Nos. 17-699 and 17-714

In the Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
ET AL., PETITIONERS

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SURFACE TRANSPORTATION BOARD IN OPPOSITION

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QUESTION PRESENTED

Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, Tit. II, 122 Stat. 4925 (49 U.S.C. 24308(f)(1)), "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters," the Surface Transportation Board (STB) may investigate whether a freight railroad has failed to provide Amtrak's passenger trains with the preference required by 49 U.S.C. 24308(c). The question presented is whether Section 213 confers authority on the STB to issue regulations defining "on-time performance."

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OPINION BELOW

The opinion of the court of appeals (17-699 Pet. App. 1a-18a) is reported at 863 F.3d 816.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2017. On October 3, 2017 (No. 17-699), and on October 5, 2017 (No. 17-714), Justice Gorsuch extended

the time within which to file petitions for writs of certiorari to and including November 9, 2017, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907, to improve Amtrak's service reliability and on-time performance when it operates over rail lines owned by the nation's freight railroads. Section 207(a) of PRIIA instructed the Federal Railroad Administration (FRA) and Amtrak to jointly "develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." 49 U.S.C. 24101 note. Section 207(d) further provided that, if the metrics and standards were not completed within 180 days of PRIIA's enactment, "any party involved in the development of those standards [could] petition the Surface Transportation Board [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Ibid.*

Section 213 of PRIIA provides that the STB may, and in certain cases must, investigate substandard performance of Amtrak trains if one of two conditions—sometimes described as statutory "triggers"—is met:

> [1] the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or [2] the service quality of intercity passenger train operations for which minimum standards are established under section 207 of

> [PRIIA] fails to meet those standards for 2 consecutive calendar quarters.

49 U.S.C. 24308(f)(1). After the STB conducts an investigation, it may make recommendations or choose to award damages or other appropriate relief upon finding that Amtrak's substandard performance was caused by a host railroad's "failure to provide preference to Amtrak over freight transportation." 49 U.S.C. 24308(f)(2). The "preference" referred to in that provision was created by Congress in 1973, shortly after Amtrak itself was created, to ensure that Amtrak trains have preference over freight trains under most circumstances in the use of any given line of track, junction, or crossing. 49 U.S.C. 24308(c).

2. After the FRA and Amtrak jointly issued metrics and standards under Section 207, the Association of American Railroads challenged the constitutionality of that provision. The D.C. Circuit held Section 207 to be unconstitutional, under non-delegation and separation-of-powers principles, based on the view that Amtrak was a private entity to which Congress could not validly assign authority to develop the metrics and standards (along with the FRA). *Association of Am. R.Rs.* v. *United States Dep't of Transp.*, 721 F.3d 666, 670-677 (2013). This Court vacated and remanded, concluding that Amtrak is a governmental entity for purposes of Section 207. *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1228, 1234 (2015).

On remand, the D.C. Circuit found Section 207 unconstitutional on due process grounds, this time reasoning that Section 207 impermissibly authorizes "an economically self-interested actor [*viz.*, Amtrak] to regulate its competitors." *Association of Am. R.Rs.* v. *United States Dep't of Transp.*, 821 F.3d 19, 23 (2016).

The court acknowledged that the FRA, which had developed the metrics and standards along with Amtrak, is not self-interested, *id.* at 27, 32, but the court held that the FRA's ability to "check" Amtrak's self-interest was limited by the potential involvement of an arbitrator under the arbitration provision, *id.* at 35. The court in turn determined that the arbitrator was an "Officer of the United States" within the meaning of the Appointments Clause and that the method specified for the arbitrator's selection did not comply with that Clause. *Id.* at 37-39.

On remand to the district court following that decision, the government argued that the constitutional defect identified by the D.C. Circuit could be remedied by severing the arbitration provision (Section 207(d)). The district court rejected that argument, concluding that the D.C. Circuit had declared Section 207 unconstitutional in its entirety. *Association of Am. R.Rs.* v. *Department of Transp.*, 11-cv-1499 Docket entry No. 27, at 4-6 (D.D.C. Mar. 23, 2017). The government has appealed that ruling, and the severability question is currently pending before the D.C. Circuit. *Association of Am. R.Rs.* v. *United States Dep't of Transp.*, 17-5123 C.A. Order (Jan. 4, 2018) (oral argument to be scheduled "as soon as the business of the court permits").

3. While the constitutional litigation challenging Section 207 proceeded, Amtrak filed complaints with the STB under Section 213 seeking investigation of substandard performance on one of its routes. 17-699 Pet. App. 44a-45a. The STB determined that it had authority to define the term "on-time performance" for purposes of the first investigation "trigger" in Section 213. *Id.* at 51-60a. The STB instituted a rulemaking pro-

ceeding and, following notice and comment, promulgated a final rule defining "on-time performance" by reference to Amtrak's adherence to public schedules at all stations on a particular route. 81 Fed. Reg. 51,343 (Aug. 4, 2016) (reprinted at 17-699 Pet. App. 19a-41a).

4. The Association of American Railroads and several freight railroads (respondents here) sought review of the STB's "on-time performance" rule in the Eighth Circuit, which vacated the rule. 17-699 Pet. App. 1a-18a. At the outset, the court rejected the argument that the STB has authority to define "on-time performance" in Section 213 in order to fill the gap left by the D.C. Circuit's invalidation of Section 207. *Id.* at 11a-13a. The Eighth Circuit concluded that "the gap-filling rationale does not allow one agency to assume the authority expressly delegated to another." *Id.* at 12a.

Next, the Eighth Circuit rejected the argument that Section 213 itself authorizes the STB to develop a standard for on-time performance as one of "two separate triggers" for investigating substandard performance by Amtrak—the other trigger being the metrics and standards established under Section 207. 17-699 Pet. App. 15a; see *id.* at 15a-18a. The court acknowledged that such a reading of Section 213, "in isolation," was "reasonable." *Id.* at 15a. The court concluded, however, that the reading was implausible "in the light of the full text and context." *Id.* at 16a. The court explained that, because Section 207 is the only place within PRIIA "where on-time performance is described and given an explicit source," Section 207 is the "natural source" for the meaning of "on-time performance" in Section 213 as well. *Id.* at 16a-17a. The court also found it unlikely that Congress would "give the FRA/Amtrak and the [STB] separate authority to develop two potentially

conflicting on-time performance rules." *Id.* at 17a. The court therefore concluded that Congress intended for "on-time performance" to be defined solely in connection with the metrics and standards jointly developed by the FRA and Amtrak under Section 207. *Id.* at 17a-18a. In the court's view, the STB's role was confined to investigating, as appropriate, failures to meet those performance standards. *Id.* at 18a.

ARGUMENT

The government agrees with petitioners that Section 213, properly construed, authorizes the STB to develop a standard through rulemaking for "on-time performance" as one of two statutory triggers under 49 U.S.C. 24308(f)(1). As petitioners explain (17-699 Pet. 20), that construction of Section 213 is most consistent with "PRIIA's text, structure, and purposes." See 17-699 Pet. 20-31; 17-714 Pet. 10-12. The Eighth Circuit's decision to invalidate the STB's final rule based on a contrary reading of Section 213 was erroneous. That decision, in combination with the D.C. Circuit's decision striking down on constitutional grounds the metrics and standards established under Section 207, leaves a significant gap in the scheme Congress created by enacting PRIIA, thereby threatening the quality of passenger rail service nationwide. See 17-699 Pet. 15-18.

The government does not believe, however, that this Court's review of that issue is warranted at this time. Litigation regarding the metrics and standards remains ongoing in the D.C. Circuit, see *Association of Am. R.Rs.* v. *United States Dep't of Transp.*, 17-5123 C.A. Order (Jan. 4, 2018) (oral argument to be scheduled "as soon as the business of the court permits"), where the government has argued that the constitutional infirmity identified by that court may be remedied by severing

only the arbitration provision, Section 207(d). Should the government prevail on that argument, the rest of Section 207 would remain operational; the FRA and Amtrak would thus be able to develop new metrics and standards for evaluating Amtrak's performance and service quality. By contrast, if the D.C. Circuit declines to sever Section 207(d), instead choosing to strike down Section 207 in its entirety, this Court's review of that ruling may be warranted in order to ensure the accomplishment of Congress's clear purpose to provide for the establishment of standards to measure Amtrak's on-time performance and enforce Amtrak's statutory preference. There is accordingly no immediate need for the Court to grant review to consider the issue addressed by the Eighth Circuit's ruling in this case, which does not conflict with any decision of another court of appeals. The government does not oppose petitioners' alternative suggestion (17-699 Pet. 32-33) that the petitions be held pending the D.C. Circuit's resolution of *Association of American Railroads*.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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