No. _____

IN THE

Supreme Court of the United States

ASSOCIATION OF AMERICAN RAILROADS,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA) gives Amtrak, a for-profit government corporation, joint rulemaking authority with the Federal Railroad Administration (FRA) over the private freight railroads that compete with Amtrak—and empowers an arbitrator with the ultimate authority to promulgate the regulations if Amtrak and FRA cannot agree.

Following a remand from this Court for resolution of the "substantial" constitutional questions presented, *see Dep't of Transp. v. Ass'n Am. R.R.s*, 135 S. Ct. 1225 (2015), a panel of the D.C. Circuit struck down Section 207 in its entirety as violating due process because it "authoriz[es] an economically self-interested actor to regulate its competitors." A different panel of the D.C. Circuit later reinstated the grant of rulemaking power to Amtrak and FRA by severing the arbitration provision, holding that severance cured the constitutional infirmity.

The questions presented are:

1. Whether PRIIA § 207 violates due process and the separation of powers by permitting regulatory authority to be exercised by a for-profit government corporation that participates in the very industry it is empowered to regulate.

2. Whether PRIIA § 207's grant of rulemaking power to Amtrak and FRA can be sustained by severing the arbitration provision.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the respondent named in the caption, respondents include Elaine Chao, in her official capacity as Secretary of Transportation; the Federal Railroad Administration; and Ron Batory, in his official capacity as Administrator of the Federal Railroad Administration.

The Association of American Railroads is a trade association. It has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Association of American Railroads respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The D.C. Circuit's opinion (App. 1a) is reported at 896 F.3d 539. The D.C. Circuit's orders denying rehearing or rehearing en banc (App. 88a, 90a) are not reported. The order and opinion of the district court (App. 42a) is not reported but is available at 2017 WL 6209642. The D.C. Circuit's prior opinion on remand from this Court (App. 50a) is reported at 821 F.3d 19.

JURISDICTION

The D.C. Circuit entered its judgment on July 20, 2018, and denied petitioner's timely petition for rehearing or rehearing en banc on October 24, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 207 of the Passenger Rail Investment and Improvement Act, codified at 49 U.S.C. § 24101 note, provides, in relevant part:

SEC. 207. METRICS AND STANDARDS.

(a) IN GENERAL.—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, ontime performance and minutes of delay, ridership, 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.

Sections 207 and 213(a) of the Passenger Rail Investment and Improvement Act are reprinted in full in the appendix to this petition, App. 92a-96a.

INTRODUCTION

This case presents the question whether Congress may vest a for-profit government corporation with regulatory authority over its private-sector competitors.

Congress created Amtrak, and provided that it "shall be operated and managed as a for-profit corporation," 49 U.S.C. § 24301(a)(2), rather than as a neutral and disinterested government agency. Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA) gives Amtrak and the Federal Railroad Administration (FRA) joint rulemaking authority over the private freight railroads that compete with Amtrak for scarce track capacity. *Id*. § 207(a). The statute provides that once Amtrak and FRA have issued their regulations, the freight railroads "shall incorporate" those regulations into their contracts with Amtrak "[t]o the extent practicable." *Id*. § 207(c). In the event Amtrak and FRA cannot agree, or fail to issue regulations within 180 days, an unspecified arbitrator may take over and promulgate the regulations. *Id*. § 207(d).

Following a remand from this Court, *see Dep't of Transp. v. Ass'n Am. R.R.s*, 135 S. Ct. 1225 (2015), a unanimous panel of the D.C. Circuit struck down Section 207 in its entirety, holding that it "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor to regulate its competitors." App. 52a-53a. But a different D.C. Circuit panel later held, by a 2-1 vote over a dissent from Judge Tatel, that the due process violation could be cured by severing the statute's arbitration provision, and leaving the grant of rulemaking power to Amtrak intact. App. 23a-24a.

The result is that, for the first time, a for-profit government corporation has been authorized to exercise regulatory authority over the very industry in which it competes as a commercial actor. This Court should grant review because the court of appeals' decision is directly at odds with *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). There, the Court held that entities exercising sovereign rulemaking power must be "disinterested," and that granting a corporation "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Id.* at 311-12.

The panel's severability analysis raises additional questions warranting this Court's review. As Judge Tatel emphasized in dissent, severing the arbitration provision does "not correct the due-process deficiencies" in Section 207 identified by the prior D.C. Circuit panel. App. 39a. Moreover, by severing the arbitration provision, thus empowering Amtrak and FRA to conduct a rulemaking *without* possible recourse to the arbitrator, the court authorized the government to issue binding rules through a process that fundamentally differs from the one Congress enacted into law. In doing so, the court infringed on Congress's constitutional prerogative to specify how its delegated rulemaking power may be exercised.

This Court has recognized that the due process questions presented by this case are "substantial." *Dep't of Transp.*, 135 S. Ct. at 1228. The decision below—authorizing Congress to launch government corporations into the commercial world with a dual statutory mandate to regulate their competitors and make a profit—warrants review.

STATEMENT

A. Amtrak And The Freight Railroads

In 1970, Congress established the National Railroad Passenger Corporation, better known as Amtrak, to engage in the commercial enterprise of providing intercity passenger rail service. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985). Congress's purpose was to "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking." H.R. Rep. No. 91-1580, at 1-2 (1970), reprinted in 1970 U.S.C.C.A.N. 4735, 4735.

Congress provided that Amtrak "shall be operated and managed as a for-profit corporation," 49 U.S.C. § 24301(a)(2), and Amtrak began offering passenger service on May 1, 1971. *Atchison*, 470 U.S. at 456. Because essentially all of the nation's rail infrastructure was owned at the time by the freight railroads, the only viable option was for Amtrak's passenger trains to operate over the freight railroads' tracks. The same is true today: 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. JA156.[1]

The tracks used by Amtrak trains are also used by the host railroads to move freight traffic. Just as an air-traffic controller manages departures and landings at a busy airport, the freight railroads must carefully schedule and manage the timing and sequencing of the passenger and freight trains operating on their tracks to maximize available

[1] "JA" cites refer to the Joint Appendix filed in the D.C. Circuit following the remand from this Court. *See* D.C. Cir. Doc. 1700389.

capacity and minimize backups and delays. JA258, 266, 273, 281. Amtrak trains consume capacity and limit the host railroads' ability to move freight and serve their customers. Thus, while "Amtrak and freight railroads do not compete for passengers," they "do compete for scarce resources (i.e. train track) essential to the operation of both kinds of rail service." App. 53a n.1.

B. Section 207's Grant Of Rulemaking Authority

Section 207 of PRIIA sets forth the process through which Amtrak and FRA must issue regulations governing the performance of Amtrak trains operating on the freight railroads' tracks.

Subsection 207(a) requires Amtrak and FRA to "jointly" develop and promulgate regulations establishing, among other things, on-time performance standards. *See* PRIIA § 207(a) (codified at 49 U.S.C. § 24101 note) ("the Federal Railroad Administration and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations"). If Amtrak trains do not satisfy these standards, the Surface Transportation Board "shall" launch an investigation at Amtrak's request, and potentially assess damages, payable directly to Amtrak, against the host freight railroad. *Id*. § 213(a)(1) (codified at 49 U.S.C. § 24308(f)).

Subsection 207(c) provides that the freight railroads "shall" amend their existing contracts with Amtrak by "incorporat[ing]" the regulations into their contracts to the extent practicable. These contracts—commonly known as operating agreements—are painstakingly negotiated documents that were

executed soon after Amtrak's creation and have been amended or renegotiated over the years. JA257-84. The operating agreements establish agreed-upon conditions governing Amtrak's use of the freight railroads' track, and spell out rights and duties of the parties. *Atchison*, 470 U.S. at 455.

Finally, subsection 207(d) provides that if Amtrak and FRA do not issue the metrics and standards within 180 days, "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."

Amtrak and FRA jointly issued their regulations—known as the "metrics and standards"—in 2010. The metrics and standards forced the freight railroads to make immediate and substantial changes to their business operations, including delaying their own freight traffic and redirecting resources in an effort to comply. *See Ass'n Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 672 n.6 (D.C. Cir. 2013) ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take.").

C. Proceedings Below

1. The Association of American Railroads (AAR), whose members include North America's largest freight railroads, challenged PRIIA § 207 in its entirety as unconstitutional. *See* D. Ct. ECF 8 at 1 ("AAR seeks a declaration that Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) is unconstitutional, and that the 'Metrics and Standards' promulgated by Amtrak and the Federal Railroad Administration (FRA) pursuant

to that statutory authority are consequently invalid."). The district court had jurisdiction under 28 U.S.C. § 1331. It granted summary judgment in the government's favor, but the D.C. Circuit reversed. The court of appeals held that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity." 721 F.3d at 668.

This Court then vacated and remanded for further proceedings on the premise that Amtrak should be deemed a government entity "for purposes of determining the validity of the metrics and standards." *Dep't of Transp. v. Ass'n Am. R.R.s*, 135 S. Ct. 1225, 1228 (2015). "Although Amtrak's actions here were governmental," the Court stated, "substantial questions respecting the lawfulness of the metrics and standards . . . may still remain in the case" and "should be addressed in the first instance on remand." *Id*. at 1228, 1234 (citation omitted). The Court specifically identified the argument that "Congress violated the Due Process Clause by giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry." *Id*. at 1234 (quotation marks omitted).

Justices Alito and Thomas wrote separate concurrences. Justice Alito observed that the scheme is "obviously regulatory" and emphasized that constitutional dangers arise when the government seeks to "regulate without accountability by passing off a Government operation as an independent private concern." 135 S. Ct. at 1234, 1235 (Alito, J., concurring). Justice Thomas concluded that "Section 207 . . . violates the Constitution," and wrote to "highlight serious constitutional defects in [the statute] that are properly presented for the lower

courts' review on remand." *Id*. at 1240, 1254 (Thomas, J., concurring in the judgment).

2. In its initial opinion on remand, the D.C. Circuit found two separate and distinct constitutional flaws in the statute. It held that Section 207 "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor [Amtrak] to regulate its competitors *and* violates the Appointments Clause for delegating regulatory power to an improperly appointed arbitrator." App. 52a-53a (emphasis added and footnote omitted).

First, the court stated that the "legal question at the heart of this case is whether it violates due process for Congress to give a self-interested entity rulemaking authority over its competitors." App. 61a. Declaring that "the Government's arguments are unpersuasive," the court ruled in AAR's favor, striking down Section 207 as unconstitutional in its entirety. App. 75a. The court devoted ten published pages to explaining why subsection 207(a)'s grant of rulemaking authority to Amtrak violates the Due Process Clause. App. 60a-80a. It "conclude[d], as did the Supreme Court in 1936, that the due process of law is violated when a self-interested entity is 'intrusted with the power to regulate the business . . . of a competitor.'" App. 69a (quoting *Carter Coal*, 298 U.S. at 311). That is because "the Due Process Clause effectively guarantees the regulatory power of the federal government will be wielded by 'presumptively disinterested' and 'duly appointed' actors who, in exercising that awesome power, are beholden to no constituency but the public good." App. 87a.

Second, after concluding the due process analysis, the court "consider[ed] the other challenge to PRIIA preserved for [its] review: whether the arbitration

provision violates the Appointments Clause." App. 80a. The court held that subsection 207(d) violated the Appointments Clause because it delegated regulatory power to an improperly appointed arbitrator. The court concluded that "[w]ithout providing for the arbitrator's direction or supervision by principal officers, PRIIA impermissibly vests power to appoint an arbitrator in the [Surface Transportation Board]." App. 86a.

Accordingly, the court reversed the grant of summary judgment in favor of the government. The court did not remand or suggest in any way that there were to be further proceedings in the district court. To the contrary, the court made clear that any effort to fix the statute would need to come from Congress. It explained that the Due Process Clause "puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies"—but not both. App. 79a.

3. Nearly five months after the D.C. Circuit issued its mandate, the government resurfaced in the district court. It asked the court to enter a final judgment reinstating the grant of rulemaking power to Amtrak, on the theory that subsection 207(d)'s arbitration provision could be severed, thus purportedly curing the due process infirmity in subsection 207(a). This was the first time in more than five years of litigation that the government had argued that Section 207 was severable, or that the grant of rulemaking power to Amtrak could be upheld as constitutional on this basis.

The district court (Boasberg, J.) rejected the government's request. It explained that "[t]he Circuit framed its inquiry broadly, on several occasions, as whether the 'PRIIA violates due process.'" App. 45a.

Then, "[a]fter ten pages of discussion on § 207, the Court of Appeals held, 'Because PRIIA endows Amtrak with regulatory authority over its competitors, that delegation violates due process.'" *Id*. The district court explained that "[j]ust because there certainly is a due-process violation with § 207(d) does not mean there is not a violation without it," and "[n]othing in the D.C. Circuit's opinion expresses this latter reading." App. 46a. Thus, the district court concluded, "[o]n an issue the Court of Appeals duly considered, this Court will not propose a narrower possible holding than what it adopted; otherwise, AAR would be correct that this Court would essentially be overriding the holding of the D.C. Circuit and transforming AAR's hard-earned win into a loss." App. 47a (alterations and quotation marks omitted). The court added that "[e]ven if the Circuit had left open the question of whether there would be a due-process issue absent § 207(d), severance does not necessarily follow as the relief." *Id*. Accordingly, the court held Section 207 void and unconstitutional. App. 48a.

4. A split panel of the D.C. Circuit reversed.[2] The new panel acknowledged that the prior panel "held Section 207 unconstitutional" in its entirety. App. 7a. But the new panel held that subsection 207(a)'s grant of rulemaking power to Amtrak could be resurrected through what it called a "curative severance"

[2] The same panel that decided this case initially (Judges Brown, Sentelle, and Williams) decided it again following this Court's remand, invalidating Section 207 in full both times. However, when the government appealed the district court's order on severability, the case was assigned to a different panel (Judges Garland, Tatel, and Millett), which reinstated the grant of rulemaking power to Amtrak, over Judge Tatel's dissent.

approach. App. 18a. According to the new panel, the prior panel held that Section 207 violated due process *only* because of the arbitration provision; in other words, "the arbitration provision is what constitutionally derailed the statutory scheme." App. 11a. Thus, by severing the arbitration provision in subsection 207(d), the grant of rulemaking power to Amtrak in subsection 207(a) could spring back to life. App. 18a.

The new panel reasoned that, with the arbitration provision deleted, the grant of rulemaking power to Amtrak could be upheld under this Court's decisions in *Currin v. Wallace*, 306 U.S. 1 (1939), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). In the new panel's view, giving Amtrak and FRA co-equal regulatory power over private freight railroads did not pose a constitutional problem, because FRA could stop Amtrak from regulating in its own self-interest. App. 11a-18a.

Judge Tatel dissented. He rejected the government's severability "gambit," and stated that "our prior holding permits no remedy short of [Section 207's] wholesale invalidation." App. 29a, 31a. He explained that "our prior panel never suggested that the constitutional flaw resides in any localized, potentially severable portion of Section 207—and certainly never breathed so much as a hint that it resides in subsection 207(d)." App. 31a-32a. And he emphasized that the prior panel invalidated Section 207 *in full*—and that the D.C. Circuit had historically presumed that its members respect their duty not to strike down more of a statute than necessary. *See* App. 40a ("Out of respect for its efforts, I would presume that our prior panel well heeded its

obligation to act cautiously when reviewing the constitutionality of a legislative Act." (alterations and citations omitted)).

The court denied rehearing. App. 88a-91a.

REASONS FOR GRANTING THE PETITION

This Court has recognized that the constitutional questions presented by this case are "substantial." *Dep't of Transp. v. Ass'n Am. R.R.s*, 135 S. Ct. 1225, 1228 (2015). Justice Thomas emphasized that this case "raises serious constitutional questions" that "merit close consideration by the courts below and by this Court if the case reaches us again." *Id.* at 1254 (Thomas, J., concurring in the judgment). And Justice Alito observed that "[r]ecognition that Amtrak is part of the Federal Government raises a host of constitutional questions." *Id.* at 1234 (Alito, J., concurring). Because this case presents substantial questions of constitutional law—and because the decision below directly conflicts with decisions of this Court—review is warranted.

I. THIS CASE IS IMPORTANT AND WARRANTS REVIEW.

This case raises fundamental questions about the separation of powers and the constitutional limits on congressional delegations of rulemaking authority. Congress's power to enter the commercial sphere by creating federally chartered, statutorily "private" for-profit corporations is firmly established. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386-91 (1995). Likewise, Congress's power to delegate rulemaking authority to federal agencies is well settled. *See Touby v. United States*, 500 U.S. 160, 165 (1991). But until it enacted PRIIA, Congress had never attempted to *blend* the two—to give a federally

chartered, for-profit corporation rulemaking authority over its own industry.

As the D.C. Circuit recognized, Congress's attempt to vest a for-profit government corporation with regulatory authority over its private-sector competitors is without precedent in American history. App. 51a. This Court has held that those exercising sovereign rulemaking power must be neutral, even-handed, and "disinterested." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). For that reason, granting a corporation "the power to regulate the business of another, *and especially of a competitor*," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Id.* at 311-12 (emphasis added). Section 207 is unconstitutional under a straightforward application of *Carter Coal* because it gives Amtrak the power to regulate its competitors. Amtrak cannot be a disinterested regulator of its own industry when it stands to reap substantial commercial benefits by issuing rules that help Amtrak and harm Amtrak's competitors.

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

The D.C. Circuit recognized that Congress had taken an "unprecedented" approach to Amtrak, creating a "wholly unique statutory creature"—"a for-profit corporation indirectly controlled by the President of the United States" and "endowed . . . with agency powers . . . to regulate its resource competitors." App. 51a. Indeed, the government has never identified another statute that, like PRIIA § 207, vests a federally chartered, for-profit corporation with regulatory authority over other companies in the same industry. This is another strong indicator that Section 207 is unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." (quotation marks omitted)).

The panel's approach to severability raises additional important questions. Through what it called a "curative severance" technique, the panel approved Amtrak and FRA's issuing rules through a procedure that Congress did not authorize. App. 18a. In enacting Section 207, Congress authorized Amtrak and FRA to issue rules under the auspices of an arbitrator whose jurisdiction would be invoked if the parties did not agree or otherwise failed to issue regulations promptly. As the D.C. Circuit recognized, this was a critical element of the rulemaking scheme because it pressured the two sides to compromise. App. 11a. By deleting the arbitration provision, the panel judicially authorized the exercise of delegated rulemaking power in a way that is inconsistent with Congress's actual delegation. Whether a court may sever a statute so as to authorize rulemaking through a procedure Congress did not enact is itself an important question that warrants this Court's review.

The importance of these issues, and the panel majority's constitutional errors, are underscored by the fact that five of the seven federal judges who have considered this case on remand—all but the two who comprised the panel majority in the D.C. Circuit's most recent decision—have concluded that Section 207 is unconstitutional in its entirety. That minority view on these weighty questions should not be permitted to stand in the absence of this Court's review.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THIS COURT RECOGNIZING THAT GOVERNMENT REGULATORS MUST BE NEUTRAL AND DISINTERESTED.

The panel's conclusion that the grant of rulemaking authority to Amtrak can be sustained, so long as the arbitration provision is deleted, is irreconcilable with *Carter Coal* and other decisions of this Court. In reaching this result, the panel relied on two older cases that Justice Thomas described as "discredited," *Dep't of Transp.*, 135 S. Ct. at 1254 (Thomas, J., concurring in the judgment), for the proposition that self-interested corporations can exercise rulemaking power in conjunction with a neutral federal agency. This Court's review is warranted to clarify the constitutional limits on Congress's power to vest a for-profit corporation with regulatory authority over other businesses in the same industry.

A. Giving Amtrak Regulatory Power Over Its Private-Sector Competitors Violates The Constitution.

1. The government's sovereign rulemaking power must be exercised in a neutral and disinterested manner. *Carter Coal* applied this fundamental due

process principle to delegations of rulemaking power to corporations. The Court held that granting a corporation "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311-12 (collecting cases). Because a regulator must be "presumptively disinterested," Congress could not give selected coal companies the power to regulate the rest of the industry in light of the risk that they would regulate in their own self-interest. *Id*. at 311.

The decision below conflicts with *Carter Coal*. Section 207 gives Amtrak co-equal rulemaking power with FRA. Yet Amtrak cannot be a "presumptively disinterested" regulator of the railroad industry, *Carter Coal*, 298 U.S. at 311, because it is required by statute to regulate in its own self-interest—and disadvantage its competitors—rather than regulate for the common good. Amtrak operates under a statutory for-profit mandate and its directors are required by federal law to make decisions in a way that increases Amtrak's profits. *See* 49 U.S.C. § 24301(a)(2). In Amtrak's organic statute, Congress directed Amtrak *not* to conduct itself like a neutral and disinterested regulatory agency, but rather to "use its best business judgment" in generating profit for Amtrak by "improving its contracts with operating rail carriers," and by "undertak[ing] initiatives . . . designed to maximize [Amtrak's] revenues." *Id*. § 24101(c)-(d).

Amtrak has commercial interests that are directly at odds with the freight railroads' commercial interests. As the D.C. Circuit recognized, "Amtrak may not compete with the freight railroads for customers, but it does compete with them for use of

their scarce track." *Ass'n Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666, 675 (D.C. Cir. 2013). Amtrak and the freight railroads alike want their trains to run on time, but because only one train can occupy a slot on a rail line, granting that slot to an Amtrak train means that freight traffic must be delayed. Adjusting freight operations to satisfy the metrics and standards imposes significant costs and burdens on the freight railroads, in addition to the costs and burdens of having to host the Amtrak trains in the first place. *See* JA262, 266-67, 273-74, 281.

To be sure, Amtrak is *also* required to pursue various "public" goals, such as providing *passenger* rail service. But this does not mean that Amtrak is capable of regulating the *freight* railroad industry in the "public interest." Nothing in Amtrak's charter or composition requires it to take the freight railroads' interests into account or to regulate through anything other than an Amtrak-focused lens. As the D.C. Circuit observed, "[p]erverse incentives abound" under Section 207, because "[n]othing about the government's involvement in Amtrak's operations restrains the corporation from devising metrics and standards that inure to its own financial benefit rather than the common good." *Ass'n Am. R.R.s*, 721 F.3d at 676. In issuing the metrics and standards, Amtrak was motivated to regulate the railroad industry with the goal of benefiting a single corporation within that industry—Amtrak—just as any profit-seeking commercial actor would be if Congress happened to grant it regulatory power over its own industry.

Amtrak's officers not only had a commercial interest in the substance of their own regulations, they had a *personal* financial interest as well. Under

federal law, Amtrak's officers may receive pay greater than "the general level of pay for officers of rail carriers with comparable responsibility" for any year in which Amtrak does not receive federal assistance, 49 U.S.C. § 24303(b), thus giving Amtrak officials a strong *private* financial incentive to maximize Amtrak's profits, reduce the federal subsidy, and receive a higher salary in return. Likewise, Congress encouraged Amtrak's Board "to develop an incentive pay program for Amtrak management employees." *See* PRIIA § 223. The Board did so, providing management employees with the opportunity "to receive monetary awards based on the company achieving pre-determined financial and customer service goals." *See* Amtrak Office of Inspector Gen., Audit Report OIG-A-2015-009, *Human Capital: Incentive Awards Were Appropriate, But Payment Controls Can Be Improved* 1 (2015). In short, the potential for financial self-interest affecting the regulatory decisions of Amtrak managers is not just theoretical—it is baked into federal law and the compensation structure established by Amtrak's Board. *See Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (due process violated where "success in the Board's efforts would possibly redound to the personal benefit of members of the Board").

This Court's ruling that Amtrak must be deemed a government entity for constitutional purposes does not change the fact that Amtrak is a commercial actor that has every incentive to wield its regulatory power to advance its own business interests. Whether they be private entities, as in *Carter Coal*, or government-chartered corporations, as is Amtrak, those exercising governmental power must be free from bias and self-interest. "Not only is a biased decisionmaker constitutionally unacceptable but our system of law

has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quotation marks omitted). A statute empowering Coca-Cola to regulate Pepsi would violate due process. That result should not change just because the regulating entity is a federally chartered corporation: the for-profit Government Cola Corporation should not be allowed to regulate Coke and Pepsi. Regardless of whether the regulator is a private company or a government entity, due process is violated where the regulator has commercial "interests [that] may be and often are adverse to the interests of others in the same business," *Carter Coal*, 298 U.S. at 311, and thus has an incentive to wield sovereign power in a way that disadvantages its market competitors.

2. The decision below erases what this Court has recognized as the "fundamental" constitutional distinction between market participant and market regulator. *See Carter Coal*, 298 U.S. at 311 ("The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a government function . . . ."). If Congress can create for-profit entities that are simultaneously market participants and market regulators, that would signal a profound expansion in government power, and a basic change in the nature of federal agencies. Congress could give the for-profit corporations it creates a boost in the marketplace by pairing them up with traditional regulatory agencies—and then vesting them with the power to regulate their competitors.

The decision below also conflicts with this Court's line of cases recognizing that when the government

chooses to enter the commercial sphere and compete against private companies, it must compete on a level playing field. *See Cooke v. United States*, 91 U.S. 389, 398 (1875) ("If [the federal government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."); *Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907-08 (1824) ("As a member of a corporation, a government never exercises its sovereignty."); *see also Library of Cong. v. Shaw*, 478 U.S. 310, 317 n.5 (1986) (sovereign immunity "inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise") (abrogated on other grounds).

The unconstitutional blending of sovereign and commercial actor is especially visible in subsection 207(c). That provision requires that the freight railroads "shall" amend their contracts with Amtrak to "incorporate" the metrics and standards to the extent practicable. Congress launched Amtrak into the commercial sphere to negotiate these contracts with the freight railroads in its role as a statutorily private corporation. Now, Congress has attempted to empower Amtrak to assume the mantle of a government regulator and amend those contracts, achieving through regulatory fiat what it could not achieve through arm's-length negotiation.

B. The D.C. Circuit's Rationale Does Not Withstand Scrutiny.

The panel focused on FRA's involvement in the rulemaking, noting that the agency shared co-equal rulemaking power with Amtrak. It held that Section 207, once stripped of the arbitration provision, was indistinguishable from the rulemaking schemes this

Court upheld in *Currin v. Wallace*, 306 U.S. 1 (1939), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). *See* App. 11a-14a. But the statutes involved in those cases do not resemble, let alone justify, the scheme at issue here.

Currin involved a statute that granted the Secretary of Agriculture authority to issue regulations governing tobacco markets, but provided that the regulations would only be effective if two-thirds of the growers in the relevant market voted in a referendum to subject themselves to the regulations. *See* 306 U.S. at 6. *Currin* is inapposite here because this is not a referendum scheme: the freight railroads never voted to subject themselves to Amtrak and FRA's regulations. Moreover, as the Court explained, the *Currin* scheme did not involve self-interested corporations exercising regulatory power because "it is *Congress* that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." *Id*. at 16 (emphasis added). The Court pointed out that "Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market" absent consent of two-thirds of the regulated businesses. *Id*. at 15. "'While in a sense one might say that such [businesses] are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution.'" *Id*. at 16 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928)). Thus, the panel's assertion that *Currin* authorizes "programs for the joint private

and governmental promulgation of regulations," App. 12a, is simply wrong.[3]

Adkins involved a scheme where coal producers "propose[d] minimum prices pursuant to prescribed statutory standards," and the proposed prices were then "approved, disapproved, or modified" by the Department of the Interior. 310 U.S. at 388. *Adkins* is easily distinguishable here because under the *Adkins* scheme, the self-interested parties merely *proposed* minimum prices—it was the disinterested government agency that then decided whether to adopt, modify, or reject the proposals. *See id*. at 398. As the Court explained, self-interested corporations may play a role in rulemaking provided that they "function subordinately" to a disinterested government agency. *Id*. at 399. Here, of course, Section 207 did *not* make Amtrak "function subordinately" to FRA. Quite the contrary, Amtrak shared *co-equal* rulemaking power with the agency. If Amtrak wanted to block FRA's proposed regulations, FRA would be powerless to overrule Amtrak's wishes. *See* App. 77a-78a ("As joint developers, [Amtrak and FRA] occupy positions of equal authority," and "FRA is powerless to overrule Amtrak.").

The panel held that due process is satisfied because FRA supposedly can hold the line against Amtrak, and thus prevent any self-interested Amtrak proposals from becoming law. App. 18a. But this

[3] Justice Thomas observed that *Currin*—and another case relied upon by the panel, *United States v. Rock Royal Co-operative, Inc*., 307 U.S. 533 (1939)—"have been discredited and lack any force as precedents" because they "are directly contrary to our more recent holding that a discretionary 'veto' necessarily involves an exercise of legislative power." *Dep't of Transp.*, 135 S. Ct. at 1254 (Thomas, J., concurring in the judgment) (citing *INS v. Chadha*, 462 U.S. 919, 952-53 (1983)).

overlooks the pressure to compromise. Congress mandated that Amtrak and FRA "shall" issue regulations within 180 days. *See* PRIIA § 207(a). Thus, assuming that FRA officials will comply with the statute and "endeavor to promulgate the required rules," App. 20a, they will be under pressure to compromise—to accept something demanded by the self-interested party that the neutral government officials would not have wanted if it was entirely up to them, but that they are forced to accept in order to reach an agreement and issue regulations as Congress has directed. Similarly, if FRA wished to promulgate regulations that were *not* crafted to favor Amtrak, Amtrak could block them. Giving a self-interested corporation the power to veto the regulation preferred by a disinterested federal agency violates due process. In these ways, FRA's involvement cannot purge the taint arising from Amtrak's co-equal role in the rulemaking.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SEVERABILITY PRECEDENTS.

By authorizing Amtrak and FRA to issue rules through a process that fundamentally differs from the one Congress enacted into law, the panel infringed on Congress's constitutional prerogative to specify how its delegated rulemaking power may be exercised. The panel's use of severability conflicts in several respects with prior decisions of this Court.

This Court has held that recipients of delegated rulemaking power "may not exercise [their] authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (quotation marks omitted). Agencies are "bound, not only by the ultimate

purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). This bedrock principle respects the text of Article I of the Constitution, which vests "[a]ll" legislative power in the Congress, and reflects that Congress—and only Congress—may determine when and how its delegated rulemaking power may be exercised.

Here, Congress specified the process through which the metrics and standards must be issued: a joint FRA–Amtrak rulemaking, carried out under the auspices of an arbitrator whose jurisdiction could be invoked by anyone "involved" in the rulemaking in the event of disagreement. *See* PRIIA § 207(d). By deleting the arbitration provision, the panel lifted Congress's restriction on Amtrak and FRA's authority, and empowered Amtrak and FRA to exercise rulemaking authority in a manner that is *not* consistent with the administrative structure Congress enacted into law. Indeed, the panel acknowledged that, by eliminating the arbitrator from the scheme, its decision had the effect of redirecting the "[u]ltimate control" over the rulemaking process. App. 13a. The panel described the arbitration provision not as an insignificant appendage, but as "the linchpin" of the rulemaking scheme that enabled Amtrak "to unconstitutionally exercise regulatory authority over its competitors." App. 9a.

Deleting the "linchpin" of a rulemaking scheme as a way of redirecting the "ultimate authority" to issue

regulations eliminates a critical check that Congress purposefully placed in the statute. The very fact that Congress chose an arbitrator to resolve disputes shows that Congress wanted a neutral and disinterested referee. Empowering Amtrak to regulate in its own self-interest while eliminating the neutral referee is exactly the *opposite* of what Congress intended. The panel majority further erred by excusing the government's failure to raise severability earlier. The government litigated this case for years without ever suggesting the statute could be severable, until it lost the case in the D.C. Circuit. App. 21a.

The D.C. Circuit's severability "fix" infringes on Congress's prerogative to decide whether and how to fix the statute itself. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court explained that a court is not "free to rewrite the statutory scheme in order to approximate what [it] think[s] Congress might have wanted had it known that [enacting the statute] was beyond its authority. If that effort is to be made, it should be made by Congress." *Id*. at 76. Put differently, the "editorial freedom" to revise a statute after the finding of a constitutional violation "belongs to the Legislature, not the Judiciary." *Free Enterprise Fund*, 561 U.S. at 510. As the three members of the first D.C. Circuit panel, as well as Judges Tatel and Boasberg, all recognized—contrary to the views of the two members of the later panel majority—any future fix to Section 207 must come from Congress. *See* App. 33a, 47a-48a, 79a.

CONCLUSION

As the Court has recognized, *see* 135 S. Ct. at 1228, this case raises "substantial" questions of constitutional law concerning Congress's power to vest rulemaking authority in for-profit government corporations it has launched into the commercial sphere. Many aspects of the decision below—its clear conflict with *Carter Coal*, its questionable reliance on two older precedents from this Court, and its aggressive use of severability to judicially refashion the rulemaking procedure Congress enacted into law—underscore the need for this Court's review.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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