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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 3

I. This Case Is Important And Warrants Review 3

II. The Decision Below Conflicts With *Carter Coal* And Other Decisions Of This Court 5

III. The Panel Majority's Approach To Severability Conflicts With Decisions Of This Court 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 2, 10

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 1, 6, 7

Currin v. Wallace,
306 U.S. 1 (1939) 7

Dep't of Transp. v. Ass'n Am. R.R.s,
135 S. Ct. 1225 (2015) .... *passim*

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 10

Gundy v. United States,
138 S. Ct. 1260 (2018) 3

INS v. Chadha,
462 U.S. 919 (1983) 9

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 10

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940) 7

Thacker v. Tenn. Valley Auth.,
No. 17-1201, 2019 WL 1886028 (U.S. Apr.
29, 2019) 4

United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533 (1939) 7

Statute

Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, § 207, 122 Stat. 4916 (codified at 49 U.S.C. § 24101 note) .... *passim*

Constitutional Provision

U.S. Const. art. 1, § 1 10

REPLY BRIEF FOR PETITIONER

All nine Justices agreed that the due process question presented here is "substantial." *Dep't of Transp. v. Ass'n Am. R.R.s*, 135 S. Ct. 1225, 1228 (2015). The government does not dispute the importance of the question—whether a for-profit government corporation may be vested with regulatory authority over its private-sector competitors—but instead contends that this Court should deny review because the decision below is correct.

The government is mistaken. For the first time in our nation's constitutional history, a for-profit government corporation has been empowered to regulate the competition. By vesting Amtrak with rulemaking authority over private freight railroads, Section 207 of the Passenger Rail Investment and Improvement Act created what the D.C. Circuit described as an "unprecedented" and "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.

The government argues that there is no constitutional problem because Amtrak is owned by the government and subject to various statutory mandates. Opp. 12-16. But the due process principle recognized in *Carter Coal*—that granting one for-profit 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"—applies equally to for-profit government corporations. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936).

The government also argues that, with the arbitration provision deleted, Section 207 is no different than other rulemaking schemes this Court has approved. Opp. 16-19. But the three examples the government provides involve industrywide referenda or schemes in which a commercially self-interested party merely *proposes* regulations for the approval of a disinterested government agency. The government's claim that commercially self-interested parties "may participate in a regulatory process," *id*. at 17, is true as far as it goes—but neither this Court nor, until the decision below, any court of appeals has ever held that a commercially self-interested party may *co-author* federal regulations governing its own industry.

The court of appeals' approach to severability presents a distinct question warranting review. Over a dissent by Judge Tatel, the panel majority empowered Amtrak and the Federal Railroad Administration (FRA) to exercise rulemaking power in a manner that Congress did not authorize. The government errs in arguing, Opp. 20-23, that severing the arbitration provision and reinstating the grant of rulemaking power (without the critical check of the arbitrator) was what Congress would have wanted in this circumstance. This Court has held that delegated rulemaking power can *only* be exercised in the precise manner Congress has specified, *see Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988), and here the panel majority itself declared that by deleting the arbitration provision, it had redirected "[u]ltimate control" over the rulemaking. App. 13a.

The decision below invalidates some, but not all, of a federal statute, reinstating the grant of rulemaking authority to Amtrak while striking down

the arbitration provision as unconstitutional. As the government previously argued when it successfully petitioned for certiorari in this case, "[t]his Court has often reviewed lower-court decisions holding that a federal law is unconstitutional, even in the absence of a circuit split." U.S. Pet. for Cert., No. 13-1080, at 24. The government further argued at the time that review was warranted because "the D.C. Circuit has invalidated the method that Congress prescribed for the development of metrics and standards for Amtrak," and "there will be no further percolation of the question in other courts of appeals." *Id*. at 25.

Because all of this is as true now as when the government successfully sought certiorari, this Court should grant review.

ARGUMENT

I. THIS CASE IS IMPORTANT AND WARRANTS REVIEW.

Although the government does not quarrel with the importance of the constitutional questions presented, it raises several arguments in hopes of deterring the Court from granting review. None has merit.

The government argues that there is no circuit split. Opp. 23. But the absence of a circuit split did not prevent this Court from finding that petitioner's due process challenge presents a "substantial" question of constitutional law. 135 S. Ct. at 1228. Nor has it deterred the Court from granting review to address other important constitutional questions on the docket this Term. *See Gundy v. United States*, 138 S. Ct. 1260 (2018) (granting review of nondelegation question over the government's opposition emphasizing the absence of a circuit split).

In any event, the absence of a circuit split simply reflects the undisputed fact that Congress has never before created a hybrid entity that simultaneously competes in the market and regulates the competition. Whereas Congress has occasionally authorized government corporations to perform both commercial and governmental functions*, see Thacker v. Tenn. Valley Auth.*, No. 17-1201, 2019 WL 1886028 (U.S. Apr. 29, 2019), it has historically respected the constitutional bright line prohibiting a government corporation from regulating those businesses with which it competes commercially.

The government also observes that new metrics and standards have not yet issued and this Court should defer review "to determine whether a court of appeals properly applied this Court's precedents to a new factual scenario." Opp. 23. This argument misses the mark because petitioner's challenge is to the authorizing statute itself. There is no need to await a "new factual scenario" where the question is whether Section 207, as modified by the panel below, violates due process.

As the U.S. Chamber of Commerce and other amici have explained, the decision below has "far-reaching consequences" for businesses that rely on fright rail. *See* Amicus Br. of Chamber of Commerce et al., at 23. Amtrak's ability to tilt regulatory standards in its favor could cause slower and more expensive freight rail service. "Restricting this regulatory power to disinterested government entities, 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." *Id*.

Finally, notwithstanding the government's claim that it is "unclear" what the original D.C. Circuit panel decided, Opp. 23-24, four of the six D.C. Circuit judges who have heard this case—the three original panel members plus Judge Tatel—have held the grant of rulemaking power to Amtrak cannot stand. Yet it *will* stand absent this Court's review.

II. THE DECISION BELOW CONFLICTS WITH *CARTER COAL* AND OTHER DECISIONS OF THIS COURT.

The government argues that *Carter Coal* can be distinguished on two grounds. It contends that Amtrak differs from the private parties given regulatory authority in *Carter Coal*. Opp. 12-16. And it argues that FRA's co-equal role in the rulemaking ensures sufficient oversight by a disinterested governmental entity. *Id*. at 16-20. The government is wrong on both counts.

A. This Court previously held that because Amtrak must be deemed the government for constitutional purposes, Section 207 does not violate the private nondelegation doctrine. 135 S. Ct. at 1228. In the government's view, petitioner's due process challenge merely "reframe[s]" the nondelegation challenge, Opp. 12, and should be rejected for the same reason. But if Amtrak's status as a government actor foreclosed petitioner's due process challenge, this Court would have said so. It would not have declared the due process challenge "substantial" and remanded the case to the D.C. Circuit to decide whether "Congress violated the Due Process Clause by giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its

own industry." 135 S. Ct. at 1234 (quotation marks omitted).

The government notes that Amtrak is required to pursue various statutory goals, Opp. 13-14, but that has no bearing on *Carter Coal*'s due process holding. There, the Court stated that granting one 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). The due process violation arose from Congress's giving commercially self-interested entities the power to regulate their competitors. That fundamental constitutional protection does not evaporate when the commercially self-interested regulator is a governmental for-profit corporation, even one that is charged with achieving various statutory goals. Indeed, private corporations must follow a host of statutory mandates themselves, and are similarly constrained by limitations in their corporate charter, but that does not prevent them from pursuing profits at the expense of their competitors.

The government's argument rests on the erroneous premise that because Amtrak's ownership has "been entrusted to governmental hands," Amtrak is not commercially self-interested in a way that disqualifies it from exercising regulatory authority. Opp. 14. That is wrong because *any* for-profit corporation, public or private, has commercial motivations that prevent it from regulating its competitors in a "disinterested" manner. *Carter Coal*, 298 U.S. at 311. This Court has stated that the difference between a *commercial actor* in a market and a *regulator* of that market, is "fundamental," and that a regulator cannot be disinterested, as required

under the Due Process Clause, when it has commercial "interests [that] may be and often are adverse to the interests of others in the same business." *Id*. In fact, Congress recognized that, in the context of a Section 207 rulemaking, Amtrak's motivations would *not* be those of a disinterested government regulator. That is why Congress deemed it necessary to include an arbitration provision to resolve disputes between Amtrak and FRA—a provision that would be unthinkable in a statute that gave joint rulemaking power to, say, the Departments of Energy and Commerce.

Moreover, Amtrak's executives *are* self-interested. Congress has given Amtrak executives personal financial incentives to turn a profit, thus directly linking Amtrak's financial performance to the pecuniary self-interest of those running the government corporation. *See* Pet. 18-19. If Amtrak wields its regulatory power to disadvantage the freight railroads and put money in Amtrak's coffers, that redounds to the personal financial benefit of those at Amtrak who drafted the regulations. That is a clear due process violation—and yet the government's brief is silent in response.

B. The government next argues that, with the arbitration provision deleted, Section 207 is no different than rulemaking schemes this Court has previously upheld. *See* Opp. 16-17 (citing *Currin v. Wallace*, 306 U.S. 1 (1939); *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939); and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)). The government contends that these cases—which one member of this Court has called "discredited," *Dep't of Transp.*, 135 S. Ct. at 1254 (Thomas, J., concurring in the judgment)—suggest

that "so long as the federal government's concurrence is ultimately required, even purely self-interested private entities may participate in a regulatory process." Opp. 17.

Section 207 fundamentally differs from the schemes at issue in those cases. *Currin* and *Rock Royal* involved industrywide referenda, in which the regulated parties voted to subject themselves to a regulatory scheme; the freight railroads did not have that option here. *Adkins* involved a scheme where self-interested parties merely *proposed* regulations for government approval; here, Amtrak and FRA had co-equal authority, and FRA could not regulate without Amtrak's approval.

Echoing the panel majority, the government contends that Section 207 "affords Amtrak only 'the opportunity to persuade the [FRA],'" Opp. 16 (quoting App. 16a). Not so. It affords Amtrak the opportunity to *block* FRA from issuing regulations entirely. If FRA wants to issue regulations, it must ensure that Amtrak is satisfied. Assuming Amtrak acts as any for-profit corporation would, and insists on regulations that advance its commercial interests or harm its competitors' interests, FRA may very well conclude that regulations skewed in Amtrak's favor are preferable to no regulations at all. The government's argument that Amtrak lacks the power to regulate—and only has the opportunity to persuade—is like saying the House of Representatives lacks the power to legislate because all it can do is try to persuade the Senate.

The government portrays Section 207 as nothing more than a self-interested veto scheme, which it contends is perfectly constitutional under *Currin* and *Rock Royal*. Opp. 17-18. But those cases did not

involve giving a single company within an industry the power to veto regulations affecting the industry as a whole. Moreover, the constitutional validity of a veto provision is questionable after *INS v. Chadha*, 462 U.S. 919 (1983), which struck down a discretionary "veto" provision as an unconstitutional exercise of legislative power.

Finally, the government's argument that "the metrics and standards do not directly regulate" the freight railroads, Opp. 19-20, has been rejected at every stage of this case. Section 207(c) provides that the freight railroads "shall" incorporate the metrics and standards into their operating agreements with Amtrak "[t]o the extent practicable." That the operating agreements are negotiated, and subject to oversight by the Surface Transportation Board, does not change the "obviously regulatory" command, 135 S. Ct. at 1235 (Alito, J., concurring), that the contracts "shall" be modified. Likewise, although the Board's ability to impose damages or injunctive relief against a freight railroad depends on its finding a violation of the preference requirement, the commencement of an enforcement proceeding is triggered by a freight railroad's failure to satisfy the metrics and standards. The regulatory effect is clear and indisputable: If the metrics and standards are met, there can be no enforcement proceeding.

III. THE PANEL MAJORITY'S APPROACH TO SEVERABILITY CONFLICTS WITH DECISIONS OF THIS COURT.

In refashioning Section 207 by eliminating the arbitration provision in subsection (d), the panel majority enabled Amtrak and FRA to "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). This Court has held time and again that only Congress may determine how its delegated rulemaking power may be exercised. *See, e.g*., *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 231 n.4 (1994); *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). That principle follows logically from Article I of the Constitution, which vests "[a]ll legislative Powers" in the Congress. Whether the panel majority's use of severability to amend the rulemaking scheme infringed on Congress's plenary authority to delegate its legislative power presents a separate, additional question warranting this Court's review.

The government does not address this Court's decisions holding that an agency can issue rules only in the precise manner Congress has specified. Nor does it even acknowledge, let alone dispute, the panel majority's bold proclamation that by removing the arbitrator from the process, the court redirected "[u]ltimate control" over the rulemaking. App. 13a. It should be self-evident that selecting a different entity to control a rulemaking infringes on Congress's Article I authority to decide *who* shall execute delegated rulemaking power.

The government sidesteps this problem and focuses instead on whether the judicially-amended statute would operate in a way that "'would better comport with Congress's objectives'" than if Section 207 were invalidated. Opp. 21 (quoting App. 20a). But even if this were the correct approach in construing other statutes, it is not the correct one here, where the question is not what Congress *would* have delegated in a hypothetical world, but what it

did delegate. The government does not dispute that even if the reworked Section 207 could be said to have furthered the underlying congressional purpose, it is *not* the rulemaking scheme Congress enacted into law.

The government errs in contending that "Amtrak and the FRA have no authority that they did not possess before the arbitration provision was invalidated." Opp. 22. The statute Congress enacted gave Amtrak and FRA 180 days to regulate before an arbitrator could step in and they would lose their rulemaking authority. *See* PRIIA 207(d). Now, under the refashioned version of the statute, the grant of rulemaking authority is permanent and unbridled. In fact, elsewhere in its brief, the government *emphasizes* the elimination of this critical statutory restriction, stating that "it is far from clear what, if anything, remains of the 180-day deadline." Opp. 18.

The panel majority's approach to severability conflicts with this Court's repeated recognition that it is the prerogative of Congress to decide how its delegated rulemaking power shall be exercised. Four out of the six D.C. Circuit judges who decided this case on remand have determined that any fix to Section 207 must come from Congress. *See* App. 33a, 47a-48a, 79a. This Court should grant review and reach the same conclusion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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