation for nondelegation purposes.

1. While Congress may exempt—and indeed has exempted—Amtrak from many statutory obligations that apply to governmental entities, the Court has previously determined that Congress cannot prevent Amtrak from being deemed governmental "for the purpose of individual rights guaranteed against the Government by the Constitution." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995). The extent of Congress's latitude under nondelegation principles is a question involving structural constitutional limits, and is therefore not controlled by Congress's statements that Amtrak is not a governmental agency. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (applying *Lebron* in the context of an Appointments Clause and separation-of-powers challenge).

2. Treating Amtrak as a private entity for nondelegation purposes cannot be squared with Amtrak's statutorily prescribed mission and goals, which are legion and often not conducive to profitability. The federal government also exercises extensive control over Amtrak's management, by virtue of many oversight provisions as well as the President's direct appointment, with the Senate's advice and consent, of eight of the nine members of its Board of Directors, who then appoint, and have the power to remove, the ninth member, the President of Amtrak. And Amtrak routinely receives significant federal funding (totaling more than $41 billion in its first 43 years).

Those multiple mechanisms for control easily outweigh Congress's declaration that Amtrak "shall be operated and managed as a for-profit corporation." 49 U.S.C. 24301(a)(2). Indeed, Congress has long recognized that Amtrak is not in fact profitable, and it has

merely sought to reduce Amtrak's need for federal subsidies. The court of appeals' belief that an overarching profit motive would cause Amtrak to serve "private interests" rather than the "the common good" (Pet. App. 20a, 23a) is particularly incongruous, because the owner of the overwhelming majority of Amtrak's stock (*i.e.*, the one who would reap any profits) is the federal government, not a private person.

ARGUMENT

The court of appeals held unconstitutional a key component of Congress's most recent effort to improve intercity passenger-rail service in the United States by providing for the establishment of metrics and standards for evaluating Amtrak's performance and service quality. Although the court of appeals believed that Section 207 resulted in an "unprecedented" delegation of power to a private entity, Pet. App. 10a, this Court's decisions have, in fact, sustained the constitutionality of Acts of Congress under which certain regulatory provisions could not take effect without the approval of private entities. In any event, even if private entities were entirely precluded from playing any role in the development or approval of regulatory provisions, the metrics and standards do not impose any such regulatory requirements. Moreover, Amtrak should not be considered a private entity for purposes of the nondelegation doctrine, in light of the federal government's extensive control over Amtrak's mission and goals, its management, and a substantial portion of its funding.

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

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

Instead, respondent contends that Section 207 is unconstitutional because it permits Amtrak to act jointly with the FRA in developing the metrics and standards that are to be used to judge Amtrak's own performance and help identify which routes need what kinds of improvements. In respondent's view, 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." Br. in Opp. 13-14; see *id.* at 26 (asserting that this Court's precedents "prohibit delegations to private companies, period"). But, assuming *arguendo* that Amtrak should be deemed a private entity for purposes of nondelegation analysis, the role Congress assigned to Amtrak still presents no nondelegation concerns because governmental entities had sufficient control over the development and adoption of the metrics and standards in the first instance. Those governmental entities also have sufficient control over any enforcement actions against the freight railroads rep-

resented by respondent, which would be predicated on an independent and unchallenged statutory mandate.

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

a. It has been nearly 80 years since this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute that required all coal producers to accept the maximum labor hours and minimum wages negotiated by the producers of more than two-thirds of the annual coal tonnage and representatives of more than half of the mine workers. *Id.* at 283-284, 310-312. In that case, the government had no involvement in the creation or approval of the binding labor provisions, which were instead devised and approved entirely by private entities, and then deemed to be "accepted" by all code members in the relevant district or districts. *Id.* at 284.[5]

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[5] The Court had previously held, in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), that the National Industrial Recovery Act, ch. 90, 48 Stat. 195, which had authorized the President to approve "codes of fair competition" developed and submitted by industry groups, had effected "an unconstitutional delegation of legislative power." 295 U.S. at 542, 552. But that holding rested to a significant extent on the "virtually unfettered" nature of the delegation to the President, rather than just the involvement of private parties. *Id.* at 542; see *id.* at 538-539. Before that, the Court had sustained statutes authorizing private parties to make determinations with legally binding consequences. See, *e.g.*, *St. Louis, Iron Mountain & S. Ry.* v. *Taylor*, 210 U.S. 281, 286-287 (1908) (rejecting challenge to Act of Mar. 2, 1893, ch. 196, §§ 5-6, 27 Stat. 531-532, which authorized a private railway association to establish standard heights for drawbars on railroad

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

b. The court of appeals believed that Section 207 of PRIIA delegated "unprecedented regulatory powers" to Amtrak because the requirement for joint development meant that if the FRA had "prefer[red] an alternative to Amtrak's proposed metrics and standards," it would have been "impotent to choose its [own] version without Amtrak's permission." Pet. App. 10a. This Court, however, has approved statutory schemes under which particular standards were subject to private parties' veto powers.

In *Currin*, *supra*, the statute provided that new federal inspection and certification standards could not be applied to a tobacco market designated by the Secretary of Agriculture "unless" their application was

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cars used in interstate commerce, and subjected railroads to monetary penalties for failure to comply with the height requirement); *Jackson* v. *Roby*, 109 U.S. 440, 441-442 (1883) (sustaining Act of July 26, 1866, ch. 262, § 1, 14 Stat. 251, which provided that "the mineral lands of the public domain" are "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States").

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

The court of appeals sought to distinguish *Currin* on the ground that it involved "the collective participation of two thirds of industry members" rather than "a statute that favored a single firm over all its market rivals." Pet. App. 10a n.4. But the standards or prices at issue in *Currin* (as well as in *Rock Royal Co-operative*) would indisputably favor or disfavor some market participants *vis-à-vis* others. And it would make no sense to forbid Congress from requiring an agency to secure the consent of one party (as under PRIIA Section 207), and yet permit Congress to require the same agency to secure the consent of many such parties (as in *Currin* and *Rock Royal Co-operative*). Here, it was entirely reasonable for Congress to provide a distinct role for Amtrak—among the others who needed only to be consulted—because the

metrics and standards were intended to assess Amtrak's own performance and because Amtrak is the instrument through which Congress sought to advance the public interest in passenger-rail service when freight railroads were released from that aspect of their common-carrier obligations.[6]

c. Taking a slightly different tack than the court of appeals, respondent has attempted to distinguish *Currin* and *Rock Royal Co-operative* as merely giving private parties "the ability to *opt out* of the exercise of coercive state power" without being "given the ability to *wield* coercive state power over their business competitors." Br. in Opp. 17. That distinction also fails. In each case, the regulatory provisions or prices to which an industry super-majority agreed had precisely the effect of binding other market participants who had not consented. In *Rock Royal Co-operative*, "[v]igorous campaigns were waged by both proponents and opponents of the [Secretary of Agriculture's proposed] Order," which provided "[c]ompetitive advantages to co-operatives." 307 U.S. at 556-557. When less than half of the affected milk handlers agreed to the Secretary's price order, the order was nevertheless allowed to go into effect because three-quarters

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[6] Other courts of appeals have rejected nondelegation challenges to statutes that vested private parties with authority to disapprove regulatory standards. See *Kentucky Div., Horsemen's Benevolent & Protective Ass'n* v. *Turfway Park Racing Ass'n*, 20 F.3d 1406, 1416 (6th Cir. 1994) (challenge to federal statute giving racehorse owners veto power over racetrack's plan to permit interstate off-track betting); *Sequoia Orange Co.* v. *Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992) (challenge to Secretary of Agriculture's determination to implement amendments to orange marketing order only with approval of 75% of growers (or those growing two-thirds of total crop)), amended by 985 F.2d 1419 (9th Cir. 1993).

(*i.e.*, more than the requisite two-thirds) of the affected milk producers had "approved its terms." *Id.* at 559, 577. In other words, some private actors were able to decide what prices would apply (even to their competitors), and dissenting producers and handlers were powerless to opt out.

Similarly, 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 therefore no basis for respondent's suggestion (Br. in Opp. 15) that Amtrak is the first entity that has effectively been authorized to exercise a veto power over a federal standard that could affect other market participants.[7]

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[7] As respondent has conceded, Amtrak is not a direct competitor with the freight railroads for customers. See Br. in Opp. 15 ("Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of their scarce track.") (quoting Pet. App. 19a). Amtrak assumed the passenger-service obligations that other railroads were permitted to abandon; in furtherance of the public's interest in preserving a national system of intercity passenger-rail transportation, the freight railroads are now bound 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.*, 470 U.S. 451, 453-456 (1985). Accordingly, Amtrak's position *vis-à-vis* a host railroad is not akin to a market competitor, but rather to a customer of a common carrier that cannot refuse to furnish a service to the customer at the approved rate, or to the holder of an easement of necessity who may have to coordinate the exercise of his privilege to use the

d. This Court has also recognized that private parties may play a role in the development of proposed regulatory standards. In *Sunshine Anthracite Coal*, *supra*, for instance, the Court upheld a statutory framework authorizing groups of coal producers to propose prices for coal that were then subject to approval, disapproval, or modification by the National Bituminous Coal Commission (a governmental entity). 310 U.S. at 387-388 & n.2, 399.

Thus, to the extent that Amtrak is considered a private entity, Section 207 of PRIIA broke no new ground in allowing it to play a role in developing the Amtrak-performance metrics and standards. Unlike the wage and hour requirements in *Carter Coal*, the metrics and standards could not take effect without both the active participation and the independent assent of a governmental entity (the FRA). See *Carter Coal*, 298 U.S. at 284 (quoting statute providing only that private wage agreement "shall be filed with the Labor Board and shall be accepted as the minimum wages * * * by the code members operating in such district"). Moreover, the FRA and Amtrak were obliged to act "in consultation with" various stakeholders other than Amtrak, including freight railroads. 49 U.S.C. 24101 note (PRIIA § 207(a)). Invoking the statute's consultation provision, respondent, several of its freight-railroad members, and others provided comments in response to the *Federal Register* notice about the proposed metrics and standards. See, *e.g.*, C.A. App. 153-192 (reprinting several comment letters). In response to the comments, the final metrics and standards reflect-

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right-of-way with the owner of the servient estate who must also use the same physical space.

ed revisions that made them more favorable to the freight railroads than the original proposals.[8]

In light of those procedures and the active participation of the Executive Branch, Amtrak had no more involvement in the standards' development than did the coal producers in *Sunshine Anthracite Coal*. And the requirement that Amtrak agree to the standards (*i.e.*, its "veto" power over the FRA) was consistent with *Currin* and *Rock Royal Co-operative*. The court of appeals therefore erred in concluding that a private party is categorically precluded from playing anything more than an advisory role in the development of a standard and that such a standard cannot be conditioned upon a private party's approval.[9]

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[8] For instance, the final version increased the amount of "Host-Responsible Delays" outside the Northeast Corridor from 700 minutes per 10,000 Train-Miles, as proposed, to 900 minutes, and created a mechanism that would permit Amtrak and host railroads to adjust published timetables and delay allowances to accommodate major planned construction and maintenance. J.A. 100-101, 145-147. The final version also postponed the implementation of the new standard measuring on-time performance at all stations (rather than just the end of each route). J.A. 115.

[9] Other courts of appeals have upheld statutes that authorize private parties to take regulatory action subject to the approval of a governmental agency. See *Sorrell* v. *SEC*, 679 F.2d 1323, 1325 (9th Cir. 1982) (rejecting nondelegation challenge to statute allowing private self-regulatory organizations to develop rules for, and to conduct, disciplinary proceedings concerning their members, subject to SEC review and approval); *First Jersey Secs., Inc.* v. *Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1074 (1980); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir.) (same), cert. denied, 344 U.S. 855 (1952).

2. By providing for a government-appointed arbitrator to resolve disputes, Congress ensured that governmental entities would have the last word about the development of the metrics and standards

Even assuming that it would generally be impermissible for a governmental entity (the FRA) and a purportedly private entity (Amtrak) to have "equal" authority with respect to the development and adoption of the metrics and standards (Pet. App. 10a), the court of appeals seriously misconstrued the effect and significance of Section 207(d) of PRIIA. Section 207(d) 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." 49 U.S.C. 24101 note. In other words, Amtrak was ultimately not an equal partner with the FRA. Rather, the government always retained the upper hand by virtue of the reserved authority of a *government-appointed* arbitrator.

The court of appeals believed that the statute's arbitration provision (which was never invoked) compounded the delegation problem it perceived because that provision did not expressly forbid "the appointment of a private party as arbitrator." Pet. App. 14a-15a. But that conclusion runs counter to normal principles of statutory construction for two reasons. First, Congress is, in the absence of "an affirmative showing," presumed not to have authorized "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). Second, elsewhere in the same Act that included PRIIA, Congress demonstrated that it

knew how to prescribe the use of a more elaborate (and traditional) procedure for selecting an arbitrator. See 49 U.S.C. 24405(d)(1), (2)(A), and (2)(B) (providing that, if employment-related disputes arise when a new entity replaces "intercity rail passenger service that was provided by Amtrak," then "the parties shall select an arbitrator" or alternately strike names from a list of arbitrators provided by the National Mediation Board). By contrast, in Section 207(d), Congress simply vested the power to choose the arbitrator in the STB (an adjudicatory agency of the government) without making any provision for private nomination of potential arbitrators or for the parties to select the arbitrator. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally.") (citation omitted).

PRIIA and other statutes already contemplate that other disputes involving Amtrak would be resolved by the STB rather than a private entity. See, *e.g.*, 49 U.S.C. 24308(a)(2)(A) (STB resolution of disputes about terms and compensation for Amtrak's use of other railroads' facilities and services); 49 U.S.C. 24308(f)(2) (STB resolution of disputes about passenger transportation's "preference" over freight transportation); see *2007 Senate Report* 26 ("The intent of [Section 24308(f)] is to provide a forum for both Amtrak and the freight railroads for the adjudication of service disputes, including on-time performance problems. * * * The Committee believes that STB will be able to consider disputes in an efficient and evenhanded manner."). Accordingly, the court of appeals' facile expectation that the Board-appointed

arbitrator would be a private party is especially anomalous.

If the court of appeals' constitutional concerns had been valid, then principles of constitutional avoidance would have counseled strongly in favor of reading the provision as contemplating a governmental, rather than private, arbitrator. See generally *Boos* v. *Barry*, 485 U.S. 312, 330-331 (1988) ("It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible.") (citations omitted). Nondelegation concerns can support such an avoidance-based construction. See *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974); *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). Such a construction merely needs to be a "plausible interpretation[]" of the text. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). In *The Abby Dodge*, 223 U.S. 166 (1912), for example, the Court invoked constitutional concerns to construe a reference to "the waters of the Gulf of Mexico or Straits of Florida" as applying only to the portions of those waters "outside of the territorial limits of a State." *Id.* at 173, 177. Here, there is nothing in the text of PRIIA Section 207(d) that prevents its reference to an "arbitrator" appointed by the STB from being limited to a governmental arbitrator, thus eliminating even the hypothetical possibility (Pet. App. 15a) that private parties could combine to dominate the process of developing the metrics and standards.

3. Any sanction against a freight railroad must be based on a determination by the Surface Transportation Board that the railroad failed to satisfy an independent statutory obligation, not the metrics and standards

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

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

a. There was perhaps some incentivizing effect associated with the metrics and standards before the court of appeals struck them down. In the 21 months after they were finalized, Amtrak's on-time performance climbed to its highest point ever: In February 2012, its end-point, on-time-performance rate was

88.7% system-wide—and 81.2% on its long-distance routes (on which the rate had been below 30% in 2006).[10] After the court of appeals' July 2013 decision, however, Amtrak "saw an immediate drop in on-time performance across the board," which it believed "was directly attributable to train handling by the host carriers."[11] By June 2014, the system-wide rate had fallen to 69.7%, and the rate for long-distance routes was only 41.2%—barely half of what it had been 28 months earlier.[12]

Nevertheless, the freight railroads' concrete reasons to facilitate Amtrak's traffic would not have stemmed from the metrics and standards themselves, which have no direct regulatory effect on the host railroads. The railroads' actions would instead have been the product of the interaction of two other statutory provisions that present no nondelegation con-

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[10] See Amtrak, *Monthly Performance Report for February 2012*, at E-7 (rev. Sept. 14, 2012), www.amtrak.com/ccurl/395/557/Amtrak-Monthly-Performance-Report-February-2012,0.pdf; D.J. Stadtler, Vice President of Operations, Amtrak, *Testimony before the Surface Transportation Board* 3, 6 (Apr. 10, 2014), www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadtler-STB-Apr-09-2014.pdf (*Stadtler Testimony*).

[11] *Stadtler Testimony* 3; see also Joseph C. Szabo, Administrator, FRA, *Prepared Oral Testimony for Surface Transportation Board Hearing: U.S. Rail Service Issues, Docket EP 724*, at 2 (Apr. 10, 2014), www.fra.dot.gov/Elib/Document/3634 ("Over the past twelve months, we have witnessed a steady decline in timeliness of Amtrak trains, particularly those that operate over the freight rail network."); *id.* at 3 ("For February 2014, * * * delays attributable to the host freight railroad were the highest in over 5 years.").

[12] See Amtrak, *Monthly Performance Report for June 2014*, at E-7 (July 31, 2014), www.amtrak.com/ccurl/621/650/Amtrak-Monthly-Performance-Report-June-2014.pdf.

cerns: 49 U.S.C. 24308(c), which generally mandates that Amtrak's passenger-rail transportation "has preference over freight transportation in using a rail line, junction, or crossing"; and 49 U.S.C. 24308(f), which authorizes the STB to investigate Amtrak's delays and award damages or other relief only if it finds that a host railroad failed to provide the mandated preference.

The metrics and standards play a comparatively minimal role in that enforcement scheme. They simply provide standardized ways to collect data about Amtrak's performance. When "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 [PRIIA] fails to meet those standards for 2 consecutive calendar quarters," that can trigger an "investigation" by the STB (either in the STB's discretion or at the request of Amtrak or a host railroad). 49 U.S.C. 24308(f)(1). But federal law often permits a private party to prompt the government to initiate an investigation. For example, under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, a private citizen may petition to have a species listed, thereby triggering consideration by the Department of the Interior or the Department of Commerce. See 16 U.S.C. 1533(b)(3). And, under the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, a private individual may file a complaint with the Department of Housing and Urban Development alleging a discriminatory housing practice, thereby causing it to "make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days

* * * unless it is impracticable to do so." 42 U.S.C. 3610(a)(1)(B)(iv). As this Court has explained more generally with respect to the ability of private parties to choose whether or not to initiate a government enforcement proceeding, "[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forego its protection." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978).

The unexceptional nature of the process at issue here is underscored by Section 24308(f)(1)'s choice of terminology. Except when the STB acts *sua sponte*, its investigation begins "upon the filing of a complaint by Amtrak" or "a host freight railroad," 49 U.S.C. 24308(f)(1), and the STB then "adjudicat[es]" the complaint, 49 U.S.C. 24308 note (PRIIA § 213(b)); see also *2007 Senate Report* 26 (describing the proceeding as "a forum for both Amtrak and the freight railroads for the adjudication of service disputes, including on-time performance problems"). That conception—under which a governmental agency (like the STB) adjudicates a complaint by one entity about whether another entity has fulfilled its statutory obligations—has never been considered an unconstitutional delegation of power to the complaining private entity.

In fact, in *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992), the Court rejected the suggestion that Congress had delegated eminent-domain power to a private entity by authorizing Amtrak to initiate a condemnation proceeding before the ICC in which there would be a statutory presumption that Amtrak had a "need" for the property at issue, which could be overcome only if the ICC made certain findings. *Id.* at 410-411, 421. The Court

recognized that "the statute creates a presumption in favor of conveyance to Amtrak," but it did not create a private power of eminent domain because the ICC itself was still required to "assess the impact of any condemnation and make a determination as to just compensation." *Id.* at 421.

Accordingly, constitutional nondelegation principles do not prevent the metrics and standards from playing a role in specifying when Amtrak—or, for that matter, a host freight railroad, 49 U.S.C. 24308(f)(1)—can demand an STB investigation.

b. In any event, once the STB begins an investigation under Section 24308(f), the metrics and standards will be neither its focus nor the basis for any resulting sanction. The question under Subsection (f)(1) will be "whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a [host railroad] or reasonably addressed by Amtrak." 49 U.S.C. 24308(f)(1). And then the question, under Subsection (f)(2), with respect to any sanctions, will be whether the delays or failures "are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." 49 U.S.C. 24308(f)(2).

In the course of making those determinations, the STB will "obtain information from *all parties* involved" and have the "authority to *review the accuracy* of the train performance data and the extent to which scheduling and congestion contribute to delays." 49 U.S.C. 24308(f)(1) (emphases added).[13] Respondent therefore

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[13] The STB has stated that, when Amtrak files a petition under Section 24308(f)(1), the proceeding is to "be adjudicated using the established procedures governing complaints and the encompassing discovery and motion practice guidelines set forth in" 49

errs in two respects when it asserts (Br. in Opp. 16) that Amtrak "creates and supplies the evidence that will be used to determine responsibility for violations of the rules it drafted." First, a host railroad may submit its own evidence about what caused delays on its lines, and the STB may conclude that the host railroad's information is more accurate than Amtrak's in terms of explaining the cause of a delay. See J.A. 182-183, 190, 197, 205 (declarations submitted by respondent describing collection of data by freight railroads to rebut the accuracy of Amtrak's Conductor Delay Reports in future STB proceedings). Second, the Board is not determining responsibility for "violations" of any standards developed by Amtrak (and the FRA). Rather, the *only* sanctionable violation will be of the preference requirement, which was written by Congress, not Amtrak. See 49 U.S.C. 24308(f)(2) (permitting damages only if delays or other failures are "attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required" by the statute). To the extent that the STB otherwise "identif[ies] reasonable measures * * * to improve the service, quality, and on-time performance of the train," it is empowered only to make nonbinding "recommendations." 49 U.S.C. 24308(f)(1).[14]

C.F.R. Parts 1112 and 1114, and that those procedures will provide both Amtrak and the freight railroad "ample opportunity to shape the evidence, suggest certain findings, and argue for or against damages and their scope." *In re National R.R. Passenger Corp.–Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry. Co.*, Docket No. NOR 42134, at 3 (S.T.B. Jan. 2, 2013), www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/DB156C8056FC046585257AE800544598/$file/42405.pdf.

[14] Although Section 24308(f)(1) contains nothing requiring the STB to defer to the metrics and standards in the course of its

In other words, even when the metrics and standards have not been satisfied, a host railroad will face liability only if a governmental entity (the STB) determines, after its independent review of evidence submitted by all sides, that the host railroad failed to comply with the longstanding statutory-preference requirement, which is independent of the metrics and standards.

c. Finally, the fact that Congress directed Amtrak to seek to incorporate the metrics and standards into its contracts with host railroads does not transform the metrics and standards into something with actual regulatory effect. The metrics and standards do not supplant the operating agreements. Section 207(c) only provides for incorporation of the metrics and standards "[t]o the extent *practicable*," 49 U.S.C. 24101 note (emphasis added), and there is no statutory penalty for a failure to do so. The operating agreements remain individual contracts that are subject to the give-and-take of bargaining between Amtrak and the freight railroads. To the extent that Amtrak and a host railroad cannot agree on new terms in the wake of the metrics and standards, then the STB shall—as it has been able to do since it took over this function from the ICC in 1996, see 49 U.S.C. 702—"prescribe reasonable terms and compensation." 49 U.S.C.

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investigation, a contrary rule would not present a nondelegation concern. See, *e.g.*, 15 U.S.C. 2056a(b)(1)(B) (authorizing the Consumer Product Safety Commission to promulgate certain safety standards that "are substantially the same" as "voluntary consumer product safety standards"); *Safety Standard for Infant Bath Seats: Final Rule*, 75 Fed. Reg. 31,691, 31,691 (June 4, 2010) (rule adopting a safety standard that was "substantially the same as a voluntary standard developed by the American Society for Testing and Materials").

24308(a)(2)(A)(ii). Thus, it will be the Board, not Amtrak, that determines what terms are reasonable if a host railroad and Amtrak do not agree.

Under these circumstances, Amtrak's role in developing the standards intended to measure (and enable improvements in) its own performance is not at all analogous to the "scenario" conjured by the court of appeals, "in which Congress has given to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers." Pet. App. 1a. Amtrak's supposed "competitive advantage" (Br. in Opp. 16) over the freight railroads ultimately inheres in Congress's own prescription that Amtrak's passenger service be given preference—which respondent does not challenge—and not in the performance standards jointly developed by the FRA and Amtrak. The court of appeals erred in concluding that Section 207 of PRIIA fails to satisfy constitutional nondelegation concerns, even if Amtrak is deemed to be a private entity for these purposes.[15]

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[15] To the extent that the metrics and standards actually embodied a final determination of "rights or obligations" or were an action "from which legal consequences will flow," then the FRA's involvement in their promulgation would render them final agency action subject to judicial review under the Administrative Procedure Act (APA) for arbitrariness. *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (quoting *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); 5 U.S.C. 704. When respondent filed a version of this suit as a petition for review in the court of appeals, it expressed its intention to challenge not only the constitutionality of Section 207 of PRIIA, but also whether the metrics and standards were "a product of arbitrary and capricious decision making in violation of the Administrative Procedure Act." Statement of Issues to be Raised of Peti-

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

Assuming *arguendo* that the nature of the Amtrak-performance metrics and standards, even when combined with the FRA's involvement in their promulgation and the STB's exclusive enforcement role, would preclude a private entity's participation in their development, the court of appeals still erred because Amtrak is not merely "a private corporation" for purposes of nondelegation analysis. Pet. App. 16a. The court of appeals' contrary conclusion is inconsistent with *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and with the multiple statutory provisions establishing federal control over Amtrak's mission and goals, its management, and a substantial portion of its funding.

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tioner Association of American Railroads 2, *Association of Am. R.R.* v. *Department of Transp.*, No. 10-1154 (D.C. Cir. Aug. 9, 2010). But after that proceeding was dismissed for want of jurisdiction (Order, *Association of Am. R.R.* v. *Department of Transp.*, No. 10-1154 (D.C. Cir. Nov. 24, 2010)), respondent pursued this parallel suit in district court without raising any APA claim.

If the STB ever orders a freight railroad to pay damages to Amtrak for failing to provide the statutorily required preference, that order would be subject to APA challenge and would provide a mechanism for judicial review of the metrics and standards if they, rather than the statutory preference, were somehow the basis of the decision. That constitutes another procedural safeguard associated with the Amtrak-performance metrics and standards that was absent in *Carter Coal*. See p. 20, *supra*.

1. Congress's undoubted power to exempt Amtrak from federal statutory obligations does not affect its governmental status for constitutional nondelegation purposes

In *Lebron*, this Court considered whether Amtrak should, despite its "nominal[]" status as "a private corporation," be "regarded as a Government entity for First Amendment purposes." 513 U.S. at 383. The Court held that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.* at 394. As the Court explained, Congress's characterizations of Amtrak are "assuredly dispositive of Amtrak's status as a Government [or non-Government] entity for purposes of matters that are within Congress's control—for example, whether it is subject to statutes." *Id.* at 392. Congress has, for instance, specified that Amtrak is subject to the Freedom of Information Act, 5 U.S.C. 552, in any year in which it "receives a Federal subsidy." 49 U.S.C. 24301(e). And Amtrak has an Inspector General pursuant to the Inspector General Act of 1978, 5 U.S.C. App. 2.[16] On the other hand, Congress has removed Amtrak altogether from the Government Corporation Control Act, 31 U.S.C. 9101 *et seq.* See Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(d)(2), 111 Stat. 2590. It has expressly exempted Amtrak from all of title 31 of the United States Code. See 49 U.S.C. 24301(a)(3). And it has

[16] Amtrak is defined as a "designated Federal entity" for purposes of the Inspector General Act—the same category that includes, *inter alia*, the EEOC, the FCC, the National Archives and Records Administration, the National Security Agency, and the SEC. See § 8G(a)(2), 5 U.S.C. App. 2, at 521-522.

treated Amtrak as part of the private sector for purposes of the Unfunded Mandate Reform Act of 1995, 2 U.S.C. 1501 *et seq.* See, *e.g.*, *2007 Senate Report* 18; *2008 House Report* 52-53.

The latitude permitted to Congress under nondelegation principles, however, is not defined by statute. Here, the court of appeals recognized that respondent's nondelegation challenge presents "a constitutional question, not a statutory one." Pet. App. 21a. It nevertheless attempted to distinguish the holding of *Lebron*—that Amtrak is a governmental agency or instrumentality for the purpose of individual rights guaranteed by the Constitution—from the context of nondelegation analysis, which it described as presenting a question about "the federal government's structural powers under the Constitution." *Id.* at 22a. In the court of appeals' view, under *Lebron*, Amtrak should be subject to the Constitution's "'affirmative prohibitions' on government action," which do not extend to the nondelegation doctrine because that doctrine merely "defines the limits of what Congress *can* do," "rather than proscribing what Congress *cannot* do." *Id.* at 22a-23a (citation omitted).

The court of appeals' distinction between "the First Amendment" and "the federal government's structural powers" (Pet. App. 22a) cannot be reconciled with this Court's repeated recognition that the structural provisions of the Constitution serve not only to allocate powers among various organs of government but also to protect individual liberty. See, *e.g.*, *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("We recognize, of course, that the separation of powers can serve to safeguard individual liberty."); *id.* at 2592 (Scalia, J., concurring in the judgment) ("[T]he Constitution's

core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights."); *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011) ("The structural principles secured by the separation of powers protect the individual as well."); *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986) ("[C]hecks and balances were the foundation of a structure of government that would protect liberty."); *INS* v. *Chadha*, 462 U.S. 919, 946-950, 959 (1983).

The court of appeals' reasoning is also inconsistent with *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), which relied on *Lebron* when it considered Appointments Clause and separation-of-powers challenges to statutory limitations on the removal of members of the Public Company Accounting Oversight Board (PCAOB). *Id.* at 3151-3164. Like Amtrak, the PCAOB is "a Government-created, Government-appointed entity," *id.* at 3147, but Congress has specified that the PCAOB "shall not be an agency or establishment of the United States Government" and that none of the PCAOB's members, employees, or agents "shall be deemed to be an officer or employee of or agent for the Federal Government," 15 U.S.C. 7211(b). Nevertheless, the Court's opinion in *Free Enterprise Fund* invoked *Lebron* in support of the proposition, uncontested by the parties, that "the [PCAOB] is 'part of the Government' for constitutional purposes." 130 S. Ct. at 3148 (quoting *Lebron*, 513 U.S. at 397).

2. The federal government's controls over Amtrak's mission, goals, and management, as well as much of its funding, prevent it from being deemed "private" for nondelegation purposes

Even aside from this Court's prior cases, the court of appeals' view of Amtrak as a private entity for nondelegation purposes cannot be squared with Amtrak's statutorily prescribed mission and goals, the federal government's control over its management, and its significant federal funding. The court of appeals principally relied (Pet. App. 17a, 18a) on Congress's declarations that Amtrak "is not a department, agency, or instrumentality of the United States Government" and that it is to "be operated and managed as a for-profit corporation." 49 U.S.C. 24301(a)(2) and (3). In doing so, however, the court minimized a host of ties between Amtrak and the federal government demonstrating that Amtrak should not be considered a private entity for these purposes.

a. Not least, "Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." *Lebron*, 513 U.S. at 397. From the outset, Amtrak's principal purpose has been to prevent the extinction of intercity passenger-rail transportation in the name of "the *public* convenience and necessity." Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 101, 84 Stat. 1328 (emphasis added); see also 49 U.S.C. 24101(a)(1). But Congress did not just charter Amtrak and unleash it to make money by providing passenger-rail service. Instead, as described above, Congress has continually modified and refined its instructions for Amtrak—identifying a welter of subsidiary public objectives, from reducing unemployment, to promoting equitable access, to purchasing

materials and supplies that are mined, produced, and manufactured in the United States. Congress has even specified various ways in which Amtrak must go about attempting to accomplish its statutorily defined tasks. See pp. 4-5, 7 n.4, *supra*.

In light of those multifarious statutory commands, the court of appeals was mistaken in treating Congress's declaration that Amtrak "shall be operated and managed as a for-profit corporation" (49 U.S.C. 24301(a)(2)) as the equivalent of an overarching directive to "seek profit on behalf of private interests," in light of a presumed "fiduciary duty to maximize company profits" on behalf of Amtrak's shareholders. Pet. App. 19a, 23a; see also Br. in Opp. 22 ("Amtrak's directors have a fiduciary duty to maximize corporate profits.").

In Amtrak's case, moreover, there is no equivalence between "for-profit" status and the promotion of "private interests." Private parties own only a small fraction of Amtrak's stock; the overwhelming majority is held by the Secretary of the Transportation "for the benefit of the Federal Government." C.A. App. 350.[17] Congress is also well aware that any expectations

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[17] The Secretary holds all of the preferred stock in Amtrak—109.4 million shares, each one of which "is convertible into 10 shares of common stock at the option of the preferred stockholder." C.A. App. 350. There are 9.4 million shares of common stock in private hands, acquired "from four railroads whose intercity rail passenger operations Amtrak assumed in 1971." *Id.* at 351. In 1997, Congress instructed Amtrak to redeem all of the common stock by 2002. See Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(b), 111 Stat. 2590. That has not yet occurred and is the subject of ongoing litigation. See C.A. App. 351; *American Premier Underwriters, Inc.* v. *National R.R. Passenger Corp.*, 709 F.3d 584 (6th Cir. 2013).

of actual profits have long been, and are currently, unrealistic. See *2008 House Report* 33 ("There have been unrealistic expectations that Amtrak should be self-sufficient and profitable."); *2007 Senate Report* 2, 3 (noting that the "expectation of Amtrak's self-sufficiency, and even profitability," held in 1971 "has proven to be * * * unrealistic," and that Amtrak's unwillingness "to exit services perceived as essential to *its public mission* led to the failure to dramatically reduce [its] reliance on Federal operating subsidies") (emphasis added); *1978 House Report* 15 (explaining that "Amtrak is not a for-profit corporation"). Indeed, the statutory text shows that Amtrak's efforts to "maximize its revenues" are not for the purpose of serving private interests but for "minimiz[ing] the need for Federal operating subsidies," 49 U.S.C. 24101(d), while it pursues its statutorily defined "mission" and goals, 49 U.S.C. 24101(b) and (c). Congress has accordingly instructed Amtrak to "use its best business judgment" not for private ends but "to minimize United States Government subsidies." 49 U.S.C. 24101(c)(1). Under these circumstances, it made no sense for the court of appeals to conclude that a supposed antithesis between Amtrak's "own financial benefit" and "the common good" reflects "the very essence of the public-private distinction" served by the nondelegation doctrine. Pet. App. 20a.

b. In addition to specifying Amtrak's goals and many of the means it will use to pursue them, Congress has maintained other direct forms of governmental control. As noted above, Amtrak is virtually wholly owned by the federal government. This is "not merely" the kind of "temporary control" that may occur with "a private corporation whose stock comes into

federal ownership." *Lebron*, 513 U.S. at 398. The government also "controls the operation of the corporation through its appointees." *Id.* at 399. That significant form of control has been strengthened since *Lebron* was decided. Now, eight of Amtrak's nine directors (including the Secretary of Transportation, who serves as an *ex officio* board member) are appointed by the President with the advice and consent of the Senate, 49 U.S.C. 24302(a)(1), and they are understood to be removable without cause by the President, see *Holdover and Removal of Members of Amtrak's Reform Board*, 27 Op. O.L.C. 163, 166 (2003). As in *Lebron*, see 513 U.S. at 385, the ninth director (Amtrak's own President) is selected by the other eight directors, and serves at their pleasure. 49 U.S.C. 24302(a)(1)(B), 24303(a).

Congress has also used other mechanisms to control Amtrak's management. It has set the salary limits for Amtrak's officers. See 49 U.S.C. 24303(b). It has required Amtrak to submit various reports about its operations to Congress and the President. See, *e.g.*, 49 U.S.C. 24315(a) and (b). In PRIIA alone, it required several aspects of Amtrak's activities to be reviewed by the Department of Transportation's Inspector General (see PRIIA §§ 203(b), 204(d), 221, 225, 227, 122 Stat. 4913, 4914, 4931, 4933, 4934)—even though Amtrak already has its own Inspector General, as noted above (see p. 39 & n.16, *supra*), whose office receives appropriations directly from Congress (see, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, Div. C, Tit. III, 125 Stat. 704).

c. Finally, Amtrak's subservience to the federal government, rather than private interests, is also

reflected in the stark reality that, in its first 43 years of operation, it has received more than $41 billion in federal subsidies, and the subsidies continue at a rate of more than $1 billion annually. See p. 5 & n.2, *supra*.

Thus, the federal government's substantial and direct connections with Amtrak itself—to say nothing of the extensive involvement of the FRA in the promulgation of the Amtrak-performance metrics and standards and the STB's responsibility for adjudicating any proceeding triggered by the metrics and standards—belie the court of appeals' conclusion that Congress somehow sought to "absolv[e] the federal government of all responsibility" for the metrics and standards. Pet. App. 21a. Contrary to that court's fears, giving the government-created, government-controlled, and government-subsidized Amtrak a role in the development of the metrics and standards to assess its own performance did not make it possible to evade public criticism by claiming that any flaws in the resulting standards are "not the federal government's fault." *Id.* at 18a. Accordingly, even if the metrics and standards were in fact "regulatory," and even if private entities could play no role in their development, the metrics and standards are valid because Amtrak should not be treated as a merely private entity for purposes of nondelegation analysis.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916-4917 (reprinted at 49 U.S.C. 24101 note) provides:

METRICS AND STANDARDS.

(a) IN GENERAL.—Within 180 days after the date of enactment of this Act [Oct. 16, 2008], the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services. Such metrics, at a minimum, shall include the percentage of avoidable and fully allocated operating costs covered by passenger revenues on each route, ridership per train mile operated, measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier and, for long-distance routes, measures of connectivity with other routes in all regions currently receiving Amtrak service and the transportation needs of communities and populations that are not well-served by other forms of intercity transportation. Amtrak shall provide reasonable access to the Federal Railroad Administration in order

to enable the Administration to carry out its duty under this section.

(b) QUARTERLY REPORTS.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, on-board services, stations, facilities, equipment, and other services.

(c) CONTRACTS WITH HOST RAIL CARRIERS.—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

(d) ARBITRATION.—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

* * * * *

2. 49 U.S.C. 24101 provides in pertinent part:

Findings, mission, and goals

(a) FINDINGS.—(1) Public convenience and necessity require that Amtrak, to the extent its budget allows, provide modern, cost-efficient, and energy-efficient intercity rail passenger transportation be-

tween crowded urban areas and in other areas of the United States.

* * * * *

(b) MISSION.—The mission of Amtrak is to provide efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options and that is consistent with the goals of subsection (d).

(c) GOALS.—Amtrak shall—

(1) use its best business judgment in acting to minimize United States Government subsidies, including—

(A) increasing fares;

(B) increasing revenue from the transportation of mail and express;

(C) reducing losses on food service;

(D) improving its contracts with operating rail carriers;

(E) reducing management costs; and

(F) increasing employee productivity;

(2) minimize Government subsidies by encouraging State, regional, and local governments and the private sector, separately or in combination, to share the cost of providing rail passenger transportation, including the cost of operating facilities;

(3) carry out strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient transportation;

(4) operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables;

(5) develop transportation on rail corridors subsidized by States and private parties;

(6) implement schedules based on a systemwide average speed of at least 60 miles an hour that can be achieved with a degree of reliability and passenger comfort;

(7) encourage rail carriers to assist in improving intercity rail passenger transportation;

(8) improve generally the performance of Amtrak through comprehensive and systematic operational programs and employee incentives;

(9) provide additional or complementary intercity transportation service to ensure mobility in times of national disaster or other instances where other travel options are not adequately available;

(10) carry out policies that ensure equitable access to the Northeast Corridor by intercity and commuter rail passenger transportation;

(11) coordinate the uses of the Northeast Corridor, particularly intercity and commuter rail passenger transportation; and

(12) maximize the use of its resources, including the most cost-effective use of employees, facilities, and real property.

(d) MINIMIZING GOVERNMENT SUBSIDIES.—To carry out subsection (c)(12) of this section, Amtrak is encouraged to make agreements with the private sec-

tor and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies. Amtrak shall prepare a financial plan, consistent with section 204 of the Passenger Rail Investment and Improvement Act of 2008, including the budgetary goals for fiscal years 2009 through 2013. Amtrak and its Board of Directors shall adopt a long-term plan that minimizes the need for Federal operating subsidies.

3. 49 U.S.C. 24301 provides in pertinent part:

Status and applicable laws

(a) STATUS.—Amtrak—

(1) is a railroad carrier under section 20102(2)[2] and chapters 261 and 281 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.

(b) PRINCIPAL OFFICE AND PLACE OF BUSINESS.—The principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal

[2] See references in text note below.

office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the United States in a civil action.

(c) APPLICATION OF SUBTITLE IV.—Subtitle IV of this title shall not apply to Amtrak, except for sections 11123, 11301, 11322(a), 11502, and 11706. Notwithstanding the preceding sentence, Amtrak shall continue to be considered an employer under the Railroad Retirement Act of 1974, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act.

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

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

* * * * *

4. 49 U.S.C. 24302 provides:

Board of directors

(a) COMPOSITION AND TERMS.—

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

(A) The Secretary of Transportation.

(B) The President of Amtrak.

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

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

(3) An individual appointed under paragraph (1)(C) of this subsection shall be appointed for a term of 5 years. Such term may be extended until the individual's successor is appointed and quali-

fied. Not more than 5 individuals appointed under paragraph (1)(C) may be members of the same political party.

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

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

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

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

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

(3) The report submitted under paragraph (2) shall include a detailed justification for any travel or reimbursable business travel expense that deviates from

Amtrak's travel and reimbursable business travel expense policies and guidelines.

(d) VACANCIES.—A vacancy on the Board is filled in the same way as the original selection, except that an individual appointed by the President of the United States under subsection (a)(1)(C) of this section to fill a vacancy occurring before the end of the term for which the predecessor of that individual was appointed is appointed for the remainder of that term. A vacancy required to be filled by appointment under subsection (a)(1)(C) must be filled not later than 120 days after the vacancy occurs.

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

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

5. 49 U.S.C. 24303 provides:

Officers

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

(b) PAY.—The board may fix the pay of the officers of Amtrak. An officer may not be paid more than the general level of pay for officers of rail carriers with comparable responsibility. The preceding sentence

shall not apply for any fiscal year for which no Federal assistance is provided to Amtrak.

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

6. 49 U.S.C. 24305 provides in pertinent part:

General authority

* * * * *

(f) DOMESTIC BUYING PREFERENCES.—(1) In this subsection, "United States" means the States, territories, and possessions of the United States and the District of Columbia.

(2) Amtrak shall buy only—

(A) unmanufactured articles, material, and supplies mined or produced in the United States; or

(B) manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States.

(3) Paragraph (2) of this subsection applies only when the cost of those articles, material, or supplies bought is at least $1,000,000.

(4) On application of Amtrak, the Secretary of Transportation may exempt Amtrak from this subsection if the Secretary decides that—

(A) for particular articles, material, or supplies—

(i) the requirements of paragraph (2) of this subsection are inconsistent with the public interest;

(ii) the cost of imposing those requirements is unreasonable; or

(iii) the articles, material, or supplies, or the articles, material, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality; or

(B) rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time.

7. 49 U.S.C. 24307 provides in pertinent part:

Special transportation

(a) REDUCED FARE PROGRAM.—Amtrak shall maintain a reduced fare program for the following:

(1) individuals at least 65 years of age.

(2) individuals (except alcoholics and drug abusers) who—

(A) have a physical or mental impairment that substantially limits a major life activity of the individual;

(B) have a record of an impairment; or

(C) are regarded as having an impairment.

* * * * *

8. 49 U.S.C. 24308 provides:

Use of facilities and providing services to Amtrak

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

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

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

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

(B) When prescribing reasonable compensation under subparagraph (A) of this paragraph, the Board shall consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.

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

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

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

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

(c) PREFERENCE OVER FREIGHT TRANSPORTATION.—Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall estab-

lish the rights of the carrier and Amtrak on reasonable terms.

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

(e) ADDITIONAL TRAINS.—(1) When a rail carrier does not agree to provide, or allow Amtrak to provide, for the operation of additional trains over a rail line of the carrier, Amtrak may apply to the Board for an order requiring the carrier to provide or allow for the operation of the requested trains. After a hearing on the record, the Board may order the carrier, within 60 days, to provide or allow for the operation of the requested trains on a schedule based on legally permissible operating times. However, if the Board decides not to hold a hearing, the Board, not later than 30 days after receiving the application, shall publish in the Federal Register the reasons for the decision not to hold the hearing.

(2) The Board shall consider—

(A) when conducting a hearing, whether an order would impair unreasonably freight transportation of the rail carrier, with the carrier having the

burden of demonstrating that the additional trains will impair the freight transportation; and

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

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

(f) PASSENGER TRAIN PERFORMANCE AND OTHER STANDARDS.—

(1) INVESTIGATION OF SUBSTANDARD PERFORMANCE.—If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board (referred to in this section as the "Board") may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are

due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators. As part of its investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays. In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.

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

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

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

(B) what reasonable measures would adequately deter future actions which may reason-

ably 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).

9. 49 U.S.C. 24710 provides:

Long-distance routes

(a) ANNUAL EVALUATION.—Using the financial and performance metrics developed under section 207 of the Passenger Rail Investment and Improvement Act of 2008, Amtrak shall—

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

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

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

(1) on-time performance;

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

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

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

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

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

(7) improving financial performance;

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

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

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

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

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

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

(d) ENFORCEMENT.—The Federal Railroad Administration shall monitor the development, implementation, and outcome of improvement plans under this section. If the Federal Railroad Administration determines that Amtrak is not making reasonable progress in implementing its performance improvement plan or, after the performance improvement plan is implemented under subsection (c)(1) in accordance with the terms of that plan, Amtrak has not achieved the outcomes it has established for such routes, under the plan for any calendar year, the Federal Railroad Administration—

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

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

(3) may withhold appropriated funds otherwise available to Amtrak for the operation of a route or

routes from among the worst performing third of routes currently served by Amtrak on which Amtrak is not making reasonable progress, other than funds made available for passenger safety or security measures.

10. 49 U.S.C. 24902 provides in pertinent part:

Goals and requirements

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

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

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

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

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

(4) Trip-time requirements of this section must be achieved to the extent compatible with the prior-

ities referred to in paragraphs (1)-(3) of this subsection.

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

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

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

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

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

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

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

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