No. 18-976

In the Supreme Court of the United States

ASSOCIATION OF AMERICAN RAILROADS, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

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

The questions presented are:

1. Whether the joint promulgation of metrics and standards by the FRA and Amtrak, in the absence of the arbitration provision (Section 207(d)), violates the Due Process Clause.

2. Whether Section 207(d) is severable from the rest of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 896 F.3d 539. The opinion and order of the district court (Pet. App. 42a-49a) are not published in the Federal Supplement but are available at 2017 WL 6209642.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2018. Petitions for rehearing were denied on October 24, 2018 (Pet. App. 88a-89a, 90a-91a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before 1970, intercity passenger-railroad service in the United States had become unprofitable. *National R.R. Passenger Corp.* v. *Atchison, Topeka &*

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

"Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the freight railroads," *Department of Transportation* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1229 (2015). From the outset, it required that railroads make available to Amtrak their facilities, including tracks. See 49 U.S.C. 24308(a). Congress authorized Amtrak and a host railroad to set the terms for the use of the tracks and facilities, but empowered the ICC to set those terms in the event of a dispute. That function, along with the other regulatory and adjudicatory functions formerly performed by the ICC, has been transferred to the Surface Transportation Board (STB or Board), which now has jurisdiction over railroad rate and service issues generally. See *Department of Transportation*, 135 S. Ct. at 1229; see also 49 U.S.C. 702 (2012).

In 1973, to ensure the improvement of passenger rail service for the public good, Congress granted Amtrak a general preference over freight transportation in using rail lines. See 49 U.S.C. 24308(c) ("Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection."). This preference requirement promotes timely Amtrak performance by prohibiting the host freight railroad from prioritizing its own traffic over Amtrak's trains.

Congress has declared that Amtrak is "not a department, agency, or instrumentality of the United States Government." 49 U.S.C. 24301(a)(3). "As initially conceived, Amtrak was to be 'a for profit corporation.'" *Lebron*, 513 U.S. at 384-385 (quoting RPSA § 301, 84 Stat. 1330). But Congress soon modified that language, stating—"less optimistically perhaps," *id.* at 385—that Amtrak "shall be operated and managed as a for-profit corporation," 49 U.S.C. 24301(a)(2). As the Committee responsible for recommending that change explained, the "amendment recognizes that Amtrak is not a for-profit corporation." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978). Since then, Congress has further specified that Amtrak's core "mission" is "to provide efficient and effective intercity passenger rail mobility," while using its business judgment to "minimize Government subsidies." 49 U.S.C. 24101(b) and (d) (2012 & Supp. V 2017).

Congress has further required Amtrak to pursue various other public objectives and has prescribed how Amtrak will conduct certain aspects of its operations. For instance, Amtrak must provide reduced fares for

the disabled and the elderly. 49 U.S.C. 24307(a). It shall "ensure mobility in times of national disaster or other instances where other travel options are not adequately available" and shall "ensure equitable access to the Northeast Corridor by intercity and commuter rail passenger transportation." 49 U.S.C. 24101(c)(9) and (10). When it decides which improvements to make in the Northeast Corridor, Amtrak must apply seven "considerations," in a specified "order of priority," and the improvements must "produce the maximum labor benefit from hiring individuals presently unemployed." 49 U.S.C. 24902(b) and (c). Whenever Amtrak purchases at least $1 million of articles, materials, or supplies, they must be mined or produced in the United States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. 49 U.S.C. 24305(f). Congress has also prescribed the minimum average speed on which Amtrak's schedules should be based (60 miles per hour), and has even required it to develop a plan for restoring service on a particular route (from New Orleans to Sanford, Florida). See 49 U.S.C. 24101(c)(6); Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, § 226, 122 Stat. 4934.

In addition to providing such instructions, Congress has subjected Amtrak to governmental oversight and control through a variety of mechanisms, including the appointment of Amtrak's nine voting directors—one of whom is the Secretary of Transportation, 49 U.S.C. 24302(a)(1)(A) (Supp. V 2017), and the other eight of whom are presidentially appointed by and with the advice and consent of the Senate, 49 U.S.C. 24302(a)(1)(C)

(Supp. V 2017). And Congress has repeatedly appropriated substantial federal funds to ensure Amtrak's continued operations. See, *e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. L, Tit. I, 128 Stat. 591-592.

b. In 2008, Congress enacted the Passenger Rail Investment and Improvement Act of 2008, § 207, 122 Stat. 4916, to effectuate Amtrak's statutory preference rights and thereby improve "service reliability and on-time performance." H.R. Rep. No. 690, 110th Cong., 2d Sess. 36 (2008). Section 207(a) of PRIIA directs Amtrak and the Federal Railroad Administration (FRA) to "jointly * * * develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." 122 Stat. 4916 (49 U.S.C. 24101 note). The metrics must, among other things, include "measures of on-time performance and delays incurred by intercity passenger trains on the rail lines of each rail carrier." *Ibid.* Congress instructed the FRA and Amtrak to "consult[]" during this process with the STB and a variety of stakeholders, including "rail carriers over whose rail lines Amtrak trains operate." *Ibid.* Section 207(d) of PRIIA provided that, if the metrics and standards were not completed within 180 days, "any party involved in the development of those standards [could] petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917.

Congress directed Amtrak and the FRA to incorporate the metrics and standards into evaluations of Amtrak's performance and into plans to improve Amtrak's long-distance routes and on-board service. 49 U.S.C. 24710(a) and (b); PRIIA §§ 207(b), 222, 122 Stat.

4916-4917, 4932. The statute further provided that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards * * * into their access and service agreements." PRIIA § 207(c), 122 Stat. 4917.

Failure to meet the metrics and standards does not, of itself, have any legal consequences. Repeated failures to meet the metrics and standards may, however, trigger consideration by the STB: The STB may commence an investigation on its own initiative if Amtrak repeatedly fails to satisfy the metrics and standards, and must initiate an investigation upon such repeated failure if requested by Amtrak or another rail operator. 49 U.S.C. 24308(f)(1). If it undertakes an investigation, the STB must "determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or * * * by Amtrak or other intercity passenger rail operators." *Ibid.* Following the investigation, the Board may choose to award damages or other relief if Amtrak's inability to achieve minimum standards is attributable to the host railroad's failure to comply with the preexisting preference provision in 49 U.S.C. 24308(c). Amtrak must use any awarded damages "for capital or operating expenditures on the routes over which delays" occurred. 49 U.S.C. 24308(f)(2) and (4).

c. In March 2009, the FRA and Amtrak jointly developed a draft version of metrics and standards, and published a notice in the Federal Register seeking comments from the various stakeholders identified in the statute, including freight railroads. Pet. App. 5a. After receiving and considering comments, the FRA and Amtrak developed the final version of metrics and

standards, which was issued in May 2010. *Ibid.* The FRA and Amtrak did not invoke Section 207(d)'s arbitration provision during the development of the metrics and standards. *Id.* at 43a.

2. In 2011, petitioner—an association representing, among others, large freight railroads that own tracks over which Amtrak operates—commenced this suit, raising claims under the nondelegation doctrine, the separation of powers, and the Fifth Amendment's Due Process Clause. Reversing a grant of summary judgment for the government, the D.C. Circuit held that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity." *Association of Am. R.Rs.* v. *United States Dep't of Transportation*, 721 F.3d 666, 668 (D.C. Cir. 2013). This Court vacated the panel's decision and remanded, holding that "for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity." *Department of Transportation*, 135 S. Ct. at 1228. Summarizing the various features that tie Amtrak to the federal government, the Court emphasized that "[t]he political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget." *Id.* at 1233. Accordingly, "[t]reating Amtrak as governmental for these purposes * * * is not an unbridled grant of authority to an unaccountable actor." *Ibid.*

On remand, the court of appeals held that PRIIA violates due process on the ground that Amtrak is "a self-interested entity," Pet. App. 61a, and that Amtrak's role in preparing the metrics and standards constitutes "regulatory authority over its competitors," *ibid.* See

id. at 60a-80a. The court recognized that the statute required that the metrics and standards be developed jointly by Amtrak and the FRA, a disinterested government agency, and that Section 207(d) provided for an arbitrator appointed by the STB to resolve disputes between Amtrak and the FRA regarding the metrics and standards. In the court's view, however, "[e]ither the arbitrator is a private individual and [Section 207(d)] unlawfully deputizes a private person to issue binding regulations, or she is a public official and her appointment by the STB, rather than 'the President with the advice and consent of the Senate,' violates the Appointments Clause." *Id.* at 81a (quoting U.S. Const. Art. II, § 2, Cl. 2); see *id.* at 80a-86a.

The court of appeals further determined that, by authorizing an arbitrator to resolve disputes between Amtrak and the FRA, Section 207(d) undermined the FRA's ability to "keep Amtrak's naked self-interest in check." Pet. App. 78a; see *ibid.* ("[T]he matter is resolved by an arbitrator, who may ultimately choose to side with Amtrak."). The court determined that the dispute-resolving role of the arbitrator distinguished PRIIA from other "arrangements," previously upheld in decisions of this Court, "under which regulatory burdens [were] imposed by the joint action of a self-interested group and a government agency." *Id.* at 77a n.4 (citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), and *Currin* v. *Wallace*, 306 U.S. 1 (1939)). Those other decisions were "inapplicable," the court of appeals concluded, "because the FRA's authority to hold the line against overreaching by Amtrak is undermined by the power of the arbitrator." *Ibid.*

3. On remand to the district court, the parties briefed the appropriate relief to be awarded. Both parties agreed that the panel's opinion and mandate required that the then-existing metrics and standards be vacated. See Pet. App. 42a. The parties differed, however, as to whether severing the arbitration provision, Section 207(d), would cure the due process defect and would permit Amtrak and the FRA to issue new metrics and standards. The district court agreed with petitioner that the court of appeals' decision required Section 207 to be declared unconstitutional in its entirety. *Ibid.*; see *id.* at 48a (declaring Section 207 "void and unconstitutional").

On appeal, the court of appeals reversed the district court's decision to invalidate Section 207 in its entirety, instead holding that "severing the arbitration provision is the proper remedy" for the previously identified constitutional violation. Pet. App. 2a. The court of appeals explained that, under its prior opinion, "the linchpin for Amtrak's ability to unconstitutionally exercise regulatory authority over its competitors was [PRIIA's] binding arbitration provision." *Id.* at 9a. "After all," the court noted, "the constitutional problem in this case was not that Amtrak exercised *some* role in formulating th[e] metrics and standards." *Id.* at 10a. To the contrary, the "prior opinion specifically noted that a number of arrangements by which * * * 'joint action of a self-interested group and a government agency' had passed constitutional muster." *Id.* at 11a (quoting *id.* at 77a n.4); see *ibid.* (citing *Currin* and *Adkins*). With the arbitration provision severed, the court explained, the rest of Section 207 would be constitutional under those precedents because Amtrak's proposed metrics and

standards could not take effect "unless the [FRA] independently determined that those standards were in the public interest." *Id.* at 14a; see *id.* at 18a ("[E]liminating the arbitration provision is the key to curing the constitutional problem because it eliminates Amtrak's ability and power to exercise regulatory authority over its competitors.").

Next, the court of appeals determined that severing Section 207(d)'s arbitration provision was proper "as a matter of statutory construction." Pet. App. 18a. Relying in part on the "presumption in favor of severability," the panel explained that severance of Section 207(d)'s arbitration provision is appropriate because it "would leave a functioning statutory scheme and would comport with congressional objectives." *Id.* at 18a-19a; see *id.* at 21a ("[N]othing in the statutory text, structure, or legislative history indicates that Section 207 was meant to be an all-or-nothing provision or, more to the point, that the binding-arbitration provision was a legislative deal-breaker.").

Finally, the court of appeals rejected petitioner's contention "that the government waived its ability to argue for severance by waiting until [the court] remanded to the district court to first propose severance of Section 207(d)." Pet. App. 21a. The "question of severance" did not arise until "after [the] statute ha[d] been held unconstitutional" in the prior decision, the court of appeals explained, and in any event severability would be appropriate in light of "constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government." *Id.* at 21a-22a.

Judge Tatel dissented. Pet. App. 24a-41a. He agreed that, under the majority's understanding of the prior

panel's opinion, the district court would have been "obliged to confine its declaratory remedy to the arbitration provision." *Id.* at 25a. But Judge Tatel disagreed with that understanding of the prior opinion, believing that the "prior panel held that it is Amtrak's very participation in developing the metrics and standards under the Act—and not just the possibility that Amtrak might ultimately invoke the Act's arbitration provision—that contravenes due process." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 16-24) that Amtrak's role in developing the metrics and standards, alongside the FRA, conflicts with this Court's decision in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). Petitioner also argues (Pet. 24-26) that the decision below misapplied well-established severability principles. The court of appeals' ruling is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. The last time the Court considered this case, it emphasized that "[t]he political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget." *Department of Transportation* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015). The Court accordingly concluded that "[t]reating Amtrak as governmental" for nondelegation purposes was appropriate and "not an unbridled grant of authority to an unaccountable actor." *Ibid.* The Court's determination that Amtrak is a governmental entity thus foreclosed petitioner's nondelegation challenge, which was premised on this Court's decision in *Carter Coal*, *supra*. See

Department of Transportation, 135 S. Ct. at 1231 (describing the court of appeals' nondelegation ruling as "holding [*Carter Coal*] prohibits any such delegation of authority").

Petitioner has now reframed its argument as a due process challenge to the joint promulgation of metrics and standards by Amtrak and the FRA. Petitioner argues (Pet. 16) that the decision below, which upheld the assignment of joint authority to Amtrak and the FRA, is "irreconcilable with *Carter Coal* and other decisions of this Court" regarding the due process limitations on regulation by a "self-interested" decisionmaker. Petitioner's due process argument fails for two independent reasons, either of which is sufficient to support the court of appeals' ruling that, once the arbitration provision has been severed, the remainder of PRIIA is constitutional. First, petitioner's argument ignores important characteristics of Amtrak that (as this Court has already found) distinguish it from the private parties given regulatory authority in *Carter Coal*. Second, FRA's role in promulgating metrics and standards ensures sufficient oversight and control by a disinterested governmental entity. No conflict with this Court's decisions exists.

a. In *Carter Coal*, this Court invalidated the Bituminous Coal Conservation Act of 1935, which created a commission made up of coal miners, coal producers, and the public to establish industry standards for fair competition, wages, hours, and labor relations. 298 U.S. at 280-284. Noting that the law delegated all regulatory authority over the subject-matter to "private persons whose interests may be and often are adverse to the interests of others in the same business," the Court determined that the delegation improperly "entrusted"

some industry participants "with the power to regulate the business of * * * competitor[s]." *Id.* at 311. The Court accordingly invalidated the delegation as "arbitrary" and "a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Ibid.*

Petitioner argues (Pet. 17) that the decision below "conflicts with *Carter Coal*." Petitioner asserts (*ibid.*) that in light of Amtrak's "commercial interests," due process forbids Congress from allowing Amtrak the role Section 207(d) affords it in developing metrics and standards for its own operations. That is incorrect. Even assuming that the metrics and standards reflect some degree of regulatory effect on private entities—a question that this Court declined to resolve in its prior decision, see *Department of Transportation*, 135 S. Ct. at 1234 (recognizing the parties' disagreement and reserving the issue)—Amtrak is not similarly situated to the "private entities" that were given the power to set coal-industry standards in *Carter Coal*, 298 U.S. at 284.

"Amtrak was created by a special statute, explicitly for the furtherance of federal governmental goals." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). From the start, "rather than advancing its own private economic interests, Amtrak [has been] required to pursue numerous, additional goals defined by statute." *Department of Transportation*, 135 S. Ct. at 1232. As just a "few examples" of these "broad public objectives," the Court identified the following: "Amtrak must 'provide efficient and effective intercity passenger rail mobility,' 49 U.S.C. § 24101(b); 'minimize Government subsidies,' § 24101(d); provide reduced fares to the disabled and elderly, § 24307(a); and ensure mobility in times of national disaster, § 24101(c)(9)." *Ibid.* Amtrak

also "must maintain a route between Louisiana and Florida, § 24101(c)(6)," and in certain circumstances must confine its purchases to materials of U.S. origin. *Ibid.* These and other statutory commands, see pp. 3-4, *supra*, distinguish Amtrak from the private "coal dealers" and "coal producers" invested with regulatory power in *Carter Coal*. 298 U.S. at 311.

Nor is Amtrak properly treated for due process purposes as a "private person[]," *Carter Coal*, 298 U.S. at 311, merely because Congress has specified that it "shall be operated and managed as a for-profit corporation," 49 U.S.C. 24301(a)(2). The statutory text shows that Amtrak's efforts to "maximize its revenues" are not for the purpose of serving private interests, but rather are aimed at "minimiz[ing] the need for Federal operating subsidies," 49 U.S.C. 24101(d), while it pursues its statutorily defined "mission" and goals, 49 U.S.C. 24101(b) and (c) (2012 & Supp. V 2017). Congress has accordingly instructed Amtrak to "use its best business judgment" not for private ends, but "to minimize United States Government subsidies." 49 U.S.C. 24101(c)(1).

Amtrak's ownership and control have also been entrusted to governmental hands. The overwhelming majority of Amtrak's stock is held by the Secretary of Transportation "for the benefit of the Federal Government." U.S. Br. at 43, *Department of Transportation*, *supra* (No. 13-1080) (citation omitted); see *id.* at 43 n.17. All nine of its voting directors, one of whom is the Secretary of Transportation, are Senate-confirmed presidential appointees. See 49 U.S.C. 24302(a)(1)(A) and (C) (Supp. V 2017). They are all understood to be removable without cause by the President. See *Holdover and Removal of Members of Amtrak's Reform Board*, 27 Op. O.L.C. 163, 166 (2003). Congress has also set the

salary limits for Amtrak's officers, see 49 U.S.C. 24303(b); has required Amtrak to submit various reports about its operations to Congress and the President, see, *e.g.*, 49 U.S.C. 24315(a) and (b); and has required several aspects of Amtrak's activities to be reviewed by the Department of Transportation's Inspector General (see PRIIA §§ 203(b), 204(d), 221, 225, 227, 122 Stat. 4913-4914, 4931-4934)—even though Amtrak already has its own Inspector General whose office receives appropriations directly from Congress (see, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, Div. C, Tit. III, 125 Stat. 704).

Given those characteristics—many of which have already led the Court to find that Amtrak is a "governmental entity," *Department of Transportation*, 135 S. Ct. at 1233, and therefore to reject petitioner's reliance on *Carter Coal*—Amtrak's participation under PRIIA in formulating the metrics and standards comports with due process. *Carter Coal* invalidated the Bituminous Coal Conservation Act as a "delegation" of regulatory authority to "private persons" in violation of "due process." 298 U.S. at 311. Relying on *Carter Coal*, the court of appeals originally invalidated PRIIA on nondelegation grounds based on the "premise" that the law similarly "delegate[s] regulatory authority to a private entity." *Department of Transportation*, 135 S. Ct. 1231 (citation and internal quotation marks omitted). This Court declared that premise to be "flawed" because "Amtrak is a governmental entity, not a private one." *Id.* at 1233; see *id.* at 1233-1234 ("Because the Court of Appeals' decision was based on the flawed premise that Amtrak should be treated as a private entity, that opinion is now vacated."). That same "flawed premise"

forms the basis of petitioner's due process argument, which again invokes *Carter Coal*.

In sum, as this Court has already determined, PRIIA bears little resemblance to the scheme invalidated in *Carter Coal*—much less to a "statute empowering Coca-Cola to regulate Pepsi." Pet. 20. In asking this Court to strike down the law on due process grounds, petitioner does not ask for "a straightforward application of *Carter Coal*," Pet. 14, but rather for an unprecedented extension of it.

b. Even assuming that petitioner had correctly characterized Amtrak as a purely self-interested actor, akin to the coal producers in *Carter Coal*, PRIIA would not violate due process. Once the court of appeals invalidated Section 207(d)'s arbitration provision, that step "eliminate[d] Amtrak's ability and power to exercise regulatory authority over its competitors." Pet. App. 18a. "[W]ithout the ability to resort to binding arbitration," the court of appeals explained, any proposal for metrics and standards by Amtrak "would hit a dead-end" "unless the [FRA] independently determined that those standards were in the public interest—not just Amtrak's interests." *Id.* at 14a. In light of the court's severability decision, therefore, PRIIA now affords Amtrak only "the opportunity to persuade the [FRA]," *id.* at 16a (citation and internal quotation marks omitted), an arrangement that does "not offend the Due Process Clause," *id.* at 18a.

As the court of appeals further noted, this Court on multiple occasions has sustained the validity of "programs for the joint private and governmental promulgation of regulations." Pet. App. 12a. In doing so, the Court has recognized that "[t]he Constitution has never

been regarded as denying to the Congress the necessary resources of flexibility and practicality" in fashioning statutory schemes that involve private parties in a regulatory process. *Currin* v. *Wallace*, 306 U.S. 1, 15 (1939) (citation omitted).

In *Currin*, for example, the Court upheld a statute providing that inspection and certification standards could not be applied to tobacco markets designated by the Secretary of Agriculture "unless two-thirds of the [tobacco] growers [in that market], voting at a prescribed referendum," approved their application. 306 U.S. at 6. Similarly, in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), the Court upheld marketing orders for milk that went into effect only if they were approved by two-thirds of milk producers. *Id.* at 547-548, 577-578. And in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), the Court upheld a statutory framework authorizing groups of coal producers to propose prices for coal that were then subject to approval, disapproval, or modification by the National Bituminous Coal Commission (a governmental entity). *Id.* at 387-389 & n.2.

Those cases make clear that, so long as the federal government's concurrence is ultimately required, even purely self-interested private entities may participate in a regulatory process. In *Carter Coal*, by contrast, the government had *no* involvement in the creation or approval of the binding labor provisions, which were instead devised and approved entirely by private entities and then deemed to be "accepted" by all code members in the relevant districts. 298 U.S. at 284. Petitioner asserts (Pet. 24) that "[g]iving a self-interested corporation the power to veto the regulation preferred by a disinterested federal agency violates due process." Yet

that was precisely the nature of the schemes upheld in *Currin* and *Rock Royal*.

Petitioner's other attempts to distinguish those cases are unpersuasive. As petitioner notes (Pet. 22-23), the precise factual circumstances of the cases vary: In one, the government exercised control over the standards by proposing them in the first instance; in another, it approved standards proposed by private entities. But the common thread is that in each, the Court upheld regulatory action after concluding that a government entity had sufficient involvement to ensure "that self-interested [parties] ha[ve] neither the power to craft the rules in their own image nor to 'force them upon a minority' of competitors." Pet. App. 13a (quoting *Currin*, 306 U.S. at 15) (brackets omitted). That description holds true here, where "[w]ithout the [FRA's] approval, Amtrak's regulatory proposals would amount to nothing more than trying to clap with one hand." *Id.* at 18a.

Petitioner nonetheless hypothesizes (Pet. 23-24) that the FRA may fail to exercise control over the metrics and standards because the agency may feel obligated to issue regulations within 180 days, as the statute originally contemplated. See PRIIA § 207(a), 122 Stat. 4916. But it is far from clear what, if anything, remains of the 180-day deadline, now that the first effort to promulgate metrics and standards has been invalidated by the courts. In any event, petitioner identifies no basis—and there is none—for presuming that the FRA would regard the time limit as a reason to abandon its regulatory responsibilities.

Finally, insofar as there are differences between PRIIA and the various joint-regulation schemes previously approved by the Court, they only serve to confirm that Amtrak's participation along with the FRA does

not offend due process. First, this Court has already determined that "Amtrak is not an autonomous private enterprise," *Department of Transportation*, 135 S. Ct. at 1232, but instead "is a governmental entity," *id.* at 1233. Second, as described in greater detail above, Amtrak serves numerous public objectives other than profit-seeking, and it is subject to substantial oversight and control by the federal government. See pp. 3-4, 13-15, *supra*.

Third, the metrics and standards do not directly regulate petitioner and its members. Although they are to be incorporated into operating agreements between Amtrak and the freight railroads "[t]o the extent practicable," PRIIA § 207(c), 122 Stat. 4917, those operating agreements are subject to arms-length bargaining between the parties. And if Amtrak and a host railroad cannot agree on new terms following issuance of metrics and standards, then the STB shall "prescribe reasonable terms and compensation," 49 U.S.C. 4308(a)(2)(A)(ii)—the same function it has served since it took over from the ICC in 1996, see 49 U.S.C. 702 (2012).

The STB also cannot impose relief against a freight railroad based on Amtrak's failure to meet the metrics and standards. An award of damages or other relief can be based only on a freight railroad's failure to comply with 49 U.S.C. 24308(c), the separate and longstanding statutory preference requirement. See 49 U.S.C. 24308(f)(2). While the metrics and standards help to determine when a proceeding before the STB to enforce the statutory preference requirement should be triggered, that is not equivalent to the actual exercise of enforcement authority. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 421 (1992) (Congress has not granted Amtrak eminent-domain power over

other railroads merely by authorizing Amtrak to initiate a proceeding before the ICC to condemn another railroad's property, even though the statute "creates a presumption in favor of conveyance to Amtrak"). Here, the statute permissibly authorizes Amtrak—or, indeed, a host freight railroad over which Amtrak operates—to initiate an enforcement proceeding before the STB; the metrics and standards merely operate to limit that authority. Whether the STB can obtain damages or other relief always rests on the subsequent and separate inquiry whether Amtrak's failure to satisfy the metrics and standards resulted from a freight railroad's failure to honor Amtrak's statutory preference.

In sum, this Court previously has approved statutory schemes in which (1) wholly private, (2) purely self-interested parties have been given authority, in conjunction with governmental entities, to (3) directly regulate their own competitors. There is accordingly little reason to doubt the validity of PRIIA, which gives (1) a governmental entity, (2) charged with public objectives and subject to federal oversight and control, the authority, along with a federal agency, to develop metrics and standards that (3) exert only indirect influence on companies in the same industry.

2. Petitioner argues (Pet. 24-26) that the decision below misapplied this Court's precedents regarding the circumstances in which an unconstitutional provision should be severed from the remainder of the statute. Even if correct, petitioner's argument merely asserts that the court of appeals misapplied well-established principles in a particular case, which would not merit this Court's review. And in any event, petitioner's severability analysis is mistaken.

As the court of appeals recognized, Section 207(d), the provision allowing an arbitrator to resolve disputes that might arise between Amtrak and the FRA in formulating the metrics and standards, is severable from the rest of the statutory scheme. First, in light of the "'normal rule * * * that partial, rather than facial, invalidation is the required course,'" the court properly applied a "presumption in favor of severability." Pet. App. 19a (quoting *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010)); see *Free Enterprise Fund*, 561 U.S. at 509 (severance proper unless it is "evident" that Congress "would have preferred" entire provision to be invalidated) (citation and internal quotation marks omitted).

Second, the court correctly determined that "the statutory scheme could function even with Section 207(d) pruned away." Pet. App. 20a. Indeed, the metrics and standards were originally promulgated without invoking the arbitration provision. See *ibid.* ("[The FRA] and Amtrak have been working together on such matters for almost half a century, and most of that time without the possibility of resort to binding arbitration."). Third, the court found that "narrowly severing Section 207(d) would better comport with Congress's objectives than would throwing the entire Section 207 baby out with the bath water." *Ibid.*; see *id.* at 20a-21a ("Severing Section 207(d) leaves intact Congress's objective of streamlining the process for formulating metrics and standards, and even strengthens the statutory command that the [FRA] and Amtrak work 'jointly' to develop those standards.") (quoting PRIIA § 207(a), 122 Stat. 4916). That conclusion was appropriately based on the court's assessment of PRIIA's "statutory text, structure, [and] legislative history." *Id.* at 21a.

Petitioner nevertheless asserts (Pet. 25) that "[b]y deleting the arbitration provision, the panel lifted Congress's restriction on Amtrak and FRA's authority." That argument gets things precisely backwards. Amtrak and the FRA have no authority that they did not possess before the arbitration provision was invalidated. If they can agree on metrics and standards, they may promulgate them without involving an arbitrator—as they did in the rulemaking that gave rise to this litigation. But if they disagree, they cannot invoke the arbitration provision to resolve that dispute, and there will be no metrics and standards. Put another way, if Amtrak and the FRA are unable to agree, the result will be no different than if the entire statute had been invalidated; but if they do agree, the result will be promulgation of metrics and standards as envisioned by PRIIA.

Petitioner's other arguments are similarly unconvincing. Petitioner's assertion (Pet. 26) that severing Section 207(d) "infringes on Congress's prerogative to decide whether and how to fix the statute" merely begs the question whether the partial invalidation ordered by the court of appeals was a correct assessment of congressional intent. For the reasons explained by the court of appeals, it was. Petitioner also misses the mark in claiming that the decision below described the arbitration provision as "'the linchpin' of the rulemaking scheme." Pet. 25 (quoting Pet. App. 9a). Rather, the decision described Section 207(d) as "the linchpin for Amtrak's ability to unconstitutionally exercise regulatory authority over its competitors," thus explaining why "severing Section 207(d) w[ould] fully cure the constitutional violations found in" the prior court of appeals decision. Pet. App. 9a. The court's conclusion that the

scheme was *unconstitutional* only because of the arbitration provision in no way suggests that Congress regarded the scheme as *functional* only because of the arbitration provision. Indeed, if whatever provision made a statute unconstitutional were always deemed essential, there would be nothing left of severability.

Petitioner's brief suggestion (Pet. 26) that the government forfeited the severability issue is without merit, and in any event plainly does not warrant further review. As the court of appeals explained, "the question of severance arises only after a statute has been held unconstitutional," making it "unsurprising that the government devoted its efforts to vigorously defending the constitutionality of [PRIIA], and did not broach the severability question until the remedial stage of this litigation." Pet. App. 21a. And regardless, as the court also recognized, "[p]arties cannot, by litigation tactics or oversight, compel the courts to strike down more of a law than the Constitution or statutory construction principles demand." *Id.* at 22a.

3. Petitioner does not suggest that this case presents any issue that has divided the courts of appeals; indeed, the petition cites no decision from another court of appeals. Nor does petitioner challenge metrics and standards that currently exist, nor even ones that have been proposed. And it is unclear what metrics and standards, if any, will ultimately be promulgated. This Court does not ordinarily grant review to determine whether a court of appeals properly applied this Court's precedents to a new factual scenario.

Petitioner states (Pet. 16) that "five of the seven federal judges who have considered this case on remand * * * have concluded that Section 207 is unconstitutional in its entirety." To the contrary, it is unclear

whether *any* judge reached that conclusion. The court of appeals held, in the majority opinion at issue here (two judges), that the remainder of Section 207 is constitutional once the arbitration provision has been severed. Pet. App. 18a. That ruling was based on its reading of the prior panel opinion (three judges) as not compelling the conclusion that Section 207 was unconstitutional in its entirety, because that prior panel had not reached the question whether severing the arbitration provision cured the constitutional violation. *Id.* at 14a-18a. The district court (one judge) had initially upheld the statute, but concluded on remand that it was constrained by the prior panel opinion to conclude that no part of Section 207 could be severed—a determination that the court of appeals subsequently reversed. *Id.* at 46a-47a. And Judge Tatel (the seventh judge) stated in dissent that if the majority's reading of the prior panel opinion were correct, he "would agree that the district court [would have been] obliged to confine its declaratory remedy to the arbitration provision." *Id.* at 25a.

Indeed, Judge Tatel also emphasized that if the government had sought "a more targeted constitutional holding" in a petition for rehearing en banc after the prior panel opinion, he "might well have voted to rehear the case en banc." Pet. App. 41a. By contrast, when petitioner sought rehearing en banc from the ruling currently at issue, *id.* at 90a-91a, no judge called for a vote.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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