No. 23-577

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's and CSX's briefs in opposition underscore the need for this Court's review. The government *concedes* that the courts of appeals have split on the jurisdictional question presented, and it contends that the D.C. Circuit got the answer wrong. Opp. 14-17. Because those are all reasons the case is certworthy, the government swerves, claiming that the case is a poor vehicle because Norfolk Southern prevailed on the jurisdictional question below. But the Court frequently confronts jurisdictional questions, even ones that aren't independently certworthy, in the course of plenary review. And here, the question presented is both important and the source of a circuit conflict. This Court should resolve it.

On the merits, CSX and the government try to shift the focus from the important question presented about whether *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), permits an agency to add a requirement to an unambiguous regulation. In their telling, the petition presents only a factbound question about the correct interpretation of 49 C.F.R. § 1180.2(d)(3). But that's like saying that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is just a case about an Environmental Protection Agency regulation. Here, in upholding the Surface Transportation Board's decision, the court of appeals allowed the agency to amend clear regulatory text. That decision offends basic administrative-law principles, conflicts with other circuits' understanding of *Kisor*, and ignores Norfolk Southern's and CSX's longstanding relationship with Belt Line.

The Court should grant review.

ARGUMENT

I. The government concedes that the circuits have split over the jurisdictional test.

A. 1. As Norfolk Southern explained (Pet. 20-22), the court of appeals correctly concluded that it had jurisdiction under 28 U.S.C. §§ 2321(a) and 2342(5) to review Norfolk Southern's petition. App. 15a-18a. Recognizing the importance of "bright line" jurisdictional rules, the court adhered to its decision in *McCarty Farms, Inc. v. STB*, 158 F.3d 1294 (D.C. Cir. 1998), holding that "'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. 16a-17a (quoting *McCarty Farms*, 158 F.3d at 1300).

2. At the same time, as Norfolk Southern explained (Pet. 22-24), the courts of appeals have split 3–1 on the jurisdictional test, with the D.C. Circuit reaffirming its disagreement with three other circuits. Indeed, the court of appeals 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 government'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); *Union Pacific Railroad Co. v. Ametek, Inc.*, 104 F.3d 558, 559, 562 (3d Cir. 1997); *Railroad Salvage & Restoration, Inc. v. STB*, 648 F.3d 915, 917-18 (8th Cir. 2011)).

The government agrees that the "circuit conflict" is real. Opp. 16. It concedes that Norfolk Southern "correctly observes" "that the Third and Eighth Circuits have held, contrary to the decision below, that

when the Board issues an order arising out of a referral, the referring district court has jurisdiction to review both issues in the Board's order that were expressly referred" as well as "issues in the order that were not expressly referred." Opp. 16. And it continues to contend (Opp. 14-16) that the court of appeals' test, which it acknowledges traces back to *McCarty*, is wrong. The government's position thus confirms the certworthiness of the jurisdictional question presented.

B. The government and CSX nonetheless contend that the Court shouldn't grant review to resolve the jurisdictional issue. Those arguments lack merit.

1. CSX first suggests that it's unclear whether "the courts of appeals are divided on the scope of their jurisdiction to review the answers given by the Board to referred questions." Opp. 11. That argument is wrong: both the court of appeals and the government have acknowledged the circuit split. More puzzling still, before the court of appeals, CSX made the same jurisdictional arguments, relying on the same precedent, as the government. *See* App. 16a-18a. CSX's selective memory only proves the split is real—and remains just as real as it was when CSX was making its arguments before the court of appeals.

Indeed, later in its brief in opposition, CSX says that the court of appeals is "the one circuit with an aberrational rule" and concedes that "[a]ccording to the court below … , three other circuits have taken a contrary approach." Opp. 13. CSX then spends a full page suggesting that the court of appeals should have "an opportunity to take corrective action." *Id.* But that makes no sense, since the court of appeals (correctly) followed its 1998 decision in *McCarty Farms* after

squarely considering the government's request to adopt the rule of the Third, Seventh, and Eighth Circuits. App. 16-18 & n.8. The split is not only real—it's also entrenched.

In any event, even assuming a sophisticated party like CSX can't figure out which jurisdictional rules apply, that only underscores the need for this Court's review. As Judge Posner observed, with §§ 2321(a) and 2342(5), on the one hand, and § 1336, on the other, "Congress has divided jurisdiction between the courts of appeals and the district courts, and the division should be clearly marked." *Field Container Corp. v. ICC*, 712 F.2d 250, 254 (7th Cir. 1983). Unclear jurisdictional rules don't serve anyone.

2. The government (Opp. 14, 16-17) and CSX (Opp. 11-12) next contend that this case is a poor vehicle for resolving the jurisdictional question because Norfolk Southern prevailed on the issue below. That argument misses the point.

First, because the question presents a threshold jurisdictional issue, the Court must address it if it grants review to consider Norfolk Southern's merits question presented. The government and CSX do not confront, much less dispute, that point. And given the required order of operations, it makes sense for Norfolk Southern to present the question for the Court's consideration, and to explain why the question also happens to be independently certworthy. Indeed, CSX implicitly acknowledges all this when, in addressing the jurisdictional issue, it argues that Norfolk Southern's "*merits* argument is not cert-worthy." Opp. 11 (emphasis added).

CSX's argument that Norfolk Southern hasn't pointed to a case in this exact "posture," Opp. 11, thus

loses the forest for the trees. The Court frequently confronts jurisdictional questions *not* raised in the cert petition precisely because those questions go to its power to hear the case, *see, e.g.*, *Reed v. Goertz*, 598 U.S. 230, 234-35 (2023)—and even if prior decisions have assumed jurisdiction "without anyone objecting," *Ortiz v. United States*, 585 U.S. 427, 435 (2018). So too does the Court frequently specify "additional questions to be briefed and argued" to ensure that jurisdictional issues are fully aired. Stephen Shapiro et al., *Supreme Court Practice* 5-33 (11th ed. 2019) (citing cases); *see, e.g.*, *Trump v. International Refugee Assistance Project*, 582 U.S. 571, 579 (2017) (Court directed parties to address mootness); *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (Court "directed that the parties also brief and argue" standing); *United States v. Windsor*, 570 U.S. 744, 755 (2013) (Court added jurisdictional questions); *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 226 (2007) (Court "asked the parties also to address whether the Ninth Circuit had appellate jurisdiction"). And sometimes the additional question presented becomes *the* question that the Court decides. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 112-17, 124-25 (2013).

Second, the jurisdictional question is an important one. As the petition explained (at 23-24), railroads like Norfolk Southern operate in more than one circuit. And a petitioner challenging an STB order under the Hobbs Act can *always* proceed in the D.C. Circuit under the Administrative Orders Review Act, *see* 28 U.S.C. § 2343, so long as it can satisfy the D.C. Circuit's jurisdictional test. Allowing the D.C. Circuit and other courts to apply different jurisdictional tests thus sows confusion and promotes forum-shopping.

The government's (Opp. 17) and CSX's (Opp. 12-13) only responses to these points are that the question presented is "purely procedural," CSX Opp. 12, and not important because it arises infrequently.

Those responses are unpersuasive. Many questions that federal courts must (and this Court does) resolve are of the "purely procedural" genre, but that doesn't make them any less important. That's especially true of jurisdictional questions, which go to courts' power to hear a case in the first place. And as Judge Posner explained of the similar confusion over § 1336(a), without clear rules for § 1336, "proper classification becomes a litigable issue, and a party's mistake in classification can result in his losing his right to judicial review." *Field Container Corp.*, 712 F.2d at 254. That's why courts "must make what sense [they] can out of" the regime so that the "divided jurisdiction between the courts of appeals and the district courts" may be "clearly marked" for courts and parties alike. *Id.* The government's and CSX's responses ignore all of this. Yet it's exactly why the D.C. Circuit adopted and adhered to a "bright line rule" in the first place. App. 16a-18a (quoting *McCarty Farms*, 158 F.3d at 1300); *see also Ametek*, 104 F.3d at 566 (Roth, J., dissenting) ("a bright line rule is most helpful to the parties in determining where to file an appeal," and such an "interpretation of § 1336(b) would reduce the chance that appeals are made to the wrong court").

II. The court of appeals' decision contravenes *Kisor* by allowing agencies to add unwritten requirements to their regulations.

A. The STB acted arbitrarily and capriciously in adding an atextual prior-authorization requirement to the corporate-family exemption. And the court of

appeals, in turn, erred by deferring to the agency's unreasonable interpretation of an unambiguous regulation. The plain text of 49 C.F.R. § 1180.2(d)(3) makes clear that there was no room for a prior-authorization requirement. And statutory and regulatory structure confirm that point, because the added requirement is superfluous to the listed conditions and ignores other regulatory and statutory provisions. As the petition explained (at 24-32), § 1180.2(d)(3)'s list of conditions addresses the agency's policy concerns. The bottom line is that the court of appeals' decision is wrong, and it conflicts with *Kisor* and other courts of appeals' decisions interpreting *Kisor*. The agency and court alike may think there are policy reasons to require full applications for all new authorizations, and thus to require prior authorization for the corporate-family exemption. But if that's the agency's position, it needs to amend § 1180.2(d)(3) through the rulemaking process. The ICA doesn't compel a prior-authorization requirement, and the corporate-family regulation, as written, doesn't contain one.

B. The government's and CSX's responses lack merit and underscore the need for further review.

1. The government (Opp. 9-11) and CSX (Opp. 16-17) first offer circular reasoning to defend the court of appeals' decision. In their view, the Board correctly ruled that the corporate-family exemption did not authorize Norfolk Southern to control Belt Line because Norfolk Southern's "corporate family had never been authorized in the first place." Fed. Opp. 9. According to the government, the regulation "is inapplicable by its plain terms" when an entity that a railroad seeks authorization to control is "not lawfully located within the same corporate family in the first place." Opp. 10. But that's the same question-

begging reasoning that the STB thought justified amending its regulation by interpretation in the first place. Section 1180.2(d)(3)'s plain text answers the question whether the regulation contains a prior-authorization requirement: it doesn't.

Nor does it make sense to write one in. The government says the statute *requires* the regulation to have a prior-authorization requirement, because a transaction must "be 'approved by or exempted by the Board' to qualify for 'exempt[ion] from the antitrust laws' in the first place." Opp. 11 (quoting 49 U.S.C. § 11321(a)). But that's another trip on the illogical merry-go-round. When a railroad acquires control authorization through the corporate-family exemption, as Norfolk Southern did here, then the transaction *is* "exempted by the Board." 49 U.S.C. § 11321(a).

2. For that reason, the court of appeals' and Board's reasoning amounts to reliance on policy judgments to try to justify inserting an atextual requirement into § 1180.2(d)(3). The government (Opp. 12-13) and CSX (Opp. 16-17) respond that the statute compels the Board's prior-authorization requirement. But that's not true, because the statute only requires, as noted, that transactions be approved or exempted—so exempting new control authorization under the corporate-family exemption satisfies the statute. Declining to read an atextual prior-authorization requirement into the regulation does not "undermin[e] the rest of the statutory and regulatory regime." Fed. Opp. 11-12.

To the contrary, as Norfolk Southern explained (Pet. 26-28), other regulatory and statutory provisions address the very concerns that the government and CSX think justify jettisoning the regulation's plain

text. *First*, the exemption can apply only when the transaction does not result in a "change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3). Neither the government nor CSX claims that the 1991 and 1998 transactions fail to satisfy this requirement. *Second*, other regulated parties can intervene in an exemption proceeding, *see id.* § 1180.4(g)(v), as the government recognizes (Opp. 3-4). CSX doesn't (and can't) claim that it didn't know about Norfolk Southern's relationship with Belt Line. *Third*, the STB can revoke an exemption at any time under 49 U.S.C. § 10502(d). Neither the government nor CSX claims that would be warranted here. *And finally*, the Board's prior-authorization rule is inconsistent with the regulatory and statutory regime more generally because it ignores the use of exemptions (with all their pros and cons as a matter of *policy*). Pet. 27-28. Again, neither the government nor CSX offers any persuasive response.

3. Tellingly, the government and CSX spend all their time on these deep-merits questions in an attempt to recharacterize the question presented as "factbound." Fed. Opp. 9, 13, 17; *see* CSX Opp. 18. But that's like saying that *Loper Bright Enterprises v. Raimondo*, No. 22-451, and *Relentless, Inc. v. Department of Commerce*, No. 22-1219, present only questions about who should pay for fishing-vessel monitors. The question presented here is "[w]hether the court of appeals erred, contravening *Kisor v. Wilkie*, 139 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." Pet. at i. That's a question about what *Kisor* permits agencies to do and courts to let them get away with. It's an

important methodological question in the same way that *Chevron* presents an important methodological question.

4. The government next claims that reading the court of appeals' opinion to reflect that the court deferred to the STB "mischaracterizes the court's opinion." Opp. 12. But the opinion speaks for itself. The court purported to apply *Kisor*, App. 19a, proceeding to walk through what "[t]he Board reasoned," *id.*, "noted," and "reasonably emphasized," App. 20a. Reasoning that "[t]he Board supported its commonsense reading of the regulation, first, with the text itself and, second, with the structure of the Board's and [statute's] requirements," the court concluded that the Board "reasonably" interpreted § 1180.2(d)(3). App. 21a-22a. Put simply, the court effectively deferred under *Kisor*. Indeed, CSX acknowledges that "the court agreed with the Board's explanation," "pointed to the Board's explanation," found that "'the Board reasonably emphasized'" certain points, and "quot[ed] from the Board's order." Opp. 8-9, 15.

In the end, the government's and CSX's attempts to recharacterize what the court did don't change the key point: that the court endorsed the Board's amendment of unambiguous regulatory text. Pet. 24-31. *Kisor* doesn't permit such disregard of regulatory text. And while the court of appeals found this point "fair in theory," it nonetheless sided with the Board. App. 20a. As Norfolk Southern explained, however, other courts of appeals do not permit interpreting unambiguous text to insert provisions that aren't there. Pet. 30-31 (discussing *United States v. Castillo*, 69 F.4th 648, 657-62 (9th Cir. 2023) (citing cases)). The government doesn't address *Castillo*. And CSX relegates *Castillo* to a footnote (Opp. 16 n.3) defending the

court of appeals' decision here on the merits. But when regulatory text "unambiguously identifies a list" "that does not include" certain items, "the traditional tools of statutory construction" don't permit adding that item. *Castillo*, 69 F.4th at 657-58. That's what *Castillo* says, and what the court of appeals here rejected.

5. The government also says the STB's interpretation isn't retroactive because "Section 1180.2(d)(3) was promulgated many decades ago." Opp. 13. But *Kisor* emphasizes that courts should not "defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed." 139 S. Ct. at 2148. And Norfolk Southern and CSX had a decades-long, well-known arrangement with Belt Line for which CSX now seeks to impose retroactive liability. Pet. 10-13, 31-32.

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

Norfolk Southern explained (Pet. 32-33) that this case is an ideal vehicle because it squarely presents an important jurisdictional question and an important *Kisor* question, and that reversal would make a difference by establishing Norfolk Southern's immunity from antitrust and other laws under 49 U.S.C. § 11321(a). CSX's only response (Opp. 18) is that this is the only case to address § 1180.2(d)(3). But that argument fails for the reasons discussed above—this is a *Kisor* case, not merely a § 1180.2(d)(3) case. *Supra* pp. 9-10. And the government's only response is that "the fact that the court of appeals improperly exercised jurisdiction makes this case a particularly poor vehicle in which to address th[e] merits question." Opp. 14. That's exactly backwards. The government

agrees that there's a circuit split on the jurisdictional question and thinks the decision below is wrong. Those are reasons the petition is *certworthy*, not reasons it isn't. *Supra* pp. 4-6.

CONCLUSION

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

Respectfully submitted.

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