No. 18-976

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**

## BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CATO INSTITUTE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER


DARYL JOSEFFER
MICHAEL SCHON
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

C. FREDERICK BECKNER III*
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
rbeckner@sidley.com

*Counsel for Amicus Curiae Chamber of Commerce of the United States of America*


February 27, 2019


* Counsel of Record


[Additional counsel listed on inside cover]

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Massachusetts
Avenue, N.W.
Washington, D.C. 20001

*Counsel for Amicus Curiae Cato Institute*

KAREN R. HARNED
LUKE A. WAKE
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
1201 F Street, N.W.
Suite 200
Washington, D.C. 20004

*Counsel for Amicus Curiae National Federation of Independent Business*

## QUESTIONS PRESENTED

1. Whether Section 207 of the Passenger Rail Investment and Improvement Act violates due process and the separation of powers by permitting Amtrak, a for-profit government corporation, to exercise regulatory authority over the very industry in which it participates.

2. Whether Section 207's grant of rulemaking power to Amtrak and the Federal Railroad Administration can be sustained by severing the statute's arbitration provision.

TABLE OF CONTENTS

| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| INTERESTS OF *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 7 |
| I. ALLOWING A FOR-PROFIT GOVERNMENT CORPORATION TO REGULATE ITS COMPETITORS VIOLATES DUE PROCESS | 7 |
| A. The Decision Below Leaves Amtrak With Regulatory Power Over Freight Railroads | 7 |
| B. Amtrak's Regulatory Power Violates Due Process | 12 |
| II. THE DECISION BELOW COULD DISTORT COMPETITION AND HINDER EFFICIENT FREIGHT RAIL TRANSPORT | 17 |
| A. The D.C. Circuit's Rule Would Permit Congress Or The States To Empower Other Government Corporations To Regulate Their Competitors | 18 |
| B. The Decision Below Risks Serious Repercussions For Freight Shippers And The Economy | 21 |
| CONCLUSION | 24 |

## TABLE OF AUTHORITIES

CASES Page

*Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986) .......... 14
*Am. Trucking Ass'ns, Inc.* v. *City of L.A.*, 569 U.S. 641 (2013) .......... 2, 4
*Ass'n of Am. R.R.* v. *Dep't of Transp.*, 821 F.3d 19 (D.C. Cir. 2016), *petition for cert. filed* (U.S. Jan. 28, 2019) (No. 18-976) ...... 1
*Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936) .......... 4, 5, 15, 18
*Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979) .......... 10
*Connally* v. *Georgia*, 429 U.S. 245 (1977) .... 14
*Dep't of Transp.* v. *Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015) .......... 1, 8, 9
*Eubank* v. *City of Richmond*, 226 U.S. 137 (1912) .......... 15
*Gibson* v. *Berryhill*, 411 U.S. 564 (1973) ...... 14
*INS* v. *Chadha*, 462 U.S. 919 (1983) ........... 9
*Int'l Ass'n of Machinists & Aerospace Workers* v. *Metro-N. Commuter R.R.*, 24 F.3d 369 (2d Cir. 1994) .......... 12
*Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) .......... 2, 18
*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940) .......... 11
*Tumey* v. *Ohio*, 273 U.S. 510 (1927) ..... 13, 14, 16
*Ward* v. *Vill. of Monroeville*, 409 U.S. 57 (1972) .......... 14
*Washington ex rel. Seattle Title Tr. Co.* v. *Roberge*, 278 U.S. 116 (1928) .......... 15
*White* v. *Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204 (1983) .......... 4
*Williams* v. *Pennsylvania*, 136 S. Ct. 1899 (2016) .......... 12

TABLE OF AUTHORITIES—continued


| STATUTES | Page |
|---|---|
| Pub. L. No. 110–432, 122 Stat. 4848 (2008) | 7 |
| 5 U.S.C. § 553(c) | 10 |
| 5 U.S.C. app. 2 § 2 | 10 |
| § 9 | 10 |
| 15 U.S.C. § 78s(b) | 11 |
| 43 U.S.C. § 1606(d) | 19 |
| 49 U.S.C. § 24101(d) | 16 |
| § 24301(a) | 16 |
| § 24303(b) | 16 |
| N.D. Cent. Code § 54-18-02 | 19 |

FOREIGN CASES

| | |
|---|---|
| *The Case of the King's Prerogative in Saltpetre* (1607) 77 Eng. Rep. 1294, 12 Co. Rep. 12 | 12 |
| *Dr. Bonham's Case* (1610) 77 Eng. Rep. 638, 8 Co. Rep. 107 a (C.P.) | 12 |

LEGISLATIVE HISTORY

| | |
|---|---|
| *Perspectives from Users of the Nation's Freight System: Hearing Before the Panel on 21st-Century Freight Transp. of the H. Comm. on Transp. & Infrastructure*, 113th Cong. (2013) (statement of Edward R. Hamberger, President and CEO, Association of American Railroads) | 22 |
| S. Rep. No. 94-75 (1975) | 11 |

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES Page

Jarod M. Bona & Luke A. Wake, *The Market-Participant Exception to State-Action Immunity from Antitrust Liability*, 23 Competition: J. Antitrust & Unfair Competition L. Sec. St. B. Cal. 156 (2014) ....... 17

Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012)............ 17

A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543 (1995) ................................................ 18, 20

Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201 (1937) ......... 18

Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. Pa. L. Rev. 861 (2018) .................................... 11, 21

Mariana Pargendler, *State Ownership and Corporate Governance*, 80 Fordham L. Rev. 2917 (2012)........................................ 19

Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 Va. L. Rev. 403 (1988)......................................................... 9

Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 Sw. U. L. Rev. 569 (2003).......................................... 12

E. Budd Simpson, *Doing Business with Alaska Native Corporations*, 16 Bus. L. Today 37 (2007).......................................... 19

George P. Smith, II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 Wash. L. Rev. 297 (1966)..... 12

TABLE OF AUTHORITIES—continued

Page

Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931 (2014)........... 15

OTHER AUTHORITIES

*About Us*, N.D. Mill & Elevator, https://goo.gl/V1CPb2 (last visited Feb. 25, 2019) ...... 20

Akhil Reed Amar, *America's Unwritten Constitution* (2012).................................... 13

1 ANNALS OF CONG. 104 (1789) (Joseph Gales ed., 1834) ........................................ 13

Bureau of Transp. Statistics, U.S. Dep't of Transp., *Freight Facts and Figures 2017* (2018), https://www.bts.gov/sites/bts.dot.gov/files/docs/FFF_2017_Full_June2018revision.pdf............................................... 22

*The Economic Impact of America's Freight Railroads*, Ass'n of Am. R.Rs., https://www.aar.org/data/economic-impact-americas-freight-railroads/ (last visited Feb. 25, 2019) ......................................................... 22

*The Federalist* No. 10 (James Madison) (Clinton Rossiter ed., 1961) ...................... 13

*The Federalist* No. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ...................... 13

*Frequently Asked Questions*, Tenn. Valley Auth., https://goo.gl/URrSuG (last visited Feb. 25, 2019) ............................................ 20

TABLE OF AUTHORITIES—continued

Page

Kevin R. Kosar, Cong. Research Serv., RL30365, *Federal Government Corporations: An Overview* (2011), https://fas.org/sgp/crs/misc/RL30365.pdf .......................... 19

Gary Lawson & Guy Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* (2017) .................. 17

Regional Econ. Studies Inst., Towson Univ., *Economic and Fiscal Impact Analysis of Class I Railroads in 2017* (2018), https://www.aar.org/wp-content/uploads/2018/11/AAR-Class-I-Railroad-Towson-Economic-Impact-October-2018.pdf .......... 22

*Top Twelve Things You Should Know About the U.S. Postal Service*, U.S. Postal Serv., https://goo.gl/5DBT2e (last visited Feb. 25, 2019) .................................................... 20

## INTERESTS OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's important functions is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community. The Chamber filed *amicus* briefs in this case when it was last before this Court and in the D.C. Circuit on remand. See *Dep't of Transp.* v. *Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015) (*AAR*); *Ass'n of Am. R.R.* v. *Dep't of Transp.*, 821 F.3d 19 (D.C. Cir. 2016).

Many American businesses rely on the nation's freight railroads to carry their goods throughout the United States. Railroad track is a finite resource, with both freight railroads and Amtrak competing for track space, mostly on track the freight railroads own. The freight railroads' ability to use this limited track capacity—and the legal standards that restrict that ability—thus impact whether the Chamber's

---

[1] Counsel of record for all parties have been notified of *amici*'s intent to file this brief and have consented to its filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

members can obtain reliable and low-cost transport for their goods.

More broadly, the Chamber is concerned that the decision below allows the government to tip the regulatory scales in favor of government corporations that operate in the marketplace and against their non-governmental competitors. That result distorts competition and puts private-sector businesses at a disadvantage. To succeed in the marketplace, businesses generally have to deal with competition from other businesses and with "the government *qua* government, performing its prototypical regulatory role." *Am. Trucking Ass'ns, Inc.* v. *City of L.A.*, 569 U.S. 641, 649–51 (2013). Even without regulatory power, government corporations like Amtrak enjoy significant "Government-conferred advantages." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 390 (1995). Compounding those advantages by allowing a government corporation to regulate its competitors further unfairly tilts the playing field, to the detriment of other businesses and consumers. The Chamber and its members therefore have a substantial interest in this case.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato conducts conferences, files *amicus* briefs, and publishes books, studies, and the annual Cato Supreme Court Review. This case concerns Cato because allowing a private company to regulate its competitors not only violates due

process but contravenes a fundamental principle of a free society.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

## SUMMARY OF ARGUMENT

This case warrants review because it presents important questions about the government's roles as regulator and market participant. When a governmental body exercises regulatory power, it is subject to all of the Constitution's constraints on governmental action. Conversely, when a "government enters the market as a participant," it is largely freed of

those constraints—but it must forsake the regulatory powers that other market participants lack. See *White* v. *Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 206–08 (1983); cf. *Am. Trucking Ass'ns*, 569 U.S. at 649–50 (noting the distinction between a "State acting as a State" and as a "market actor"). The decision below erases this "fundamental" boundary, *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936), by permitting Amtrak, a for-profit market participant, to exercise regulatory power over the private freight railroads with which it competes for track space. "But the Due Process Clause . . . puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies." Pet. App. 79a. The decision below thus violates due process and distorts competition in the marketplace.

I. Section 207 of the Passenger Rail Investment and Improvement Act requires Amtrak and the Federal Railroad Administration (FRA) "jointly" to develop intercity-passenger-rail standards, which must if possible be incorporated into Amtrak's contracts with its host freight railroads. If Amtrak and the FRA cannot agree on what standards to adopt, an arbitrator may break the impasse.

On remand from this Court, the D.C. Circuit correctly held that this scheme violates due process by permitting Amtrak, a self-interested market participant, to regulate its competitors. But the court's later remedial opinion failed to cure that defect. The court severed the arbitration provision, reasoning that without the arbitrator's help, Amtrak will be unable to "unilaterally" impose standards on the freight railroads. Pet. App. 2a. But this revised regime gives both the FRA *and Amtrak* a veto over any new

standards. The FRA cannot adopt any regulations that do not align with Amtrak's self-interest. Amtrak thus continues to wield regulatory power, just in a different form than Congress contemplated. The D.C. Circuit's conferral of unilateral veto power on Amtrak actually aggravates the constitutional violation by strengthening Amtrak's hand in the regulatory process.

This veto power is different in kind from the other ways in which interested parties participate in agency rulemaking. When advisory committees counsel federal regulators, when self-regulatory organizations propose rules for the securities industry, or when interested parties comment on proposed rules under the Administrative Procedure Act, the disinterested government regulator has the exclusive and final word on the rule's content. Here, by contrast, Amtrak is legally empowered to block regulations that the FRA would adopt in its unilateral discretion, and thus Amtrak can hold the regulatory process hostage and extort concessions that serve Amtrak's pecuniary interest. And it has every incentive to do so: Amtrak's board members have a fiduciary duty to maximize profits and its officers' salaries are tied to its financial performance.

This result violates due process. Few norms are as deeply embedded in our constitutional order as the prohibition against acting as a judge in one's own case. This Court has long held that the Due Process Clause forbids both judicial and executive officers to adjudicate proceedings in which they have a substantial pecuniary interest. For similar reasons, the Court has held that a self-interested corporation "may not be entrusted with the power to regulate the business of another, and especially of a competitor." *Carter*

*Coal*, 298 U.S. at 311. Section 207 empowers Amtrak to do precisely that, with nothing to prevent Amtrak from using its joint rulemaking authority to advance its own pecuniary interest at the expense of the public good.

II. The D.C. Circuit's decision could have troubling consequences. There are now hundreds of federal and state government corporations, which often operate in the commercial sphere. Those corporations already enjoy various advantages thanks to their parentage. The decision below gives Congress and the States the green light to grant them another, far more troubling competitive edge: the power to decide what rules will—or will not—apply to their industries.

The Court should not countenance that result. Just as the U.S. Postal Service should not be able to regulate Amazon or FedEx, and the Tennessee Valley Authority should not be able to regulate the energy markets, Amtrak should not be able to set legal standards for the freight railroads with whom it competes for trackage rights—a critical input for rail service.

Finally, even limited to the rail-regulation context, the decision below could have significant consequences. Freight rail is a key part of the economy, transporting billions of tons and hundreds of billions of dollars' worth of goods every year. The standards that govern the freight railroads' track use thus have broad consequences. Allowing a self-interested competitor to set those standards risks harming other businesses and consumers.

## ARGUMENT

### I. ALLOWING A FOR-PROFIT GOVERNMENT CORPORATION TO REGULATE ITS COMPETITORS VIOLATES DUE PROCESS.

#### A. The Decision Below Leaves Amtrak With Regulatory Power Over Freight Railroads.

Section 207 gives Amtrak and the FRA joint rulemaking authority. See Pub. L. No. 110–432, § 207, 122 Stat. 4848, 4916–17 (2008) (codified at 49 U.S.C. § 24101 note). Amtrak and the FRA "shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." *Id.* § 207(a). "To the extent practicable, Amtrak and its host rail carriers"— the freight railroads that own 97% of the track on which Amtrak operates—"shall incorporate the[se] metrics and standards . . . into their access and service agreements." *Id.* § 207(c). If Amtrak and the FRA cannot agree on the metrics and standards, the Surface Transportation Board (STB) may "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* § 207(d).

On remand from this Court, the D.C. Circuit unanimously held that this scheme "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor to regulate its competitors." Pet. App. 52a–53a. The court explained that Amtrak's "statutory charge to maximize company profits," *id.* at 71a, means it is self-interested, and that Amtrak wields regulatory power because the "metrics and standards" it jointly develops with the FRA (a) must be incorporated by freight railroads

"[t]o the extent practicable," *id.* at 73a (quoting PRIIA § 207(c)), and (b) guide the STB's enforcement of Amtrak's statutory "preference . . . over freight transportation," *id.* at 74a (quoting 49 U.S.C. § 24308(f)). The court separately held that the statute "violates the Appointments Clause for delegating regulatory power to an improperly appointed arbitrator." *Id.* at 53a.

A different and divided D.C. Circuit panel, however, held that both constitutional defects could be cured merely by "severing the arbitration provision." Pet. App. 2a. In the panel majority's view, it was the arbitration provision that allowed Amtrak to "unilaterally impose its metrics and standards on objecting freight railroads"—*i.e.*, that "allowed [Amtrak] to make law." *Id.* at 2a, 15a. "[W]ithout the ability to resort to binding arbitration, Amtrak would have no power to impose its own self-interested regulatory measures on its competitors." *Id.* at 14a. Thus, "[n]o rule will go into effect without the approval and permission of" the FRA, "a neutral federal agency." *Id.* at 2a–3a; but see *id.* at 31a (Tatel, J., dissenting) ("Section 207's due-process defect lies in the fact that it allows Amtrak 'to impose its preferred metrics and standards on its competitors' *at all*, whether by prevailing in a contested arbitration proceeding or simply by convincing the Administration to adopt its proposals.") (citation omitted).

The D.C. Circuit was correct that Section 207, as enacted, improperly allowed Amtrak to exercise regulatory power. Pet. App. 15a, 72a–75a; see also *AAR*, 135 S. Ct. at 1235–36 (Alito, J., concurring) ("The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory

scheme."). The later panel's remedy does not cure that problem. The panel was right that, without the arbitration provision, "[n]o rule will go into effect without [the FRA's] approval and permission." Pet. App. 2a–3a. But the same is true of Amtrak. Under Section 207(a), Amtrak and FRA "shall jointly" develop metrics and standards. If they agree, the standards take effect. If not, they don't. See *id.* at 38a–39a (Tatel, J., dissenting); *AAR*, 135 S. Ct. at 1236 (Alito, J., concurring). This gives the FRA a veto over Amtrak's proposed standards, but it equally gives Amtrak a veto over the FRA's. The result is that, without the arbitration provision, no regulation will occur unless it satisfies Amtrak.

That is regulatory power. While Amtrak cannot unilaterally "make law," Pet. App. 15a, it can still stop law from being made. And that veto power gives Amtrak effective control over the substance of any standards that the FRA adopts. If the FRA wants to regulate, it will have to propose standards that align with Amtrak's self-interest. No one would say that the President lacks a "role in the lawmaking process" because he can "nullify proposed legislation by veto" but cannot enact it by himself. See *INS* v. *Chadha*, 462 U.S. 919, 947–48 (1983); Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 Va. L. Rev. 403, 413 n.35 (1988) (a veto provides "leverage . . . to negotiate with agencies over the content of proposed rules subject to the veto"). So too here.

In this respect, the D.C. Circuit's severance remedy actually *strengthens* Amtrak's regulatory power. Before, Amtrak could force the adoption of standards that the FRA disfavored if it could persuade the arbitrator. Pet. App. 11a–12a. But again, the converse was also true: The FRA could overcome Amtrak's veto

by persuading the arbitrator that Amtrak's position was unjustified. *Id.* Now, the FRA has no way to overcome Amtrak's veto; it is absolute. The D.C. Circuit's remedy thus creates a fundamentally different regime than Congress contemplated—and still leaves Amtrak with regulatory power.

Amtrak's regulatory veto also distinguishes this case from the far more common and salutary situations where private parties contribute to the regulatory process by providing input for the government to consider. There are "numerous committees, boards, commissions, councils, and similar groups" that "advise officers and agencies in the executive branch." 5 U.S.C. app. 2 § 2(a). These "are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." *Id.* But these committees are "advisory only," and "all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved." *Id.* § 2(b)(6); see also *id.* § 9(b).

More generally, the Administrative Procedure Act gives any interested parties "an opportunity to participate in [agency] rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Many of these commenters, of course, are self-interested. That is a good thing: Having regulated parties comment on proposed rules that will affect them aids "informed administrative decisionmaking." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316 (1979). *Amici* and their members often participate in rulemaking in this way. But commenters can neither force an agency to accept their position nor stop the agency from adopting a different rule. An agency must "conside[r] the relevant matter presented" and explain its reasoning, 5 U.S.C. § 553(c), but (within

applicable legal constraints) it has the final say. Cf. Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. Pa. L. Rev. 861, 876 (2018) (noting that "private firms enjoy additional means of influenc[ing]" policy, but these "are not sovereign powers").

Sometimes, a private organization plays a more substantial role in formulating regulations. For example, the securities laws permit self-regulatory organizations to propose rules that, if "approved by" by the Securities and Exchange Commission, take on the force of law. See 15 U.S.C. § 78s(b)(1)–(2). But again, "the industry and the government [do not] fulfill the same function in the regulatory framework or . . . enjoy the same order of authority." S. Rep. No. 94-75, at 23 (1975). "The self-regulatory organizations exercise authority subject to SEC oversight [and] have no authority to regulate independently of the SEC's control." *Id.*; cf. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 388, 399 (1940) (upholding a statute permitting private parties to propose coal prices, which could be "approved, disapproved, or modified" by the regulator).

In short, Amtrak's regulatory role is unique. Congress has vested rulemaking power in a self-interested market participant. "Possessing the dual toolkit of a sovereign *and* a business changes everything." Michaels, *supra*, at 876. It enables Amtrak "to summon the coercive force of its federal rulemaking power to tilt the commercial landscape in its favor." *Id.* And the D.C. Circuit's remedial decision does not remove that regulatory power, but merely changes its form.

### B. Amtrak's Regulatory Power Violates Due Process.

"At least since the time of Lord Coke, (*Nemo debet esse judex in propria causa*—no one may be a judge in his own case), a fundamental precept of due process has been that an interested party in a dispute cannot also sit as a decision-maker." *Int'l Ass'n of Machinists & Aerospace Workers* v. *Metro-N. Commuter R.R.*, 24 F.3d 369, 371 (2d Cir. 1994). In *Dr. Bonham's Case*, Lord Coke famously declared it "against common right and reason" to permit the Royal College of Physicians to fine an unlicensed physician when the College received half of the fines. *Dr. Bonham's Case* (1610) 77 Eng. Rep. 638, 652, 8 Co. Rep. 107 a, 118 a (C.P.); see *id.* (panel of College officers could not simultaneously serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture"); *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1917 (2016) (Thomas, J., dissenting); George P. Smith, II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 Wash. L. Rev. 297, 304 (1966).[2]

---

[2] A similar point was established in *The Case of the King's Prerogative in Saltpetre* (1607) 77 Eng. Rep. 1294, 1295, 12 Co. Rep. 12, 12 (holding that King James I could take saltpeter, essential for gunpowder, from private lands to defend the realm, but emphasizing limits on the King's power to take private property: "[T]he King cannot [take property] for the [improvement] . . . about his own house . . . for that doth not extend to public benefit."). "The King could not take property for his own benefit . . . because 'the King . . . cannot do any wrong.'" Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 Sw. U. L. Rev. 569, 572–73 (2003) (quoting *Saltpetre*, 77 Eng. Rep. at 1295, 12 Co. Rep. at 12).

This principle was codified in the Constitution. During the ratification debates, "leading Federalists explicitly invoked the *nemo judex in causa sua* principle in a variety of contexts and with a forcefulness that confirmed that this principle was a premise of the entire constitutional project." Akhil Reed Amar, *America's Unwritten Constitution* 13 (2012). In *The Federalist* No. 10, James Madison explained that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity," and that "with greater reason, a body of men are unfit to be both judges and parties at the same time." *The Federalist* No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). Alexander Hamilton echoed this sentiment in *The Federalist* No. 80: "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias." *The Federalist* No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). One of the first acts of the first House of Representatives was to adopt rules forbidding members from voting on matters in which they were "immediately and particularly interested." 1 ANNALS OF CONG. 104 (1789) (Joseph Gales ed., 1834).

Consistent with these fundamental principles, this Court's precedents have long recognized that due process requires that an adjudicator be free from any pecuniary interest in the outcome of a case, whether personal or institutional. In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), for example, the Court invalidated the conviction of a defendant who was prosecuted under an Ohio law allowing for trial by a village mayor who was authorized to recover costs to supplement his salary only if he convicted the defendant. *Id.* at 520. The Court held that it "certainly violates the Four-

teenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523. Due process, the Court explained, "is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* at 532. Rather, it forbids any interest "which would offer a possible temptation to the average man," *id.,* including the prospect of any pecuniary benefit that is more than "de minimis," *id.* at 531.[3]

These principles "appl[y] with equal force to . . . administrative adjudicators." See *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) (omission in original). In *Gibson*, this Court held that due process disqualified a state optometry board composed of private practitioners from conducting proceedings to revoke the licenses of corporate-employed optometrists against whom they competed. *Id.* at 578–79. Citing *Tumey*, the Court reiterated that "that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id.* at 579.

---

[3] *See also Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 823–24 (1986) (due process required disqualification of state supreme court justice who was the plaintiff in a pending case raising similar state-law claims); *Connally* v. *Georgia*, 429 U.S. 245, 250 (1977) (per curiam) (due process violated when justice of the peace received $5 for each search warrant issued and nothing for denied applications); *Ward* v. *Vill. of Monroeville*, 409 U.S. 57, 59–60 (1972) (due process precluded scheme that directed fines levied in a mayor's court not to the mayor himself but to his town's general fisc).

While due process concerns are perhaps most acute in adjudications, this Court has held that the Due Process Clause similarly constrains self-interested rulemaking. In *Carter Coal*, the Court invalidated a statute authorizing a majority of coal producers to promulgate wage-and-hour regulations for the industry, holding that this was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311. Noting the "conflicting and even antagonistic interests" among coal producers, the Court explained that "[t]he difference between producing coal and regulating its production is, of course, fundamental." *Id.* "The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." *Id.*[4]

The D.C. Circuit correctly held that these principles preclude Amtrak from wielding regulatory power over its competitors, regardless of its status as a private or

---

[4] *See also Washington ex rel. Seattle Title Tr. Co.* v. *Roberge*, 278 U.S. 116, 121–23 (1928) (ordinance allowing construction of philanthropic home with consent of owners of two-thirds of nearby property violated due process because owners were "free to withhold consent for selfish reasons"); *Eubank* v. *City of Richmond*, 226 U.S. 137, 143–44 (1912) (ordinance allowing owners of two-thirds of property abutting street to establish "building line" beyond which construction would be illegal violated due process because "the property holders who desire and have the authority to establish the line may do so solely for their own interest"); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 943 (2014) ("What emerges thus looks like a general rule that property owners can't regulate other property owners . . . .").

governmental entity. Pet. App. 60a–69a. Amtrak is clearly a self-interested commercial actor—by law, it is a for-profit corporation required to "undertake initiatives . . . designed to maximize its revenues." 49 U.S.C. § 24301(a)(2); *id.* § 24101(d). Amtrak's board members have a fiduciary duty to maximize corporate profits—not to act in the public interest—and its officers stand to augment their salaries in years that Amtrak earns enough to forgo federal assistance. *Id.* § 24303(b).

Amtrak and its officers thus have "a direct, personal, substantial, pecuniary interest," *Tumey*, 273 U.S. at 523, in the "metrics and standards" Amtrak is charged by law with promulgating. Given its competitive interests, Amtrak's institutional incentive is obvious: to exercise its governmental power to improve its access to scarce rail space at its competitors' expense. And that is, by all appearances, what it did. The metrics and standards it jointly developed with the FRA forced freight railroads, under threat of penalties and fines, to alter their operations to favor Amtrak's traffic, at the expense of their own. See Pet. 18 (citing record evidence). Amtrak even demanded monetary payments from one freight railroad that it believed had failed to help Amtrak meet *its own* performance goals as provided in the metrics and standards. JA 377.

None of this is consistent with the Constitution. The Due Process Clauses of the Fifth and Fourteenth Amendments embody our fundamental constitutional commitment that citizens may be deprived of their liberty or property only by "due process *of law*." That commitment presupposes that the legal standards governing private conduct will be duly promulgated by presumptively disinterested and politically ac-

countable public officials who have by oath undertaken the solemn obligation to serve the public interest. Regulations promulgated by an entity like Amtrak that is statutorily obligated to pursue its own pecuniary interest rather than, and at the expense of, the public interest cannot aspire to the high office of "law" in our constitutional system. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1724 (2012) ("Most American courts and jurists in the early Republic agreed, at a minimum, that legislative enactments that authorized other branches to deprive persons of life, liberty, or property without traditional procedural protections or their equivalent violated due process.").[5] The inherent bias of a scheme that empowers a market participant like Amtrak to regulate its competitors for its own financial benefit violates the due process of law.

## II. THE DECISION BELOW COULD DISTORT COMPETITION AND HINDER EFFICIENT FREIGHT RAIL TRANSPORT.

If it stands, the D.C. Circuit's decision could have troubling consequences, both in the immediate rail-regulation context and more broadly. The perils are

[5] *See also* Gary Lawson & Guy Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* 47 (2017) (discussing how the Constitution resembles a fiduciary instrument pursuant to which public officials must act on behalf of their principal, "We the People"); Jarod M. Bona & Luke A. Wake, *The Market-Participant Exception to State-Action Immunity from Antitrust Liability*, 23 Competition: J. Antitrust & Unfair Competition L. Sec. St. B. Cal. 156, 169 (2014) ("[T]o the extent the State acts to advance its own pecuniary interests to the detriment of its citizens, it may exceed its natural charter to govern in the public interest.").

obvious: Allowing one market actor to adopt regulatory standards that govern others creates a risk that the standards will benefit the former to the detriment of the latter. See *Carter Coal*, 298 U.S. at 311; Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 202 (1937). That would distort competition and harm businesses and consumers.

### A. The D.C. Circuit's Rule Would Permit Congress Or The States To Empower Other Government Corporations To Regulate Their Competitors.

Amtrak's regulatory power may be unique—so far—but its status as a government corporation is not. *Lebron*, 513 U.S. at 386. There is a "long history" of federal government corporations that Congress has "specifically designated *not* to be agencies or establishments of the United States Government, and declined to subject to [statutory] control mechanisms." *Id*. at 386, 390. These new corporations can "act unhindered by the restraints of bureaucracy and politics." *Id*. at 391.

These government corporations frequently engage in the "commercial sale of goods and services," *id*. at 388, sometimes competing with private entities for customers or resources. And they often start with significant "Government-conferred advantages," *id*. at 390, "including national establishment, tax and securities law exemptions, sovereign immunity, and privileged access to capital," A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 543 (1995); see *id*. at 584. They may have sector-specific advantages too. *E.g.*, *id*. at 583 ("The Tennessee Valley Authority sells power on a competitive market but enjoys at least the same anticompeti-

tive advantages as any utility with a monopoly access to a source of hydropower.").

By one count, there are now 17 federal government corporations "established by Congress to provide a market-oriented public service and to produce revenues that meet or approximate [their] expenditures." Kevin R. Kosar, Cong. Research Serv., RL30365, *Federal Government Corporations: An Overview* (2011), https://fas.org/sgp/crs/misc/RL30365.pdf. They include the U.S. Postal Service, the Export-Import Bank, the Tennessee Valley Authority (TVA), the Federal Deposit Insurance Corporation, the Government National Mortgage Corporation, Federal Prison Industries, the Pension Benefit Guaranty Corporation, and of course Amtrak. *Id*. at 15. And Congress often considers expanding their ranks: "In the typical contemporary Congress, several bills are introduced to establish government corporations." *Id*. at 1.

There are examples in the States as well. Indeed, "state governments have made lavish use of the corporate form to perform public functions." Mariana Pargendler, *State Ownership and Corporate Governance*, 80 Fordham L. Rev. 2917, 2925–26 (2012). There were over 6,000 government corporations in the United States by 1990, both state and federal. Some of these entities compete in the commercial sector, sometimes for profit. For example, Native Alaskan associations have established regional corporations under Alaska law "to conduct business for profit." 43 U.S.C. § 1606(d); see E. Budd Simpson, *Doing Business with Alaska Native Corporations*, 16 Bus. L. Today 37 (2007). North Dakota "engage[s] in the business of manufacturing and marketing farm products" through the North Dakota Mill and Elevator Association, N.D. Cent. Code § 54-18-02, which "is

currently pursuing new marketing strategies to achieve desired profit levels," *About Us*, N.D. Mill & Elevator, https://goo.gl/V1CPb2 (last visited Feb. 25, 2019). And several States engage in wholesale or retail liquor sales while controlling other such sales to varying degrees.

The decision below opens the door for any of these government corporations to exercise regulatory power over their private-sector counterparts. Although not all of these corporations are for-profit entities like Amtrak, they still have financial self-interest. Neither the Postal Service nor the TVA, for example, receives public tax dollars; the Postal Service "relies on the sale of postage, products and services to fund its operations," and the TVA "finances all of its programs . . . almost entirely through power sales and power program financings in the financial markets."[6] And these entities, like other government corporations, have direct private-sector competitors—other shippers for the Postal Service, and other power companies for the TVA. See Froomkin, *supra*, at 583 (describing several government corporations' "private competitors").

These self-interested entities should not be allowed to exercise regulatory power—whether through a veto or otherwise—over their peers and competitors. Congress could, for example, require the Postal Service to "jointly" develop regulations with the Postal Regulatory Commission to govern interstate package shipments. Under the decision below, this scheme would

[6] *See Top Twelve Things You Should Know About the U.S. Postal Service*, U.S. Postal Service, https://goo.gl/5DBT2e (last visited Feb. 25, 2019); *Frequently Asked Questions*, Tenn. Valley Auth., https://goo.gl/URrSuG (last visited Feb. 25, 2019).

be lawful so long as the Postal Service could not "unilaterally" force through its preferred regulations—even though the Service would have significant power to shape the content of any regulations the Commission and the Service jointly adopted. See Pet. App. 2a.

This scheme, or another like it, would exacerbate government corporations' existing advantages and distort competition in the marketplace. The Postal Service should not be allowed to regulate FedEx or UPS; TVA should not be allowed to regulate its competitors in the electricity markets; and Fannie Mae and Freddie Mac should not be allowed to regulate the mortgage-backed-securities markets. "[E]ven the appearance of impropriety—that is, the possibility that the government's commercial objectives influence regulatory outcomes—has serious ramifications. Government entities perceived as using their sovereign powers to boost their commercial output are likely to engender distrust and intensify existing doubts." Michaels, *supra*, at 884. The integrity of both the government and the markets thus demands a clear separation between regulatory and commercial functions. The decision below endangers that separation.

### B. The Decision Below Risks Serious Repercussions For Freight Shippers And The Economy.

Even limited to the rail-regulation context, the decision below presents risks for marketplace competition and the nation's economy. Amtrak competes with freight railroads for access to track space, a valuable and scare resource. How this balance is struck, and by whom, has broad consequences for the Chamber's members and the economy.

Freight railroads ship an enormous and increasing amount of goods. They shipped over 1.6 billion tons in 2015, and the Department of Transportation estimates that this number will reach nearly 2 billion tons by 2045. Bureau of Transp. Statistics, U.S. Dep't of Transp., *Freight Facts and Figures 2017*, at tbl.2-1 (2018), https://www.bts.gov/sites/bts.dot.gov/files/docs /FFF_2017_Full_June2018revision.pdf. Today, over $600 billion worth of goods are shipped by freight rail each year, and that number is projected to surpass a trillion dollars within 30 years. *Id.* at tbl.2-2. "More freight is moving greater distances as part of far-flung supply chains among distant trading partners." *Id.* at 2-1.

This level of commercial activity has far-reaching significance for the national economy. America's freight railroads sustain 1.1 million jobs across a variety of industries and occupations, including almost 150,000 high-paying jobs in the freight rail industry itself. Regional Econ. Studies Inst., Towson Univ., *Economic and Fiscal Impact Analysis of Class I Railroads in 2017*, at 4 (2018), https://www.aar.org/wp-content/uploads/2018/11/AAR-Class-I-Railroad-Towson-Economic-Impact-October-2018.pdf. Railroads help move roughly one-third of all U.S. exports. *Perspectives from Users of the Nation's Freight System: Hearing Before the Panel on 21st-Century Freight Transp. of the H. Comm. on Transp. & Infrastructure*, 113th Cong. 72 (2013) (statement of Edward R. Hamberger, President and CEO, Association of American Railroads). And freight rail's efficiency and reliability ultimately lowers costs for consumers worldwide. See, *e.g.*, *The Economic Impact of America's Freight Railroads*, Ass'n of Am. R.Rs., https://www.aar.org/data/economic-impact-americas-freight-railroads/ (last visited Feb. 25, 2019).

Allowing Amtrak to regulate freight railroads thus has far-reaching consequences. With Amtrak in charge, neither the FRA nor the STB will have exclusive say on important rail regulatory standards that can slow down the shipment of goods, make shipments more expensive, or both. Amtrak's ability to tilt those standards in its favor threatens the Chamber's members and consumers. Restricting this regulatory power to disinterested government agencies, by contrast, would ensure that freight rail service is subject to evenhanded rules that benefit the country as a whole, not just the interests of a single commercial entity that has incentives to seek trackage rights at the expense of freight railroads.

## CONCLUSION

For these reasons and those stated in the petition, the Court should grant certiorari.

Respectfully submitted,

DARYL JOSEFFER
MICHAEL SCHON
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

C. FREDERICK BECKNER III*
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
rbeckner@sidley.com

*Counsel for Amicus Curiae Chamber of Commerce of the United States of America*

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Massachusetts
Avenue, N.W.
Washington, D.C. 20001

*Counsel for Amicus Curiae Cato Institute*

KAREN R. HARNED
LUKE A. WAKE
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
1201 F Street, N.W.
Suite 200
Washington, D.C. 20004

*Counsel for Amicus Curiae National Federation of Independent Business*

February 27, 2019

* Counsel of Record