No. 23-____

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY CO., PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Surface Transportation Board (STB or Board) is authorized by statute to exempt certain transactions involving rail carriers from the antitrust laws and other laws. 49 U.S.C. §§ 10502, 11321. Under the statutory and regulatory scheme, the Board must exempt "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3).

Ordinarily, the courts of appeals have exclusive jurisdiction under the Administrative Orders Review Act (Hobbs Act) to review STB decisions. 28 U.S.C. §§ 2321(a), 2342(5). But 28 U.S.C. § 1336(b) creates a narrow exception when a district court refers a question to the Board: "the court which referred the question or issue shall have exclusive jurisdiction" to review the Board's ruling. 28 U.S.C. § 1336(b).

The questions presented are:

1. Whether a court of appeals has jurisdiction under 28 U.S.C. §§ 2321(a) and 2342(5) to review a ruling of the Surface Transportation Board, when that ruling addresses a question that was not referred to the Board by a district court but is contained in a decision with an additional, separate ruling that does address a question referred to the Board by a district court.

2. Whether the court of appeals erred, contravening *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), by effectively deferring to the STB's erroneous interpretation of an unambiguous regulation, 49 C.F.R. § 1180.2(d)(3), that wrote an atextual prior-authorization requirement into that regulation.

PARTIES TO THE PROCEEDING

Petitioner (petitioner below) is Norfolk Southern Railway Company. Respondents are the Surface Transportation Board and the United States (respondents below) and CSX Transportation, Inc. (intervenor below).

CORPORATE DISCLOSURE STATEMENT

Petitioner Norfolk Southern Railway Company is wholly owned by the publicly held corporation Norfolk Southern Corporation. No publicly held corporation holds 10% or more of Norfolk Southern Corporation's stock, which is traded on the New York Stock Exchange under the symbol NSC. Norfolk Southern Railway Company is a Class 1 railroad operating in the eastern United States. As relevant to this proceeding, Norfolk Southern Railway Company transports containers to and from East Coast ports, where ships carry them in interstate and international commerce.

RELATED PROCEEDINGS

Supreme Court of the United States:

Norfolk Southern Railway Company v. Surface Transportation Board, et al., No. 23A226 (Oct. 17, 2023) (order extending the time to file a petition for a writ of certiorari)

United States Court of Appeals (D.C. Cir.):

Norfolk Southern Railway Company v. Surface Transportation Board, et al., No. 22-1209 (June 30, 2023) (case below)

United States Court of Appeals (4th Cir.):

CSX Transportation, Inc. v. Norfolk Southern Railway Company, No. 23-1537 (appeal from the district court proceeding that referred questions to the Surface Transportation Board)

United States District Court (E.D. Va.):

CSX Transportation, Inc. v. Norfolk Southern Railway Company, No. 2:18-cv-00530-MSD-RJK (April 19, 2023) (proceeding that referred questions to the Surface Transportation Board)

Norfolk Southern Railway Company v. Surface Transportation Board, et al., No. 2:22-cv-00385-MSD-RL (protective action under 28 U.S.C. § 1336(b) given the jurisdictional question presented here)

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INTRODUCTION

This case presents two important issues relating to the Surface Transportation Board's (STB or Board) arbitrary and capricious refusal to recognize what has been true for decades: that Petitioner Norfolk Southern Railway Company has the power to control the Norfolk & Portsmouth Belt Line Railroad Company (Belt Line) through a majority of Belt Line's shares, and that the Interstate Commerce Commission (ICC) in 1991 and the STB in 1998 authorized that control. In concluding otherwise, the STB adopted a new rule inconsistent with its own governing regulation, on which Norfolk Southern had long relied, inserting a novel prior-authorization requirement found nowhere in the regulation's text and not compelled by the Board's regulations or the statutory scheme. The issue is important because STB authorization confers immunity from antitrust and other laws for Norfolk Southern's operations with Belt Line. *See* 49 U.S.C. § 11321(a).

In upholding the Board's decision, the court of appeals ignored basic principles of administrative law, effectively abdicating its responsibility for careful judicial review of the agency's work. Contravening the basic rule of *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), that a court must evaluate the actual reasons the agency gave for its decision, the court of appeals justified the decision based on a need for notice, rather than on the prior-authorization requirement the agency actually relied on. In doing so, the court also effectively deferred to the Board's construction of a regulation that is not ambiguous, and a construction that does not reflect "fair and considered judgment"

and that threatens retroactive liability, all in violation of *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-18 (2019).

That decision warrants this Court's review. The court of appeals' approach shortchanges important administrative law values, eschewing the fundamental principle that the government should turn square corners. Norfolk Southern satisfied the plain text of the governing regulation. The ICC and STB approved Norfolk Southern's control over Belt Line. And that should come as no surprise to CSX Transportation, Inc. (CSX), a Norfolk Southern competitor that owns the remaining 42.86% of the Belt Line's shares and has long "acknowledg[ed] and accept[ed] [Norfolk Southern's] majority ownership and control of [Belt Line]," App. 56a. CSX nonetheless brought antitrust claims against Norfolk Southern and Belt Line. *See* App. 10a; *CSX Transportation, Inc. v. Norfolk Southern Railway Co.*, 648 F. Supp. 3d 679, 687 (E.D. Va. 2023) (granting summary judgment against CSX's Sherman Act damages claims as barred by the statute of limitations and unsupported by evidence of damages), *appeal pending*, No. 23-1537 (4th Cir.).

What's more, this case implicates an important circuit split over jurisdiction to review STB decisions. While the court of appeals applied the right test and correctly concluded that it had jurisdiction, it recognized that its reading of the relevant statutes "put [it] in the minority of circuits that had considered the issue." App. 16a n.8. The court acknowledged the STB's argument that "the approaches taken by the Third, Seventh and Eighth Circuit are superior." *Id.* (citing decisions). Without this Court's review, that disagreement will continue to create uncertainty, especially in circuits, where Norfolk Southern operates, with a different test, like the Third and the Eighth. This

jurisdictional question, too, makes this case worthy of the Court's attention.

1. First things first. This Court has jurisdiction because the court of appeals had jurisdiction, although the courts are divided on the test. The courts of appeals generally have "exclusive jurisdiction" over challenges to "final orders of the Surface Transportation Board." 28 U.S.C. § 2342(5). The relevant exception is that a district court that "refers a question or issue to the Surface Transportation Board" has "exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Surface Transportation Board arising out of such referral." *Id.* § 1336(b). As the D.C. Circuit held in *McCarty Farms, Inc. v. STB*, 158 F.3d 1294, 1300 (D.C. Cir. 1998), and reaffirmed here, § 1336(b) establishes a "bright line rule" that "issues expressly set out in the district court's referral order are reviewed by the district court" under § 1336(b), while "[t]he court of appeals reviews all other issues" under §§ 2321(a) and 2342(5). App. 16a-17a.

Under that test, the court of appeals had jurisdiction over Norfolk Southern's petition, because the district court referred to the STB only a question about a 1982 transaction, not any question about the 1991 and 1998 transactions at issue here. That decision was correct. But as the court recognized, the STB argued that the referring district court had exclusive jurisdiction. *See* App 16a & n.8. Indeed, the Third and Eighth Circuits take much more expansive views of § 1336(b), holding unreferred issues are within the district court's exclusive jurisdiction so long as they are sufficiently related to the issues the district court did refer. *See infra* pp. 22-24. Given the nationwide uncertainty—Norfolk Southern had to file a protective

§ 1336(b) petition in district court, and it operates in other circuits, like the Third and Eighth—the question is an important one for this Court to resolve.

2. On the merits, the court of appeals permitted the STB to get away with rewriting its unambiguous corporate-family-exemption regulation to add a novel prior-authorization requirement it held Norfolk Southern could not satisfy. In the STB's view, "[i]t is implicit in 49 C.F.R. § 1180.2(d)(3)'s requirement that … the member of the corporate family whose ownership is changing as a result of the transaction was previously authorized to be controlled by a member of the corporate family." App. 55a. But this Court's precedent and basic principles of administrative law do not permit that rewrite, and neither the STB nor the court of appeals held that Norfolk Southern couldn't satisfy the regulation as written. To make matters worse, the court of appeals defended not the agency's prior-authorization requirement, but a separate *notice* requirement that it suggested the statutory framework required. That approach not only contravenes *Chenery* and *Kisor*; it also misunderstands the broader statutory scheme and mistakes the agency's policy choice for statutory imperative. If the STB wants to add a prior-authorization requirement to the corporate-family-exemption regulation, it need only follow notice-and-comment rulemaking to comply with the Administrative Procedure Act.

The result of the court of appeals' approach also conflicts with other courts of appeals' application of *Kisor*. For example, several courts of appeals have recognized that *Kisor* doesn't permit an interpretation that adds to an unambiguous enumerated list. *See, e.g.*, *United States v. Castillo*, 69 F.4th 648, 657-62 (9th Cir. 2023) (citing decisions).

The court of appeals' notice rationale fails on its terms anyway. There *was* no competitive-balance problem (one of the actual factors under the regulation), and CSX, the complaining competitor here, *knew* that Norfolk Southern held a controlling share of Belt Line, because *CSX* agreed to that arrangement and held the rest of Belt Line's shares. Thus, CSX didn't object to the Norfolk Southern's 1991 and 1998 corporate-family exemptions. After all, the exemptions satisfied the regulation—they would not change service levels, operations, or competitive balance.

3. This case is an ideal vehicle for resolving these important questions presented. On the jurisdictional question, the court of appeals expressly recognized that it was in the "minority," acknowledged the STB's arguments for exclusive district-court jurisdiction, and noted that Norfolk Southern had filed a protective § 1336(b) petition in district court. App. 13a n.7, 16a n.8. And on the merits question, reversal would make a real difference by removing the agency's basis for denying Norfolk Southern important antitrust immunity. The Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-22a) is reported at 72 F.4th 297. The decision of the Surface Transportation Board (App. 23a-57a) is available at 2022 WL 2191932.

JURISDICTION

The court of appeals denied the petition for review on June 30, 2023. App. 1a. On September 12, 2023, the Chief Justice extended the time to file this petition to October 30, 2023. *See* 28 U.S.C. § 2101(c). On October 17, 2023, the Chief Justice further extended the time

to file this petition to November 27, 2023. This petition is timely filed on November 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App. 58a-67a.

STATEMENT

A. Legal background

1. Congress enacted the Interstate Commerce Act (ICA), 49 U.S.C. § 10101 *et seq.*, to "promote[] railroad consolidation to create a more efficient system of interstate rail transportation." *United Transportation Union v. Burlington Northern Santa Fe Railroad*, 528 F.3d 674, 677 (9th Cir. 2008). The ICA requires STB (or, before 1996, required ICC) approval for certain "transactions involving rail carriers." 49 U.S.C. § 11323(a); *see id.* § 1302 (STB assumption of ICC functions). One such transaction is the "[c]onsolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of the previously separately owned properties." *Id.* § 11323(a)(1). Another is a rail carrier's "[a]cquisition of control" over another carrier, including the "power to exercise control" by acquiring a majority of shares. *Id.* § 11323(a)(3); *see id.* § 10102(3) (defining "control"). As discussed below, STB or ICC approval or exemption of these kinds of transactions "exempt[s]" each carrier involved "from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier … exercise control or

franchises acquired through the transaction." *See id.* § 11321(a).

2. Under the ICA and ICC/STB regulations, there are two ways the STB authorizes (or the ICC authorized) changes in control, thus conferring immunity from antitrust and other laws under 49 U.S.C. § 11321(a).

First, the STB can issue a formal "approval and authorization" after evaluating a voluminous application from rail carriers participating in the transaction. *Id.* § 11323(b); *see id.* § 11325 (application procedure); 49 C.F.R. § 1180.4(c)-(d).

Second, the statute and regulations provide for exemption processes as an alternative to the formal approval process. The ICA requires the STB (and before it, required the ICC), "to the maximum extent consistent" with the statute, to exempt transactions from the formal approval process if (1) the full approval procedures are "not necessary to carry out the transportation policy of section 10101 of [the ICA]" and (2) either the transaction is "of limited scope," or the approval process "is not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10502(a). The Board "*shall* exempt" a transaction meeting these two requirements. *Id.* (emphasis added).

The ICA's exemption authority reflects Congress' recognition that the formal process can frustrate the purpose of promoting railroad consolidation. *See Kessler v. STB*, 635 F.3d 1, 3 (D.C. Cir. 2011). The exemption authority is one of a host of measures designed to turn around a railroad industry that was struggling from "excessive regulation." *See The 35th Anniversary of the Staggers Rail Act: Railroad*

Deregulation Past, Present, and Future: Hearing Before the Subcommittee on Railroads, Pipelines, & Hazardous Materials of the House Committee on Transportation & Infrastructure, 114th Cong. 1, 5 (2015) (statement of Hon. Deb Miller, Acting Chairwoman, STB), https://tinyurl.com/hxyzwckr. With the exemption, Congress sought to "ma[k]e it easier for railroads to merge" by requiring the agency to exempt carriers from regulation and instead "quickly approve transactions that were routine." *Id.* at 5.

This exemption authority "permits the [Board] to create expedited review processes" to allow carriers to "avoid sometimes cumbersome regulatory procedures" in certain circumstances. *Snohomish County v. STB*, 954 F.3d 290, 294 (D.C. Cir. 2020). As relevant here, ICC/STB regulations promulgated under § 10502(a) identify certain classes of transactions that may qualify for exemption through a notice of exemption process. 49 C.F.R. § 1180.2(d). Those regulations list nine kinds of transactions exempt from the formal application process. *Id.*

The exemption relevant here is known as the "corporate-family exemption." Promulgated in 1982, the corporate-family exemption applies to "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family." *Id.* § 1180.2(d)(3). As discussed below (at 14-16), Norfolk Southern's petition challenges the STB's rulings that the ICC's 1991 and the STB's 1998 approvals did not authorize Norfolk Southern to control Belt Line. *See* C.A. Pet. 3-4.

3. The jurisdictional question here is whether the court of appeals or the district court presiding over the antitrust action between CSX, on the one hand, and Norfolk Southern and Belt Line, on the other, has jurisdiction over Norfolk Southern's challenge to the STB's rulings on the 1991 and 1998 corporate-family exemptions.

Ordinarily, the courts of appeals have exclusive jurisdiction under the Administrative Orders Review Act (Hobbs Act) to review decisions of the STB. 28 U.S.C. § 2342(5). The Hobbs Act gives the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of … all rules, regulations, or final orders of the Surface Transportation Board," *id.*, "[e]xcept as otherwise provided by an Act of Congress," *id.* § 2321(a).

Section 1336(b) carves "a 'narrow'" exception for issues referred to the STB by a district court. *McCarty*, 158 F.3d at 1300.

> When a district court … refers a question or issue to the Surface Transportation Board for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Surface Transportation Board arising out of such referral.

28 U.S.C. § 1336(b). In *McCarty*, the D.C. Circuit explained the interplay between § 1336(b) and the Hobbs Act: "issues expressly set out in the district court's referral order are reviewed by the district court" under § 1336(b), while "[t]he court of appeals reviews all other issues" under §§ 2321(a) and 2342(5). 158 F.3d at 1300.

B. Factual and procedural background

This case centers on the STB's rulings that corporate-family transactions approved in 1991 and 1998 do not authorize Norfolk Southern to control Belt Line.

1. a. Belt Line was established in 1896 as a joint venture by eight railroads to provide those railroads switching services in Norfolk, Portsmouth, and Chesapeake, Virginia. App. 7a. Since then, gradual consolidation in the railroad industry has left Belt Line with fewer and fewer shareholders. Before the 1980s, five railroads held Belt Line stock. C.A. J.A. 908. The Chesapeake and Ohio Railway Company (Chesapeake) held 14.3%, the Seaboard Coast Line Railroad Company (Seaboard) held 28.6%, Norfolk and Western Railway Company (Norfolk and Western) held another 28.6%, Southern Railway Company (Southern) held 14.3%, and a subsidiary of Southern owned the final 14.3%. *Id.*

Today, Norfolk Southern and CSX are Belt Line's only remaining shareholders. C.A. J.A. 917. In 1980, CSX assumed control of Chesapeake and Seaboard, giving it 42.86% of Belt Line's shares. *See CSX Corp.—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc.*, 366 I.C.C. 521, 521-23, 1980 WL 14204 (Sept. 23, 1980). That same year, Norfolk and Western, Southern, and other carriers applied for ICC authorization to consolidate several carriers. They proposed that NWS Enterprises, Inc., would acquire control of Norfolk and Western and its subsidiaries and Southern and the subsidiaries designated in the application's appendices as the "consolidated system companies." App. 30a. One of the appendices identified Belt Line along with all the

other railroad companies in which Norfolk and Western or Southern held an ownership interest, noting that Norfolk and Western owned 28.57% of Belt Line, Southern owned 14.29%, and a Southern subsidiary owned 14.28%, for a total of 57.14%. App. 30a n.8. The ICC granted the application and the consolidated entity became Norfolk Southern Corporation (NSC). *See* App. 31a. As a result, CSX held 42.86% of Belt Line and NSC held the remaining 57.14%.

After the consolidations, NSC and CSX held proportional representation on Belt Line's board of directors. From 1982 to 1988, there were six board members. C.A. J.A. 909. Three members were appointed by Norfolk Southern railroads, two by CSX railroads, and one was Belt Line's president and general manager. *Id.*

CSX agreed to this arrangement. In 1983, one of the Belt Line board members appointed by CSX recognized that "[NSC] owns 57% of the Belt Line." C.A. J.A. 967. And in 1989, CSX and NSC agreed that "CSX[] will continue to have the right to appoint two representatives to the [Belt Line] Board of Directors, and [NSC] will have the right to appoint a total of three representatives." C.A, J.A. 971.

b. In 1990, Southern filed an exemption with the ICC seeking direct control through stock ownership over Norfolk and Western and indirect control over Norfolk and Western's subsidiaries. App. 8a-9a. The ICC published the notice of exemption in the *Federal Register*. *Southern Railway Co.—Control Exemption—Norfolk and Western Railway Co. Chesapeake Western Railway, the Toledo Belt Railway Co., and Wabash Railroad Co.; Exemption*, 56 Fed. Reg. 1541-03, 1991 WL 310251 (Jan. 15, 1991).

In its submission, Southern explained that it sought to consolidate because the "separate revenue, car, and other accounts for [Southern] and [Norfolk and Western] … results in considerable duplication of effort to route and exchange traffic with" those two railroad companies. C.A. J.A. 791. Southern explained that the corporate-family exemption applied because "[t]he transaction involves only rail carrier subsidiaries of [NSC] already commonly controlled and operated as part of a corporate family." C.A. J.A. 794. Finally, Southern proposed changing its name to Norfolk Southern Railway Company. C.A. J.A. 792.

No one objected or moved to revoke the corporate-family exemption. The ICC thus approved the transaction, *see Southern Railway*, 56 Fed. Reg. at 1541, and the newly named Norfolk Southern Railway obtained "direct control of [Norfolk and Western] and indirect control of [its] rail carrier subsidiaries," C.A. J.A. 792. Because Norfolk and Western held a 28.6% share of Belt Line, Norfolk Southern's direct control over Norfolk and Western resulting from the 1991 exemption further consolidated its 57.14% control of Belt Line.

c. In 1998, NSC sought authority, also under the corporate-family exemption, for Norfolk and Western to merge into Norfolk Southern. App. 9a-10a. Reporting that Norfolk Southern "and its consolidated railroad subsidiaries own or operate lines of railroad in … Virginia," C.A. J.A. 811, NSC explained that it was the sole owner of Norfolk Southern and that Norfolk and Western was a wholly owned direct subsidiary of Norfolk Southern. C.A. J.A. 809. NSC argued that consolidation would "further the goal of corporate simplification." App. 10a.

As with the 1991 exemption, the STB published the 1998 exemption in the *Federal Register*. *Norfolk Southern Railway Company; Merger Exemption; Norfolk and Western Railway Company*, 63 Fed. Reg. 46278-01, 1998 WL 546005 (Aug. 31, 1998). And as with the 1991 exemption, no one objected or moved to revoke the exemption. The STB thus approved the transaction. *See id.* The STB's approval placed 57% of Belt Line under Norfolk Southern's direct control. C.A. J.A. 845.

2. In 2018, CSX sued Norfolk Southern and Belt Line in the Eastern District of Virginia, alleging antitrust, conspiracy, and contract law violations arising from Norfolk Southern's and Belt Line's alleged actions to deprive CSX of rail access to the Norfolk International Terminal. *CSX Transportation, Inc. v. Norfolk Southern Railway Co.*, No. 2:18-cv-530 (E.D. Va.). Norfolk Southern moved to dismiss on the ground that the ICC's authorization of the 1982 consolidation immunized it under 49 U.S.C. § 11321(a) from CSX's antitrust and state-law conspiracy claims. *CSX*, No. 2:18-cv-530, 2021 WL 2908649, at *2 (E.D. Va. May 18, 2021). Alternatively, Norfolk Southern asked the court to refer the 1982 consolidation and immunity questions to the STB. *See id.* at *10. No party mentioned the 1991 or 1998 corporate-family transactions in its briefing. *See CSX*, No. 2:18-cv-530 (E.D. Va.), ECF Nos. 116, 131, 132, 138.

The district court referred the 1982 consolidation and immunity issues to the STB, concluding the agency was the "proper authority to clarify the contours of the 1982 consolidation." *CSX*, 2021 WL 2908649, at *9. The referral order asked:

> [1] Did the 1982 consolidation, whereby NSC acquired an indirect 57 percent interest in Belt Line, involve the ICC/STB granting NSC "approval" to control Belt Line, and [2] if so, did such authorized "control" render it necessary for antitrust and/or state conspiracy laws to yield, whether because Belt Line was then deemed a "franchise" of NSC, or for any other reason?

Id. at *11.

The district court mentioned the 1991 corporate-family transaction in passing in a footnote in the factual background while explaining how Norfolk Southern came to be, calling the exemption "not critical to [its] analysis." *Id.* at *4 n.7. The court did not mention the 1991 exemption anywhere else in the referral order, and did not mention the 1998 exemption at all.

3. After the district court referred the 1982 questions to the STB, Norfolk Southern successfully petitioned the STB to institute a declaratory proceeding. C.A. J.A. 186-87. In its briefing, Norfolk Southern raised two additional issues it had not presented to the district court: whether the 1991 and 1998 corporate-family exemptions granted it authority to control Belt Line. C.A. J.A. 844-45, 1014-15.

In June 2022, the STB issued its decision. The Board first addressed the referred question about the 1982 consolidation, ruling that the ICC had not authorized Norfolk Southern's predecessor to control Belt Line. App. 40a-57a. The STB reasoned that Norfolk Southern "told the ICC and the public that [it] had no intention of controlling" Belt Line. App. 44a. The STB explained that it would not "permit an

applicant to give assurances that control will not be obtained in a transaction" and then later try to claim control. App. 49a.

The STB then addressed the separate questions on the 1991 and 1998 corporate-family exemptions that the district court had not referred. The STB rejected Norfolk Southern's arguments, concluding that the ICC and STB could not have approved control over Belt Line through the corporate-family exemption "unless authority had previously been granted for some other member of [the] corporate family to control [Belt Line]." App. 54a. To reach that result, the STB announced for the first time a categorical rule: "It is implicit in [the corporate family exemption]'s requirement that the transaction be 'within a corporate family' that the member of the corporate family whose ownership is changing as a result of the transaction was previously authorized to be controlled by a member of the corporate family." App. 55a.

The STB offered two justifications for its rule. *First*, the Board reasoned that allowing a party to gain control through the corporate-family exemption would "effectively nullify other Board requirements," such as the requirement that a party "inform[] the Board" of the transaction through "an application or another type of exemption." App. 55a. *Second*, and relatedly, the Board explained that under Norfolk Southern's interpretation of the exemption, "the Board and the public might never even know that control authority was granted." *Id.* Thus, the Board reasoned that it must be "implicit" in the corporate-family exemption that the "member of the corporate family whose ownership is changing as a result of the transaction was previously authorized to be controlled by a member of the corporate family." App. 55a. The Board offered no

analysis of the regulation's text or explanation of how its prior-authorization rule furthers the regulation's purposes.

Applying its new categorical rule, the Board concluded that neither the 1991 nor the 1998 corporate-family exemption approved Norfolk Southern's control of Belt Line. Still, the Board expressed "concern[]" that CSX had seemingly "understood that [Belt Line] was under the control of [Norfolk Southern]" for decades without objecting. App. 55a-56a & n.24.

4. Norfolk Southern petitioned the court of appeals to review the STB's rulings as to the 1991 and 1998 corporate-family exemptions. C.A. Pet. 3-5. CSX intervened to defend the STB's rulings, and CSX and the government moved to dismiss, contending that the district court has exclusive jurisdiction under 28 U.S.C. § 1336(b). Norfolk Southern also filed a protective complaint under § 1336(b) in the Eastern District of Virginia, asking the district court to hold the case in abeyance pending resolution of the proceedings before this Court. Compl. 14, *Norfolk Southern Railway Co. v. STB*, No. 2:22-cv-385, ECF No. 1 (E.D. Va. Sept. 15, 2022).

The court of appeals denied Norfolk Southern's petition for review.

The court first held that it had jurisdiction under 28 U.S.C. §§ 2321(a) and 2342(5) to review the petition. App. 15a-18a. The court explained that the Hobbs Act confers jurisdiction on the courts of appeals "to review 'all … final orders of the Surface Transportation Board'" except for the answers to "questions referred by a district court to the Board." App. 15a (quoting 28 U.S.C. § 2342(5)). Thus, referred questions lead to exclusive jurisdiction in the district court

that made the referral, but the court of appeals decides all other issues. *See* App. 16a-17a (citing *McCarty Farms*, 158 F.3d at 1298). The court noted that "the Eastern District court referred only the 'discrete question' whether 'the 1982 consolidation' authorized control of the Belt Line." App. 17a. Because the 1982 question, on the one hand, and the 1991 and 1998 questions, on the other, could "be analyzed separately, as the Board did in its order," the court concluded that it had jurisdiction over Norfolk Southern's petition, which challenged the Board's determination on the 1991 and 1998 questions. *Id*.

On the merits, the court of appeals agreed with the STB that the 1991 and 1998 corporate-family exemptions did not grant Norfolk Southern authority to control Belt Line. The court acknowledged that the relevant regulation is "silent regarding whether previously authorized control can become authorized *via* the corporate-family exemption." App. 19a. But in the court's view, not allowing the Board to insert a prior-authorization requirement "would effectively override the specific Board approval procedures for control acquisitions." App. 20a. Thus, according to the court, "the Board's previous-authorization rule is compelled by the ICA's regulatory framework." *Id*. Without a prior-authorization requirement, the corporate-family exemption would "effectively nullify other Board requirements," the court explained, "since parties could acquire control of a carrier without informing the Board in a transaction that would normally require an application or another type of exemption under the Board's rules and then cure that unauthorized acquisition by reorganizing the corporate family and seeking a corporate family transaction exemption." *Id.* (quoting App. 55a).

5. Meanwhile, the district court in *CSX* granted summary judgment in favor of Norfolk Southern on CSX's federal antitrust claims and state-law claims, concluding, among other things that CSX had pointed to no evidence that it "was *actually damaged* during the limitations period." 648 F. Supp. 3d at 720; *see also* No. 2:19-cv-530 (E.D. Va.), 2023 WL 2552343 (Jan. 27, 2023) (dismissing request for injunctive relief under federal law); 2023 WL 7273736 (Apr. 19, 2023) (dismissing all remaining claims). CSX's appeal is pending before the Fourth Circuit. *See CSX Transportation, Inc. v. Norfolk Southern Railway Company*, No. 23-1537 (4th Cir.).

REASONS FOR GRANTING THE PETITION

Although the court of appeals correctly determined that it had jurisdiction, it also acknowledged that the courts of appeals have divided over the question presented, with the Third, Seventh, and Eighth Circuits taking a different approach. The D.C. Circuit has adopted a bright-line rule—consistent with 28 U.S.C. § 1336(b) and other relevant statutes—that only "issues expressly set out in the district court's referral order" go back to the district court, with everything else going to a court of appeals. App. 16a-17a. The Third, Seventh, and Eighth Circuits, in contrast, hold that a referring district court has exclusive jurisdiction over STB rulings, even if those rulings are not responsive to questions the district court referred, so long as the STB rulings arise out of the controversy in which the district court made a referral. The circuit split leaves parties and courts alike uncertain as to which court has jurisdiction. Only this Court can resolve the problem.

On the merits, the STB's ruling was arbitrary and capricious, and the court of appeals erred twice over in failing to correct the Board's error. The STB inserted an atextual prior-authorization requirement into 49 C.F.R. § 1180.2(d)(3). In turn, the court of appeals erred by (1) relying on a reason the agency did not give for its ruling, in violation of *Chenery*, and (2) effectively deferring to the agency's interpretation of an unambiguous regulation, in violation of *Kisor*.

This case is an ideal vehicle for resolving the important questions presented. The circuit split on the jurisdictional question has created widespread confusion—which is why Norfolk Southern had to file a protective complaint in the Eastern District of Virginia, in addition to its petition for review before the D.C. Circuit. The Court should put that jurisdictional ambiguity to rest. And reversal on the merits would provide important guidance to courts an administrative agencies generally about fundamental administrative law principles, including the operation of *Kisor*. It would also provide valuable guidance to the parties in this case about the application of antitrust laws to Norfolk Southern's and Belt Line's operations, especially in the context of CSX's costly, opportunistic litigation now pending before the Fourth Circuit.

The Court should grant review.

I. The D.C. Circuit had jurisdiction, but the courts of appeals are divided on the test, as the D.C. Circuit recognized.

The court of appeals correctly concluded that it had jurisdiction, but it also recognized that its reading of the statutes put it in the short side of a circuit split. Without this Court's review, that disagreement will

continue to create uncertainty—especially for Norfolk Southern, which operates in circuits that interpret the statutes differently.

A. The court of appeals correctly concluded that it had jurisdiction.

The court of appeals correctly followed its decision in *McCarty Farms* to conclude that it had jurisdiction under 28 U.S.C. §§ 2321(a) and 2342(5) to review Norfolk Southern's petition. App. 15a-18a. As the court explained, "the Hobbs Act confers jurisdiction to review 'all … final orders of the Surface Transportation Board'" except for the answers to "questions referred by a district court to the Board." App. 15a. Referred questions lead to exclusive jurisdiction in the district court that made the referral, but the court of appeals decides all other issues. *See* App. 16a-17a (citing *McCarty Farms*, 158 F.3d at 1298).

Here, the court of appeals held that it had jurisdiction to review "the Board's rulings regarding the 1991 and 1998 transactions" "[b]ecause the Eastern District court referred only the 'discrete question' whether 'the 1982 consolidation' authorized control of the Belt Line." App. 17a. Because the 1982 question, on the one hand, and the 1991 and 1998 questions, on the other, could "be analyzed separately, as the Board did in its order," the court had jurisdiction. *Id.*

That decision was correct. "When a district court … refers a question or issue to the [STB] for determination," the district court has exclusive jurisdiction only over an "order of the [STB] arising out of such referral." 28 U.S.C. § 1336(b). That statutory language makes clear that the jurisdictional question turns on *issues*: "'issues expressly set out in the district court's referral order' fall under section

1336(b) but '[t]he court of appeals reviews all other issues' under sections 2321(a) and 2342(5)." App. 17a (quoting *McCarty Farms*, 158 F.3d at 1300). And the virtue of that approach is plain: one need "examine[] only 'the language of the district court's referral'" to determine which court has jurisdiction. App. 18a (quoting *McCarty Farms*, 158 F.3d at 1300 (quoting *Union Pacific Railroad Co. v. Ametek, Inc.*, 104 F.3d 558, 566 (3d Cir. 1997) (Roth, J., dissenting))).

In CSX and the STB's view, a district court referral triggers § 1336(b) as to any issue addressed in the resulting STB "order," because the statute gives the district court exclusive jurisdiction over "any order of the Surface Transportation Board arising out of such referral." 28 U.S.C. § 1336(b). But that view wrongly assumes that the word "order" refers to the *document* that the STB issues (which may in fact contain multiple orders) rather than the order resolving the referred issue (and not other orders in the STB decision on issues that were not referred). Indeed, it is "fairly commonsensical" that a single "document[]" can "contain[] multiple orders" resolving different issues, and that "[c]ourts frequently issue multiple orders in the same document, particularly when a party request[s] multiple forms of relief at the same time." *Boshears v. PeopleConnect, Inc.*, 76 F.4th 858, 861 (9th Cir. 2023). Here, the STB Decision contained an order on the 1982 issue that the district court referred, but it also contained separate orders on the 1991 and 1998 issues on which Norfolk Southern separately sought relief but which the district court did not refer.

The court of appeals also correctly rejected the STB's and CSX's arguments that its rule would undermine judicial economy. As the court explained, there

is little efficiency to be gained when "claims that are only tangentially related to those referred by the district court … are brought before the STB in the first instance." App. 18a n.9 (quoting *McCarty Farms*, 158 F.3d at 1300).

B. As the court of appeals recognized, however, the circuits have divided on this important jurisdictional question.

1. Although the court of appeals applied the correct jurisdictional test and reached the correct result, it recognized that its "reading of section 1336(b) put [it] in the minority of circuits that had considered the issue." App. 16a n.8. The court acknowledged the STB's argument that "the approaches taken by the Third, Seventh and Eighth Circuits are superior." *Id.* (citing *Railway Labor Executives' Association v. ICC*, 894 F.2d 915, 917 (7th Cir. 1990); *Ametek*, 104 F.3d at 559, 562 (3d Cir.); *Railroad Salvage & Restoration, Inc. v. STB*, 648 F.3d 915, 917-18 (8th Cir. 2011)).

Those other courts of appeals do not adhere to the D.C. Circuit's "bright line" rule that only "issues expressly set out in the district court's referral order" go back to the district court, with everything else going to a court of appeals. App. 16a-17a (quoting *McCarty Farms*, 158 F.3d at 1300). Indeed, *McCarty Farms* took that approach from the *dissent* in the Third Circuit's decision in *Ametek*. *See* 158 F.3d at 1300. The *Ametek* majority, in contrast, concluded that it had jurisdiction over a threshold issue that the district court had not "referred to the ICC" (even though that issue may have been logically antecedent to the referred question). *Ametek*, 104 F.3d at 561-62.

The conflict is even clearer with the Eighth Circuit, which "acknowledge[d] that [its] conclusion may

appear to be at odds with an opinion of the D.C. Circuit"—*i.e.*, *McCarty Farms*. *Railroad Salvage*, 648 F.3d at 920. In *Railroad Salvage*, the Eighth Circuit embraced "the Third Circuit's opinion in *Ametek*" and "reject[ed] [the] argument that § 1336(b) only grants exclusive jurisdiction to referring courts to review the Board's determination of issues that the court explicitly referred to the Board." *Id.* The court held that the district court had exclusive jurisdiction under § 1336(b) to review an issue "even though the court never explicitly referred the issue to the Board," because "the same basic dispute" between "the same two parties." *Id.* And according to the Eighth Circuit, "the referring district court's review of [that] issue will prevent a 'cumbersome and potentially protracted bifurcation of judicial review.'" *Id.* (quoting *Ametek*, 104 F.3d at 562).

2. Although the court of appeals here applied the correct jurisdictional test, other courts of appeals do not, and the Board and United States urged the incorrect test from *Ametek* and *Railroad Salvage*. *See* App. 18a n.9. And despite its victory below, the correct test remains an issue for Norfolk Southern, which operates in (among other jurisdictions) the Third, Seventh, and Eighth Circuits. *See* Norfolk Southern Rail Network Map, https://tinyurl.com/yc2un2wb (last visited November 27, 2023).

This Court's definitive guidance on § 1336(b) matters because the D.C. Circuit's reaffirmance of its standard doesn't necessarily settle the matter. In the Third and Eighth Circuits, for instance, *Ametek* and *Railroad Salvage* tell litigants and district courts that the district court is the exclusive forum. And although a petitioner may elect to proceed in the D.C. Circuit, 28 U.S.C. § 2343 (Hobbs Act venue provision),

§ 1336(b) also confers jurisdiction "to enforce" (and not just "enjoin" or "set aside") an STB determination, meaning that in some cases parties could seek review simultaneously in the district court and D.C. Circuit, with binding circuit precedent compelling two different paths. Beyond that, at a more practical level, a district court in the Third, Seventh, or Eight Circuit (or others) might expect to review all issues, despite D.C. Circuit precedent, and could suggest (with the regional circuit's backing) that failure to seek review in the district court would forfeit reliance on any arguments. Put simply, definitive resolution of the correct § 1336(b) test is important.

II. The court of appeals' merits ruling contravenes *Chenery* and *Kisor* and allows agencies to add unwritten requirements to their regulations.

By inserting an atextual prior-authorization requirement into 49 C.F.R. § 1180.2(d)(3), the STB's rulings on the 1991 and 1998 corporate-family exemptions are fundamentally inconsistent with the regulation the agency was purporting to interpret. In upholding the Board's decision, the court of appeals abdicated its fundamental responsibility to carefully review the agency's work. Contrary to *Chenery*, 332 U.S. at 196, the court of appeals relied on a reason the agency didn't give for writing a prior-authorization requirement into the regulation. And contrary to *Kisor*, 139 S. Ct. at 2414-18, the court of appeals effectively deferred to the Board's construction of an unambiguous regulation. Indeed, other courts of appeals have refused to defer under *Kisor* to interpretations of unambiguous text. *See Castillo*, 69 F.4th at 657-62.

A. The court of appeals erred in upholding the STB's rewrite of its regulation.

The STB acted arbitrarily and capriciously in adding an atextual requirement to the corporate-family exemption. And the court of appeals erred by deferring to the agency's unreasonable interpretation of an unambiguous regulation.

1. The STB's rulings are arbitrary and capricious because they contravene the Board's regulation.

The STB's rulings on the 1991 and 1998 corporate-family exemptions are arbitrary and capricious because they rest on a categorical rule that is inconsistent with the corporate-family exemption the agency claimed it was interpreting. In fact, rather than interpret the regulation, the agency purported to add a requirement not found in the regulation's text and contradicted by its structure.

The "plain words of the regulation," *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), require the STB to approve "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family," 49 C.F.R. § 1180.2(d)(3). But the STB's interpretation of the regulation purported to add another requirement to that list: that "the member of the corporate family whose ownership is changing as a result of the transaction was previously authorized to be controlled by a member of the corporate family." App. 55a. That addition was amendment, not interpretation.

Statutory and regulatory structure confirm that point, because the addition is superfluous to the listed

conditions and ignores other regulatory and statutory provisions. Contrary to the STB's justifications, the listed conditions provide three checks to ensure that approval of an exemption satisfies the regulation and the underlying statute.

First, for the exemption to apply, the transaction cannot result in a "change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3). The regulation's very first factor thus already addresses the concern about permitting anti-competitive transactions that the agency cited to justify adding a new prior-authorization requirement. And the agency has long adhered to its competitive-balance requirement as a key criterion for the exemption. In 1992, for instance, the ICC proposed a rulemaking that would curtail the class exemption to exempt only "transactions within a corporate family that do not result in adverse changes in service levels." *Railroad Consolidation Procedures: Class Exemption for Transactions Within a Corporate Family*, 57 Fed. Reg. 34891-02, 34891, 1992 WL 187987 (Aug. 7, 1992). But the agency then rejected that change, voting to maintain the current requirements. *49 CFR Part 1180: Railroad Consolidation Procedures: Class Exemption For Transactions Within A Corporate Family*, 1993 WL 17884 (Jan. 19, 1993). Put simply, the ICC rejected an effort to eliminate the competitive-balance requirement.

Second, other regulated parties can intervene in an exemption proceeding to object to the exemption's application if they believe the requirements for the exemption have not been met. *See* 49 C.F.R. § 1180.4(g)(v). The exemptions require public notice in the *Federal Register* "within 16 days of the filing of the notice." *Id.* § 1180.4(g)(iii). And objections are

common. *See, e.g.*, *Merger—The Baltimore & Ohio Railroad Co. & The Chesapeake & Ohio Railway Co.*, ICC No. FD 31035, 1988 WL 225928, at *1 (Feb. 22, 1988); *Delaware & Hudson Railway Co.—Lease & Trackage Rights Exemption—Springfield Terminal Railway Co.*, 4 I.C.C.2d 322, 333-34 (Feb. 17, 1988) ("We have stated in the past that while class exemptions permit the vast majority of covered transactions to go forward without specific prior approval, we stand ready to consider any necessary modifications to a particular exempted transaction in exceptional circumstances such as those found here.").

Third, the STB can revoke an exemption at any time if it concludes that revocation is "necessary to carry out the transportation policy of section 10101." 49 U.S.C. § 10502(d). Revocation, too, is common. *See, e.g.*, *BNSF Railway Co.—Temporary Trackage Rights Exemption—Union Pacific Railroad Co.*, STB No. FD 35963, 2015 WL 9241562, at *1 (Dec. 11, 2015) (granting partial revocation of an exemption because it would "promot[e] RTP policy goals"); *South Plains Switching, Ltd.—Acquisition Exemption—BNSF Railway Co.*, STB No. FD 33753, 2006 WL 2644250, at *2 (Sept. 14, 2006) (revocation is appropriate if STB finds that "regulation is necessary to carry out the rail transportation policy of 49 U.S.C. [§] 10101" or "to ensure the integrity of the Board's processes").

Finally, the Board's prior-authorization rule is inconsistent with the statutory and regulatory scheme more generally. The Board's concern that applying the corporate-family exemption where control has not been previously authorized would hamper public transparency because it would result in control without a full application process is true of *all* the exemptions. For instance, 49 C.F.R. § 1180.2(d)(1)

exempts from an application the "[a]cquisition of a line of railroad which would not constitute a major market extension where the Board has found that the public convenience and necessity permit abandonment." But the entire point of exemptions, which Congress has required the Board to use "to the maximum extent," 49 U.S.C. § 10502, is to avoid the "cumbersome regulatory procedures" of a full application. *Snohomish County*, 954 F.3d at 294. Adding ad hoc requirements inconsistent with existing regulations contravenes the statutory and regulatory regime Congress and the agency have established.

2. The court of appeals' decision is wrong, and it conflicts with other decisions interpreting *Kisor*.

Despite these problems, the court of appeals upheld the STB's ruling on the 1991 and 1998 exemptions. In the court's view, the regulation "is (understandably) silent regarding whether previously authorized control can become authorized *via* the corporate-family exemption." App. 19a. The court accepted that "Norfolk Southern's point" that the agency could not add requirements missing from the regulation's text was "fair in theory." App. 20a. According to the court, however, not allowing the Board to insert a prior-authorization requirement "would effectively override the specific Board approval procedures for control acquisitions." *Id*. The court reasoned that the Board's reasoning wasn't just a response to policy concerns but was "compelled by the ICA's regulatory framework." App. 20a. The court quoted the Board's concern that without a prior-authorization requirement, the corporate-family exemption would "effectively nullify other Board requirements since parties could acquire control of a

carrier without informing the Board in a transaction that would normally require an application or another type of exemption under the Board's rules and then cure that unauthorized acquisition by reorganizing the corporate family and seeking a corporate family transaction exemption." *Id.* (quoting App. 55a).

That reasoning fails. Put simply, the court of appeals relied on a reason the agency didn't give for writing a prior-authorization requirement into the regulation: that without a prior-authorization requirement, the STB and interested parties will not have *notice* of the new control authorization. Under *Chenery*, however, the court of appeals must examine the reasons the agency actually gave for its decision, 332 U.S. at 196, and lack of notice wasn't among them.

That makes sense. For one thing, perhaps the agency could have imposed an actual requirement. Not doing so here is unsurprising, though, given that all agree—as the STB recognized, *see* App. 56a & n.24—that CSX, Norfolk Southern's competitor, *knew* that Norfolk Southern controlled Belt Line. *See* Norfolk Southern C.A. Br. 21, 63. The Board drove home the point that notice *wasn't* the basis for its decision when it explained that CSX's knowledge was "irrelevant to whether the ICC granted [Norfolk Southern] authority to control [Belt Line]." App. 56a.

What's more, perhaps the STB by amendment or even further interpretation might address a notice requirement, but by resting its reasoning on notice concerns, the court of appeals took that decision from the agency while endorsing an unlawful amendment to the regulation. Perhaps notice could be relevant to helping the STB or interested parties determine whether the applicant satisfies the (actually

enumerated) requirements of the corporate-family-exemption regulation. But Norfolk Southern *satisfied* those requirements. Take the competitive-balance requirement—Norfolk Southern maintained control over Belt Line's shares and its Board of Directors following the 1982 consolidation, and CSX, the complaining competitor, not only knew of this arrangement, but consented to it. *See* Norfolk Southern C.A. Br. 12-14. CSX could have objected to the 1991 and 1998 corporate-family exemptions, but it did not—after all, it had no reason to do so, because the exemptions would result in no "adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3).

In the end, the court of appeals' analysis effectively deferred to the agency where the text of the regulation isn't ambiguous, in violation of *Kisor*, while inventing reasoning that wasn't the agency's—that the ICA compels the agency's result. But that's not right, either, because the agency's authority under the ICA to make regulations permits *it* to decide (so long as it proceeds the right way) which transactions to exempt from the full application process. *Supra* pp. 7-8. There may be policy reasons to require full applications for all new authorizations (*i.e.*, to require prior authorization for the corporate-family exemption). But the ICA doesn't compel that result, and the corporate-family regulation, as written, doesn't allow it.

The court of appeals' ruling cannot be reconciled with decisions from other courts of appeals that have concluded that *Kisor* doesn't permit interpreting unambiguous text to add provisions that aren't there. Just take the recent example in *Castillo*, where the Ninth Circuit joined several other circuits to hold that

the Sentencing Commission's attempt to add inchoate crimes to a Guidelines definition was barred by *Kisor*, because the enumerated definition itself was unambiguous. 69 F.4th at 657-62. That logic should have controlled here. The corporate-family exemption is unambiguous, so the STB could not concoct a notice requirement out of thin air.

B. The court of appeals' reasoning raises broader concerns about whether regulated parties can rely on the government to turn square corners.

In eschewing *Chenery* and *Kisor*, the court of appeals enabled the STB to undermine important reliance interests. For instance, *Kisor* deference requires an agency's interpretation to reflect the agency's "fair and considered judgment." *Kisor*, 139 S. Ct. at 2417. But the STB's reasoning in defending its prior-authorization rule consisted only of policy justifications not specific to the corporate-family exemption. Those conclusory rationales hardly reflect considered judgment. And now, parties like Norfolk Southern, who have relied on the corporate family exemption to acquire control, will be vulnerable to having those transactions unwound under the Board's new interpretation. The Board's new categorical rule thus has the potential to "impose[] retroactive liability on parties for longstanding conduct that the agency had never before addressed." *Id.* at 2418.

By signing off on the STB's approach, the court of appeals also let the STB violate another core APA rule: that agencies have power to create rules of only *prospective* effect. *See* 5 U.S.C. § 551(4) (defining rule as an agency statement of "future effect"). As Justice Scalia explained, agency action can constitute a "rule"

only if it has "legal consequences only for the future." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring). Here, the prior-authorization requirement isn't just an interpretation of the regulation. It's a new rule—and a rule attaching new consequences to pre-promulgation conduct, or a retroactive rule, and thus one barred by the APA.

The answer here was simple: If the agency had policy concerns, the proper route was to initiate notice-and-comment rulemaking and promulgate a new rule of prospective effect. As this Court has often noted, "the Government should turn square corners in dealing with the people." *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1909 (2020). That is true even for basic administrative law requirements, precisely because they "serve[] important values." *Id.* Whether a prior-authorization rule makes sense is a good candidate for the same rulemaking that produced the regulation the STB amended by inserting the prior-authorization rule, and the requirements that both the STB and the court of appeals ignored permitted the STB to call into question a decades-long, well-known arrangement between CSX and Norfolk Southern with no basis in regulatory text.

III. This case is the ideal vehicle for addressing these important questions.

The questions presented are important, and this is an ideal vehicle for resolving them. On the jurisdictional question, the court of appeals recognized that the STB sought dismissal for lack of jurisdiction, contending that "the approaches taken by the Third, Seventh and Eighth Circuits are superior." App. 16a

n.8. The court also acknowledged that "Norfolk Southern also filed a 'protective complaint under § 1336' in the Eastern District Court." App. 13a n.7. The Court's resolution of the jurisdictional question would determine which court has jurisdiction in this case and others like it.

As to the merits question, reversal would make a real difference. Because the STB's novel prior-authorization rule is inconsistent with the corporate-family-exemption regulation, the agency cannot rely on it to deny authorization of Norfolk Southern's control over Belt Line. Perhaps the agency would decide to initiate notice-and-comment rulemaking or even try to declare a rule of prospective effect in a remand. But it would be unable to apply the prior-authorization rule to the 1991 and 1998 corporate-family exemptions. The result would be that Norfolk Southern would have immunity from antitrust and other laws under 49 U.S.C. § 11321(a) for its operations with Belt Line, barring the costly and opportunistic litigation CSX began many years later (despite its recourse with the STB for any perceived problems).

* * *

The courts of appeals are divided on the jurisdictional question presented. Although the court of appeals took the right approach below, it recognized that its approach is the minority view, and the jurisdictional split creates uncertainty for railroads across the country. On the merits, the court of appeals erred by deferring to the STB's unreasonable interpretation of its unambiguous regulation, creating tension among the courts of appeals as to the proper interpretation and application of *Kisor*. The Court should grant review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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