Nos. 17-699 & 17-714

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, ET AL.
Petitioners,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER NATIONAL RAILROAD PASSENGER CORPORATION

DAVID W. OGDEN
Counsel of Record
JONATHAN PAIKIN
KELLY P. DUNBAR
ARI HOLTZBLATT
DEREK A. WOODMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

CORPORATE DISCLOSURE STATEMENT

The National Railroad Passenger Corporation ("Amtrak") is a District of Columbia corporation that was authorized to be created by the Rail Passenger Service Act, 49 U.S.C. §§ 24101 *et seq*. Amtrak has no parent corporations. The United States holds 100% of Amtrak's preferred stock. Amtrak's common stock is held by American Premier Underwriters, Inc. (a wholly owned, not publicly traded, subsidiary of American Financial Group Inc., which is publicly traded); Burlington Northern and Santa Fe LLC (BNSF LLC is a wholly owned, not publicly traded, subsidiary of Berkshire Hathaway, which is publicly traded); Canadian Pacific Railway; and Canadian National Railway. None of Amtrak's stock is publicly traded.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

STATUTORY AND REGULATORY PROVISIONS

OTHER AUTHORITIES

The United States agrees that the Eighth Circuit "err[ed]" in interpreting, and effectively eviscerating, PRIIA Section 213's on-time performance trigger. U.S. Resp. 6. The United States also agrees that Section 213's inoperability presents issues of national importance, as it "leaves a significant gap in the scheme Congress created" and "threatens the quality of passenger rail service nationwide." *Id.* And, although the government recommends the petition be denied—for reasons we will explain are ill-advised—it tellingly "does not oppose" Amtrak's alternative request to hold the petition pending the D.C. Circuit's issuance of the mandate in *AAR* v. *DOT*. *Id.* at 7. In fact, the only reason the government advances for not granting certiorari "at this time" is the pendency of that litigation. *Id.* at 6. As explained below, however, the outcome of *AAR* v. *DOT* could not possibly remedy the damage the Eighth Circuit's decision inflicts on PRIIA; and the delay inevitably associated with the government's approach would needlessly imperil improvements to passenger rail service that Congress intended PRIIA to bring about.

The question presented has enormous practical, financial, and operational significance for the public, Amtrak, and the freight railroads. In fact, the decision below jeopardizes the operation of a federal statute Congress enacted to safeguard the reliability of nationwide rail service for millions of passengers. Only review by this Court now can redress those concrete harms and vindicate the public interests Congress sought to protect in PRIIA.

I. CRITICAL NATIONAL INTERESTS ARE AT STAKE NOW

In PRIIA Section 213, Congress assigned the Board the vital task of enforcing Amtrak's preference

rights and resolving longstanding on-time performance problems on Amtrak's passenger trains across the country. As the Department of Transportation has recognized, these are issues of "national concern," Office of the Inspector Gen., U.S. Dep't of Transp., Report No. CR-2008-047, *Effects of Amtrak's Poor On-Time Performance* 1 (Mar. 28, 2008); indeed, poor on-time performance costs taxpayers more than $130 million annually, *id.* at 4. The responsive briefs do not refute—but confirm—the significance of these issues.

1. The United States agrees that—in view of Section 207's invalidity—the Eighth Circuit's decision "leaves a significant gap in the scheme Congress created by enacting PRIIA, … threatening the quality of passenger rail service nationwide." U.S. Resp. 6. The government stops just short of supporting certiorari, however, because it does not "believe … this Court's review … is warranted at this time" in light of the pending D.C. Circuit litigation. *Id.* Respectfully, the government's invitation to pass on this case based on speculation that the D.C. Circuit (which has twice invalidated Section 207) will save that provision is profoundly misguided.

First, plenary review here is the only way to undo the impairment of Section 213 caused by the Eighth Circuit's decision, regardless of the outcome of *AAR* v. *DOT*. Section 207 is now invalid. If this Court declines review here and if the D.C. Circuit does not resurrect *Section 207*, there would be no way to remedy the damage to *Section 213* because the decision in this case would be unreviewable. Section 213 would be a nullity.

Conversely, were the D.C. Circuit (or later, this Court) to save Section 207, the Eighth Circuit's errant interpretation of Section 213 would still require this

Court's correction. As the United States agrees (U.S. Resp. 6), Congress created two, independent enforcement mechanisms in Section 213—one tied to Section 207 (and thus directly affected by the D.C. Circuit's decision), and the other not tied to Section 207 and at issue here. Whatever the outcome of the Section 207 litigation, this Court's review is the only way to preserve PRIIA as Congress wrote it, with independent triggers for Section 213 investigations. And unless this Court grants certiorari now (or holds the petition), the Eighth Circuit's erroneous construction of the on-time performance trigger will be conclusive and unreviewable. Thus, despite the government's contrary implication, U.S. Resp. 6-7, the only time to correct the Eighth Circuit's decision is *now*.

In addition, even were the government someday to prevail in preserving Section 207, denial of certiorari here would cause serious delay and frustrate Congress's objectives. In the D.C. Circuit, the freight railroads have recently argued that a bevy of constitutional objections need to be litigated before any final severability analysis of Section 207. *See* AAR Br. 25-26, *AAR* v. *DOT*, No. 17-5123 (D.C. Cir. Nov. 11, 2017) (listing constitutional objections that "would need to be considered prior to any severability analysis"). Final litigation of those challenges could require years.

Moreover, assuming Section 207 survives those constitutional challenges, the FRA would need to issue new metrics and standards, a process that could itself take years and that assuredly would lead to further litigation. During that vast span, PRIIA Section 213—the centerpiece of Congress's bipartisan effort to combat longstanding on-time performance problems with Amtrak's trains and to give teeth to statutory preference rights—would be inoperative, as a direct result of

the Eighth Circuit's erroneous ruling here. That would needlessly frustrate Congress's objectives. Given that Congress enacted Amtrak's preference rights 45 years ago and PRIIA 10 years ago, the time for this Court's review is *now* to give Section 213 the effect Congress intended in preserving reliable nationwide passenger rail service for millions.

Importantly, much more than an agency *rule* is at stake. The Eighth Circuit's decision construes a federal *statute*, and the decision below not only vacates a regulation—one the United States believes is valid—but disables the operation of Section 213 investigations, on grounds the United States recognizes are wrong. The public and Amtrak—an entity singled out for special status in the statute and that operates the nationwide passenger rail services Congress enacted PRIIA to protect—have substantial interests in the correct interpretation of this federal statutory regime.

2. The freight railroads seek to downplay (Opp. 25-28) the obvious significance of these issues out of a self-interested desire to thwart Congress's preference-enforcement regime. Their efforts are unconvincing.

At the outset, they argue the government's "silence" "speaks powerfully," purportedly showing the issues raised are unimportant. Opp. 25. That position—repeated throughout their brief, *id.* at 1, 2, 14, 25, 26, 27-28—is unfounded. The United States was not "silen[t]"; its response demonstrates clearly its view that the Eighth Circuit wrongly invalidated the on-time performance trigger as well as its view that, given Section 207's unconstitutionality, the decision "leaves a significant gap" in a federal statute, one that "threaten[s] the quality of passenger rail service nationwide." U.S. Resp. 6. That the United States perceives (wrong-

ly) that pending Section 207 litigation counsels against review "at this time" (*id.*) does not at all undercut the importance of the issues presented.[1]

Citing no evidence, the freight railroads go on to assert they have not been "disregarding" their "preference" "obligation." Opp. 27. That is both wrong and irrelevant. It is wrong because it contradicts congressional and administrative findings—the very findings that led Congress to enact PRIIA—and it belies the experience of many decades. *E.g.*, S. Rep. No. 110-67, at 10 (2007); Pet. 6-7. It is irrelevant because Congress intended Section 213 investigations to create a "forum" to get to the bottom of Amtrak's persistent on-time performance problems. Pet. App. 55a. If the Board discovers preference violations, Congress delegated to the Board remedial authority. 49 U.S.C. § 24308(f)(2). If the Board finds no preference violations, Congress equipped the Board with other tools to help improve on-time performance. *Id.* § 24308(f)(1).

Lastly, the freight railroads accuse Amtrak of "hyperbole" because there has not been "an operative On-Time Performance Standard in most of the years since PRIIA's enactment." Opp. 27. But the point of the Board's statutory position is that, even with no valid Section 207 standard, Section 213's on-time performance trigger remains "operative." That is why Congress created *independent* triggers and it is the basis for Amtrak's pending Section 213 proceedings, proceedings the decision below disables. In any event, on-time performance problems currently do plague the reliabil-

[1] The freight railroads insist the decision below does not frustrate PRIIA because Congress did not "delegate[] … authority" to the Board to interpret the on-time performance trigger. Opp. 25-26. That is a merits position that begs the question presented.

ity of passenger rail service across the nation, Pet. 18—making clear the continuing significance of this issue.[2]

II. THE STATUTORY QUESTION IS PROPERLY PRESENTED

Attempting to sidestep the manifest importance of the issues raised as well as the significant errors in the Eighth Circuit's decision, the freight railroads' lead argument against this Court's review is that whether Section 213 contains two, independent triggers "is not actually presented." Opp. 15-16. That is mistaken.

The Eighth Circuit plainly interpreted Section 213. Pet. App. 15a-18a. In doing so, it considered, and rejected, "[t]he Board's argument" that Section 213 "creates two separate triggers for Board investigations," with the "on-time performance trigger" "separate" from Section 207. Pet. App. 15a. The so-called independent trigger rational was thus unquestionably "raised" and "'passed upon'" below, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)—putting that question squarely before this Court.

Moreover, the premise of the freight railroads' argument—that the Rule does not reflect the Board's conclusion that Section 213 creates two, independent triggers—is simply incorrect. The Eighth Circuit considered that premise, and rejected it, reaching the Board's "textual argument on the merits." Pet. App. 14a; *see* Pet. 21 n.2. The freight railroads did not conditionally cross-petition, and they cannot now challenge the court's decision to reach this issue.

---

[2] Attorney General enforcement (Opp. 27) is no substitute for Section 213. The Justice Department has initiated only one such action since 1973, Pet. 6, and Congress enacted PRIIA because it deemed that enforcement mechanism insufficient, *id.* at 6-9.

In fact, the Eighth Circuit correctly addressed the statutory question. In 2014, the Board affirmatively embraced the independent trigger rational. Pet. 12-13. The Board did so in an adjudicatory capacity, rejecting a motion to dismiss the *Illini/Saluki* investigation based on a freight railroad's argument that the D.C. Circuit's first invalidation of Section 207 rendered all of Section 213 inoperative. Because the "plain language" of Section 213 creates two triggers (separated by an "or"), Pet. App. 53a, the Board reasoned that, as a statutory matter, the "invalidity of Section 207 does not preclude [it] from construing the term 'on-time performance' and initiating an investigation" under Section 213's on-time performance trigger, *Id.* at 59a.

In response, the freight railroads asked for a rulemaking to address the meaning of "on-time performance," and the Board obliged. During the rulemaking, the freight railroads reargued the Board's statutory authority in addition to commenting on the definition of "on-time performance." In issuing the Rule, the Board thus incorporated and reaffirmed its analysis in *Illini/Saluki*, Pet. App. 14a, 25a, in addition to offering a new "gap-filling" theory. Because the rulemaking began with—indeed, was predicated on—the Board's statutory analysis in *Illini/Saluki*, it is easy to understand why the Board did not repeat that analysis in full and it is equally easy to "reasonably … discern" "the agency's path." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).[3]

[3] The freight railroads characterize the Board's reference to *Illini/Saluki* as concerning a "limited and distinct proposition" (Opp. 16), but that is decidedly not so. The Board reaffirmed *Illini/Saluki*'s conclusion that Section 207's invalidity does not render the on-time performance trigger defunct, Pet. App. 25a—a conclusion that depends on *Illini/Saluki*'s holding that the "plain

Finally, the Board has construed its "own [Rule]" in the same way and that interpretation calls for a "'high level of deference.'" *Cellco P'ship* v. *FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012). Before the court of appeals, the Board was unequivocal: *Illini/Saluki*'s statutory analysis, the Board explained, was "the foundation of [its] interpretation of 'on-time performance' in the … Rule." CA STB Br. 28; *see id.* at 37 (Rule "incorporates and confirms … *Illini/Saluki*"). The United States' "agree[ment]," U.S. Resp. 6, with Amtrak's statutory position confirms that the Board remains of that view.

III. THE EIGHTH CIRCUIT WRONGLY CONSTRUED PRIIA

This Court's review is also necessary because the Eighth Circuit's interpretation of PRIIA is wrong. Pet. 20-32. The decision elevates vague "contextual" analysis over statutory text, structure, and purpose; it defies settled principles of interpretation, as defined by decisions such as *Loughrin* v. *United States*, 134 S. Ct. 2384 (2014), and applied just recently in *National Association of Manufacturers* v. *DOD*, No. 16-299, slip op. 14 (U.S. Jan. 22, 2018) ("Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them."); and it countermands established law requiring application of *Chevron*. The United States "agrees" that "Section 213 … authorizes the STB to develop a standard through rulemaking for 'on-time performance as one of the two [Section 213] statutory triggers." U.S. Resp. 6. It also agrees that "[t]he Eighth Circuit's decision … was erroneous." *Id.*

The freight railroads' contrary defense (Opp. 17-25) of the decision below is unavailing. Of course, merits

---

language of Section 213" creates independent triggers, one tied to Section 207, the other not. Pet. App. 53a.

briefing is the time to address these issues in full. But a few points are in order now.

To begin with, the freight railroads devote many pages (Opp. 18-21) to opining on how they believe Congress intended PRIIA to operate. Tellingly, this discussion contains no serious discussion of Section 213's *text*. The freight railroads instead rely on labored analogies to cases interpreting other statutes (*e.g.*, *Martin* v. *OSHRC*, 499 U.S. 144 (1991), and *Bayou Lawn & Landscape Servs.* v. *Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013)), overlooking key statutory differences.

When they finally engage Section 213's text, the freight railroads lean almost entirely on the view that the on-time performance trigger must be defined by reference to Section 207 standards because the same term ("on-time performance") is used in "neighboring provisions." Opp. 22-23. That is untenable. The freight railroads ignore that "on-time performance" is not a concept unique to Section 207; rather, that concept has an established statutory and regulatory history. Pet. 25-26. Not only is Congress presumed aware of that history, *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978), but the statute itself reflects that congressional understanding, 49 U.S.C. § 24101 note ("develop new or *improve existing*" standards (emphasis added)).

In view of that background, Congress could not possibly have assumed that the Board or courts would understand an unadorned reference to "on-time performance" in the first Section 213 trigger to be necessarily tethered to yet-to-be-developed standards under a separate section of PRIIA (Section 207). That is doubly so given that Congress *did* expressly cross-reference Section 207 in the second Section 213 trigger, and Congress obviously would have understood that

the *absence* of a cross-reference in the on-time performance trigger (in the preceding clause) to be significant, if not dispositive. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United States* v. *Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996).

Against all of that statutory evidence, the same term/same meaning canon—if it has *any* relevance, Pet. 31 n.3—cannot bear the weight the freight railroads place on it. As the authority they cite makes clear (Opp. 22-23), that canon "'readily yields'" in the face of other indicia of statutory intent, *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007)—and here those indicia are substantial, Pet. 20-31.

At most, the developed disagreement between Amtrak, the Board, and the United States, on the one hand, and the freight railroads, on the other, only underscores the need for this Court's review. Whoever is right on the merits, this question of statutory interpretation has national importance, as well as immense practical, financial, and operational significance for the public, Amtrak, freight railroads, and the Board. It is a question that ought to be decided by this Court.[4]

---

[4] The freight railroads claim (Opp. 24) it is an "enduring myster[y]" why the Board cited 49 U.S.C. § 1321 in its rulemaking. Any mystery is easily solved: the freights *themselves* petitioned to begin a rulemaking, invoking 49 C.F.R. § 1110.2 as authority, CA Supp. App. 5—a regulation that implements § 1321 authority. *See* 49 C.F.R. § 1110.2 ("49 U.S.C. 721 [later transferred to 49 U.S.C. § 1321]" is "AUTHORITY"). And whether § 1321 applies is of no moment, because Congress delegated to the Board enforcement and adjudicatory authority in Section 213, and those delegations carry with them the authority to define statutory terms, such as "on-time performance." Pet. 31-32.

IV. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THIS PETITION PENDING *AAR* V. *DOT*

As demonstrated in Amtrak's petition and here, the need for this Court's review is pressing now. In the alternative, this Court could hold the petition pending the D.C. Circuit's issuance of a mandate in *AAR* v. *DOT*, where oral argument is scheduled for March 5, 2018. Significantly, the United States does "not oppose" this request. U.S. Resp. 7.

The freight railroads cannot conceive of a "plausible reason" to hold the petition (Opp. 28), but the reasons are straightforward. If the D.C. Circuit declines to resuscitate Section 207 (or if it remands for consideration of other constitutional challenges), that would remove the only basis identified by the United States for potentially declining review in this case. At that point, the need for this Court's review of the Eighth Circuit's decision—as well as, perhaps, the D.C. Circuit's decision—would be obvious and overwhelming.

In addition, whether Section 213's on-time performance trigger functions independently of Section 207 (the question presented here) also arises in the severability analysis at issue in the D.C. Circuit. *Cf. United States* v. *Booker*, 543 U.S. 220, 258-259 (courts must save provisions "capable of 'functioning independently'"). These are complementary and related questions that ought to have been considered together, and this Court may wish to do so if it reviews *AAR* v. *DOT*. Holding the petition preserves that flexibility.

* * *

This Court should grant or hold the petition.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
JONATHAN PAIKIN
KELLY P. DUNBAR
ARI HOLTZBLATT
DEREK A. WOODMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

JANUARY 2018