APPENDIX

APPENDIX A

896 F.3d 539
United States Court of Appeals,
District of Columbia Circuit.

ASSOCIATION OF AMERICAN RAILROADS,
Appellee

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al., Appellants

No. 17-5123

Argued
March 5, 2018

Decided
July 20, 2018

Rehearing En Banc Denied October 24, 2018

Attorneys and Law Firms

Patrick G. Nemeroff, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were Chad A. Readler, Acting Assistant Attorney General, Jessie K. Liu, U.S. Attorney, Mark B. Stern, Michael S. Raab, and Daniel Tenny, Attorneys, Steven G. Bradbury, General Counsel, U.S. Department of Transportation, James Owens, then-Acting General Counsel, Paul M. Geier, Assistant General Counsel, Christopher S. Perry, Acting Deputy Assistant General Counsel for Litigation and Enforcement,

Joy K. Park, Senior Trial Attorney, Juan D. Reyes III, Chief Counsel, Federal Railroad Administration, and Zeb G. Schorr, Assistant Chief Counsel.

Thomas H. Dupree Jr., Washington, argued the cause for appellee. With him on the brief were David A. Schnitzer, Kathryn Kirmayer, and Daniel Saphire, Washington.

Before: Garland, Chief Judge, and Tatel and Millett, Circuit Judges.

Opinion

Dissenting opinion filed by Circuit Judge Tatel.

Millett, Circuit Judge

A dispute between passenger and freight trains over priority access to railroad tracks has turned into a legal donnybrook over the bounds of congressional power. This court previously held that Congress went off the constitutional rails by empowering Amtrak to establish metrics and standards affecting track usage over the opposition of the private freight railroads that own those tracks and without the intermediation and control of a neutral governmental decision maker. More specifically, this court ruled that the Due Process Clause does not allow Amtrak to use an arbitration process to impose its preferred metrics and standards on its competitors, notwithstanding their opposition and that of the Federal Railroad Administration.

The question in this case is how to remedy that constitutional problem. We hold that severing the arbitration provision is the proper remedy. Without an arbitrator's stamp of approval, Amtrak cannot unilaterally impose its metrics and standards on objecting freight railroads. No rule will go into effect without

the approval and permission of a neutral federal agency. That brings the process of formulating metrics and standards back into the constitutional fold.

I

A

The Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327, established Amtrak (a/k/a the National Passenger Railroad Corporation) to "reinvigorate a national passenger rail system that had * * * grown moribund and unprofitable," *Association of American R.R. v. Department of Transp.*, 721 F.3d 666, 668 (D.C. Cir. 2013) (*American Railroads I*), and "to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements," Rail Passenger Service Act § 301, 84 Stat. at 1330. In passing that legislation, "Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the [regional] freight railroads." *Department of Transp. v. Association of American R.R. (American Railroads II)*, —— U.S. ——, 135 S.Ct. 1225, 1229, 191 L.Ed.2d 153 (2015).

Three years later, Congress granted Amtrak's passenger rail service "preference over freight transportation in using a rail line[.]" 49 U.S.C. § 24308(c). To implement that priority system, Congress authorized Amtrak to enter into agreements with rail carriers and regional transportation authorities "to use [the] facilities of, and have services provided by, the carrier or authority under terms on which the parties agree." *Id*. § 24308(a). Congress added that the "terms shall include a penalty for untimely performance" by either party. *Id*. If Amtrak and the carrier or authority could

not agree on governing terms, Congress empowered the federal Surface Transportation Board to "order that the facilities be made available and the services provided to Amtrak," and to "prescribe reasonable terms and compensation for using the facilities and providing the services." *Id.*[1]

In 2008, Congress enacted the Passenger Rail Investment and Improvement Act ("2008 Rail Act"), Pub. L. No. 110-432, 122 Stat. 4848, *codified* at 49 U.S.C. § 24101 note. That statute reconfigured the process for Amtrak to coordinate its rail access with private freight railroads. As is most relevant here, the Act directed that Amtrak and the Department of Transportation's Federal Railroad Administration "shall jointly * * * develop new or [shall] 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." *Id.* § 207(a). As part of that process, the 2008 Rail Act requires Amtrak and the Administration to "consult[ ] with" the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, passenger representatives, and Amtrak employees about the appropriate metrics and standards. *Id.*

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[1] Originally, the 1973 Act charged the Interstate Commerce Commission with resolving any disagreement. 45 U.S.C. §§ 561, 562 (1970 ed.). That authority was transferred to the Surface Transportation Board in 1996. *American Railroads II*, 135 S.Ct. at 1229; ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

If Amtrak and the Administration are unable to develop those metrics and standards within 180 days, Congress authorized "any party involved in the development of those standards" to "petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 2008 Rail Act § 207(d), 49 U.S.C. § 24101 note.

B

1

In tracing the history of this litigation, we write on a full slate. In March 2009, Amtrak and the Federal Railroad Administration published a Federal Register notice inviting comments on proposed metrics and standards pertaining to Amtrak's invocation of its right under the 2008 Rail Act to priority access to the railways. The Association of American Railroads ("Railroad Association") is a group of large freight railroad owners that operate tracks that Amtrak uses. The Railroad Association and its members submitted numerous comments, mostly concerning the increased expense associated with expanding and maintaining the needed track capacity and the timing metrics. *See, e.g.,* J.A. 165, 171, 176.

The final metrics and standards that issued in May 2010 did not alleviate the Railroad Association's concerns. So the Railroad Association filed suit in federal district court challenging the facial constitutionality of Section 207's scheme for promulgating metrics and standards. The Railroad Association argued that the provision unconstitutionally delegated regulatory power over private entities to Amtrak, an allegedly non-governmental entity, by allowing it to influence

or control the content of the metrics and standards imposed on its competitors. American Railroads Mot. for Summ. J., *Association of American R.R. v. Department of Transp.*, Civ. No. 11-1499 (D.D.C. May 31, 2012), ECF No. 8 at 7. The district court found no constitutional problem and granted summary judgment for the government. *Association of American R.R. v. Department of Transp.*, Civ. No. 11-1499 (D.D.C. May 31, 2012), ECF No. 17 at 2.

On appeal, this court deemed Amtrak to be a private entity and ruled that Section 207 unconstitutionally delegated authority to a private party "to jointly develop performance measures to enhance enforcement of the statutory priority Amtrak's passenger rail service has over other [private freight] trains." *American Railroads I*, 721 F.3d at 668.

The Supreme Court vacated that constitutional ruling. *American Railroads II*, 135 S.Ct. at 1234. The Court emphasized that "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit." *Id.* at 1232. Consequently, when undertaking "its joint issuance of the metrics and standards with the [Federal Railroad Administration], Amtrak acted as a governmental entity for the purposes of the Constitution's separation of powers provisions." *Id*. at 1232–1233. The Supreme Court then remanded the case for this court to address whether Section 207 ran afoul of the Fifth Amendment's Due Process Clause by giving Amtrak, a "for-profit corporation[,] regulatory authority over its own industry," and whether the arbitration provision violated the Appointments Clause, U.S. CONST., ART. II, § 2, CL. 2. *American Railroads II*, 135 S.Ct. at 1234.

2

On remand, this court again held Section 207 unconstitutional. *Association of American R.R. v. Department of Transp. (American Railroads III)*, 821 F.3d 19 (D.C. Cir. 2016). We held that Section 207 unconstitutionally delegated to Amtrak, a "self-interested entity," *id*. at 31, the authority to "regulate its resource competitors," *id*. at 23, in violation of the Due Process Clause.

This court rejected the government's argument that the Federal Railroad Administration's joint role in promulgating the metrics and standards tempered any due process concerns. We explained that the Administration "is powerless to overrule Amtrak" because, if there is "intractable disagreement between the two, the matter is resolved by an arbitrator, who may ultimately choose to side with Amtrak" in binding arbitration. *American Railroads III*, 821 F.3d at 35. Because the arbitration provision prevents the Administration from "keep[ing] Amtrak's naked self-interest in check," we concluded, "the requirement of joint development does not somehow sanitize the Act." *Id*.; *see id*. at 34 n.4 (distinguishing Supreme Court precedent upholding joint regulatory efforts by "a self-interested group and a government agency" because the Administration's "authority to hold the line against overreaching by Amtrak is undermined by the power of the arbitrator" to independently authorize Amtrak's metrics and standards).

Lastly, this court held that appointment of the arbitrator violated the Constitution's Appointments Clause. This court concluded that the arbitrator's binding decision constituted final agency action. Yet

the arbitrator was not appointed by the President, but rather by an independent agency, the Surface Transportation Board, which also had no oversight or review of the arbitrator's decision. *American Railroads III*, 821 F.3d at 38–39.

3

The case then returned to district court to remedy the constitutional violations. With the agreement of both the Railroad Association and the government, the district court vacated the May 2010 metrics and standards. *Association of American R.R. v. Department of Transp.*, Civ. No. 11-1499 (D.D.C. Mar. 23, 2017), ECF No. 27 at 6. The district court then declared Section 207's entire Amtrak-influenced process for formulating metrics and standards unconstitutional, rejecting the government's argument that severing Section 207(d)'s arbitration provision by itself would cure the identified constitutional infirmities. *Id.* at 5.

II

The district court had jurisdiction over this case under 28 U.S.C. § 1331, and we have jurisdiction to review its final order under 28 U.S.C. § 1291. We review *de novo* questions concerning the remediation of a statute's unconstitutionality and questions of statutory construction. *See Stop This Insanity Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10, 13 (D.C. Cir. 2014).

A

1

Now at round four of this appellate litigation, we reach the question of how to remediate the constitutional violations previously found. The government

does not challenge the prior panel's constitutional holdings on this appeal and, in any event, we are bound by them. The district court vacated the most immediate byproduct of the constitutional violations—the metrics and standards adopted in May 2010—and that aspect of the district court's decision is final and is also not challenged on appeal. The question instead is how to constitutionally right the statutory ship going forward. Because the linchpin for Amtrak's ability to unconstitutionally exercise regulatory authority over its competitors was the 2008 Rail Act's binding arbitration provision, severing Section 207(d) will fully cure the constitutional violations found in *American Railroads III*.

Declaring unconstitutional an Act of Congress, duly adopted by the Legislative Branch and signed into law by the Executive, is one of the gravest powers courts exercise. Longstanding principles of constitutional avoidance caution courts against exercising that power unless it is strictly necessary to resolve a case. *See, e.g.*, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 657 (D.C. Cir. 1989). And even when a constitutional question must be joined, courts must choose the narrowest constitutional path to decision. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).

When a statute has been held to be unconstitutional, an important corollary to those principles of constitutional avoidance is that the remedy should be no more severe than necessary to cure the disease. When possible, courts must preserve as much of a statute as is

constitutionally possible, because "[t]he cardinal principle of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 684, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 57 S.Ct. 615, 81 L.Ed. 893 (1937)).

Our decision in *American Railroads III* points us down that same narrow path. In concluding that the 2008 Rail Act's process for developing metrics and standards was unconstitutional, this court's analysis comprised two distinct determinations: (1) that Amtrak was economically self-interested in and competing with the freight railroads as to the content of the metrics and standards, and (2) the 2008 Rail Act endowed Amtrak with the power to regulate those competitors. *American Railroads III*, 821 F.3d at 31. Both prongs were required to make out a Due Process Clause violation. *Id*. at 31.

This court's resolution of that second prong identifies the arbitration provision as the critical constitutional fissure. After all, the constitutional problem in this case was not that Amtrak exercised *some* role in formulating those metrics and standards—Amtrak had some role under the 1970 Act and the 1973 amendment, which the freight railroads have not challenged. Plus Amtrak's participation to some extent is inherent in the development of contracts between Amtrak and individual freight railroads that embody those metrics and standards. *See* 49 U.S.C. § 24308(a).

Nor, as our prior opinion explained, would the Constitution prohibit Amtrak from exercising some measure of joint control with a disinterested governmental agency, as long as that agency's duty to protect the

"public good" could check Amtrak's self-interest and prevent unfair harm to its competitors. *American Railroads III*, 821 F.3d at 29. Indeed, our prior opinion specifically noted that a number of arrangements by which regulatory measures were imposed through the "joint action of a self-interested group and a government agency" had passed constitutional muster. *Id*. at 34 n.4 (citing *Currin v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940)).

Instead, the straw that broke the camel's back was that the 2008 Rail Act stripped the Federal Railroad Administration of that independent ability to temper or prevent Amtrak from adopting measures that promoted its own self-interest at the expense of its freight railroad competitors. It was Section 207(d)'s binding-arbitration provision that both gave Amtrak that independent regulatory muscle and disarmed the Administration. The 2008 Rail Act charged Amtrak and the Administration, at the outset, with developing the metrics and standards jointly. 2008 Rail Act § 207(a), 49 U.S.C. § 24101 note. But critically, if that collaborative process stalled, Section 207(d) allowed Amtrak on its own to request the appointment of a Surface Transportation Board arbitrator. 2008 Rail Act § 207(d), 49 U.S.C. § 24101 note. The arbitrator then had the authority, through binding arbitration, to force the promulgation of final metrics and standards regardless of the Administration's, the private freight railroads', or anyone else's objections to their terms. *American Railroads III*, 821 F.3d at 39.

So the arbitration provision is what constitutionally derailed the statutory scheme. For it empowered

Amtrak to impose on its competitors rules formulated with its own self-interest in mind, without the controlling intermediation of a neutral federal agency. All Amtrak had to do was persuade the arbitrator to rule in its favor. Once that happened, the disinterested governmental agency—the Administration —"[wa]s powerless to overrule Amtrak." *American Railroads III*, 821 F.3d at 35. Whatever "equal authority" the Administration initially had with Amtrak by virtue of the charge to jointly develop the metrics and standards, that power would evaporate "[w]hen there is intractable disagreement between the two[.]" *Id*. At that point, "the matter is resolved by an arbitrator, who may ultimately choose to side with Amtrak." *Id*. The Administration "cannot keep Amtrak's naked self-interest in check, and therefore the requirement of joint development does not somehow sanitize the [2008 Rail] Act." *Id*.

Emphasizing the centrality of the arbitration provision to our constitutional decision, this court pointed to Amtrak's arbitration escape hatch to distinguish Supreme Court precedent otherwise upholding programs for the joint private and governmental promulgation of regulations. For example, in *Currin v. Wallace*, the Tobacco Inspection Act of 1935, 7 U.S.C. §§ 511 *et seq.*, delegated to the Secretary of Agriculture the authority to set standards for various classes of tobacco that would affect the commodity's market pricing. 306 U.S. at 5–6, 59 S.Ct. 379. But the Secretary's proposed standards and prices would govern only if two-thirds of the tobacco growers within the market region approved them by referendum. *Id.* at 15, 59 S.Ct. 379. The Supreme Court upheld that provision because the Secretary's ultimate control over

the content of the standards and prices submitted for approval meant that self-interested producers had neither the power to craft the rules in their own image nor to "force [them] upon a minority" of competitors. *Id*.; *see United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577–578, 59 S.Ct. 993, 83 L.Ed. 1446 (1939) (upholding marketing orders for milk because, even though they were approved by two-thirds of milk producers, the Secretary of Agriculture exercised ultimate control over the prices set).

Similarly, in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940), the Supreme Court upheld a provision in the 1937 Bituminous Coal Act, 15 U.S.C. §§ 828 *et seq.*, under which participating coal producers could propose minimum coal prices to a government agency—the National Bituminous Coal Commission. The Coal Commission, however, retained complete authority to "approve[ ], disapprove[ ], or modif[y]" the prices ultimately adopted. *Id*. at 388, 60 S.Ct. 907; *see id*. at 399, 60 S.Ct. 907. Because the Commission exercised "authority and surveillance" over the participating coal producers, and because law-making remained in the hands of the agency and was "not entrusted to the industry," the Supreme Court declared the statutory scheme to be "unquestionably valid." *Id*. at 399, 60 S.Ct. 907.

The arbitration provision in the 2008 Rail Act broke from that mold. Ultimate control over the regulatory standards did not rest with a neutral governmental agency; it could be exercised by Amtrak with an assist from the arbitrator. *American Railroads III*, 821 F.3d at 34 n.4. "[T]he [Federal Railroad Administration's] authority to hold the line against overreaching by

Amtrak," we explained, "is undermined by the power of the arbitrator." *Id.*

Said another way, without the ability to resort to binding arbitration, Amtrak would have no power to impose its own self-interested regulatory measures on its competitors. While Amtrak could press its views with the Federal Railroad Administration, unless the Administration independently determined that those standards were in the public interest—not just Amtrak's interests—Amtrak's proposals would hit a dead-end. *See American Railroads I*, 721 F.3d at 674 (stating that, if the regulatory authority to set metrics and standards is wielded by a governmental agency, "[Section] 207 is of no constitutional moment").

2

Our dissenting colleague reads our prior decision differently, concluding that *American Railroads III* constitutionally quarantined Amtrak away from any "participation" in the regulatory process "*at all*," Dissent Op. at 551, 554, and forbade even efforts to "convinc[e]" or "persuade" the Federal Railroad Administration what the metrics and standards governing its own performance should be, *id*. at 554, 557.

But our prior opinion never said that the Constitution required sidelining Amtrak throughout the regulatory process. We were quite explicit about what the constitutional Due Process problem was: Notwithstanding its self-interest, the 2008 Rail Act empowered Amtrak "to regulate" its competitors and "to make law." 821 F.3d at 23; *see id*. at 27 ("Our view of the case can be reduced to a neat syllogism," which turns at each line of the syllogism on whether the Act gives

Amtrak "regulatory authority"); *id*. (due process question turns on whether Amtrak has "rulemaking authority"); *see also American Railroads II*, 135 S.Ct. at 1234 (remanding for decision as to whether Amtrak unconstitutionally exercised "regulatory authority" over its competitors).

So the critical constitutional question is what in the 2008 Rail Act made Amtrak itself a *regulator*—that is, what allowed it to make law. It was not, we said, Amtrak's ability to engage in "joint [regulatory] action" with the Administration. Such joint efforts between "a self-interested group and a government agency," we specifically noted, raised no constitutional eyebrow as long as the government agency could "hold the line" against the entity's "overreaching" to advance its own self-interests. 821 F.3d at 34 n.4. The opinion then went on to explain that the critical check on private interests that had been present in those Supreme Court cases was missing here precisely because the "[Administration] is powerless to overrule Amtrak," and when there is "intractable disagreement between the two, the matter is resolved by an arbitrator, who may ultimately side with Amtrak." *Id*. at 35. As a result, the Administration "cannot keep Amtrak's naked self-interest in check." *Id*.

The dissenting opinion rightly notes our holding that the metrics and standards the Administration and Amtrak jointly develop are forms of regulation, 821 F.3d at 33-34, and reads our opinion as holding that the constitutional flaw was in vesting " 'Amtrak [with] the authority to develop [those] metrics and standards—constrained very partially ... by the [Administration] and the arbitrator[.]' " Dissent Op. at 555 (quoting 821 F.3d at 33). To the dissenting opinion,

the ensuing discussion about joint rulemaking efforts and the Administration's and arbitrator's inability to rein Amtrak in was simply an explanatory aside just answering the government's argument about precedent. Dissent Op. at 556–57.

Our opinion said otherwise, explicitly wrapping the two points together. The source of the constitutional trouble, we explained, was that the 2008 Rail Act vested "Amtrak [with] the authority to develop [those] metrics and standards—constrained very partially, **as discussed below**, by the [Administration] and the arbitrator[.]" *Id*. at 33 (bold added). The referenced "discuss[ion] below" was precisely the analysis on the following pages of how the arbitration option allowed Amtrak to escape the type of check on its self-interest that the Due Process Clause requires when regulations are jointly developed between a government agency and self-interested groups. The two portions of the opinion cannot be delinked.

The crux of the constitutional problem, in short, was not that Amtrak had input or the opportunity to "persuade" the Administration. Dissent Op. at 557. That happens all the time in the regulatory process by all manner of self-interested parties. "[P]articipation" is not regulation. *Id*. at 551. What went wrong in the 2008 Rail Act was that Amtrak, through unilateral resort to the arbitrator, had the power "to make law," 821 F.3d at 23, by formulating regulatory metrics and standards without the agreement or control of the Administration.[2]

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[2] The dissenting opinion objects that the arbitration provision had not even been invoked with respect to the May 2010 metrics

The dissenting opinion also objects that the Federal Railroad Administration itself is neither "disinterested" nor tasked with promoting the freight operators' interests. Dissent Op. at 557. Our prior decision never suggested that the Administration does not act in good faith to protect the public interest, just like the other agencies involved in joint regulatory development with private interests. To the contrary, it explicitly noted that if Congress had "directed the [Federal Railroad Administration] to develop [the metrics and standards] alone," Congress would have been giving regulatory power to a "presumptively disinterested" government entity. *American Railroads III*, 821 F.3d at 35 (quoting *Carter Coal*, 298 U.S. at 311, 56 S.Ct. 855). Anyhow, the relevant constitutional question, as our prior opinion explained, is whether the Administration can "check" Amtrak's self-interests, 821 F.3d at 35, not whether it can speak for a different self-interested group. With the arbitrator provision removed, the Administration can stop a self-serving Amtrak proposal dead in its tracks.

Finally, the dissenting opinion notes that the Administration is housed "in the same branch" of an Executive agency as Amtrak. Dissent Op. at 557. But that is just a reminder that, when it comes to formulating these metrics and standards, the Supreme Court has held that "Amtrak act[s] as a governmental entity," 135 S.Ct. at 1233, and thus is not *purely* animated by

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and standards that the freight railroads challenged. Dissent Op. at 555. That is beside the point because the Railroad Association leveled a facial challenge to the 2008 Rail Act provisions. J.A. 20–21. That facial challenge is why we also decided the Railroad Association's Appointments Clause challenge to the same never-appointed arbitrator.

self-interest. That Amtrak has "public objectives" to serve, *id*. at 1232, is yet another reason that the constitutional remedy does not require completely walling Amtrak off from any role at all in the regulatory process.

* * * * *

Given all of that, eliminating the arbitration provision is the key to curing the constitutional problem because it eliminates Amtrak's ability and power to exercise regulatory authority over its competitors. Without the Administration's approval, Amtrak's regulatory proposals would amount to nothing more than trying to clap with one hand. Such an ineffective endeavor would not offend the Due Process Clause.

B

As a matter of constitutional law, excising Section 207(d)'s binding-arbitration provision would deprive Amtrak of its unlawful ability to engage in regulatory self-help. But a court may order such curative severance only if, as a matter of statutory construction, doing so would leave a functioning statutory scheme and would comport with congressional objectives. *See United States v. Booker*¸ 543 U.S. 220, 258–259, 125 S.Ct. 738, 160 L.Ed.2d 621 (quotations omitted); *see also Bismullah v. Gates*, 551 F.3d 1068, 1071 (D.C. Cir. 2009) ("[W]e must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute.") (quotations omitted).

We hold that severing Section 207(d) is the proper medicine in this case, for four reasons.

First, there is a presumption in favor of severability. *See*, *e.g.*, *United States v. National Treasury Employees Union*, 513 U.S. 454, 488, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995); *Bismullah*, 551 F.3d at 1071; *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1560 (D.C. Cir. 1985). The "normal rule is that partial, rather than facial, invalidation is the required course." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (internal quotation marks omitted).

That presumption enforces judicial restraint in constitutional adjudication by ensuring that, to the extent possible, courts "limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enterprise Fund*, 561 U.S. at 508, 130 S.Ct. 3138 (internal quotation marks omitted). After all, "the unconstitutionality of a part of an Act" says nothing about "the validity of its remaining provisions[.]" *Id*. (internal quotation marks omitted).

To be sure, this question of statutory (re)construction would be easier if the 2008 Rail Act contained a severability clause. But it does not. Still, sometimes such congressional "silence is just that— silence[.]" *New York v. United States*, 505 U.S. 144, 186, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted). The absence of a severability clause cuts neither against nor in favor of severance; the presumption of severability remains intact. *Id*.; *see City of New Haven v. United States*, 809 F.2d 900, 905 n.15 (D.C. Cir. 1987).

Second, as to the requirement that the statute be functional in the absence of the severed provision, the

parallels between the trimmed down 2008 Rail Act and the original 1970 and 1973 schemes offer substantial assurance that the statutory scheme could function even with Section 207(d) pruned away. To be sure, negotiations over what metrics and standards to adopt may be harder without the binding-arbitration tiebreaker. But the Federal Railroad Administration and Amtrak have been working together on such matters for almost half a century, and most of that time without the possibility of resort to binding arbitration. We also assume that the Federal Railroad Administration and Amtrak, which wears a governmental hat in this role, *American Railroads II*, 135 S.Ct. at 1233, will endeavor to promulgate the required rules in good faith and consistently with their legislatively assigned duties, *see CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 989 (D.C. Cir. 2008) (agencies are presumed to exercise their duties in good faith).

Third, narrowly severing Section 207(d) would better comport with Congress's objectives than would throwing the entire Section 207 baby out with the bath water. In this regard, we do not inquire what Congress intended, since it undoubtedly intended the legislation as enacted. "The relevant question * * * is not whether the legislature would prefer (A+B) to B, because by reason of the invalidation of A that choice is no longer available." *Leavitt v. Jane L.*, 518 U.S. 137, 143, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996). Instead, we ask the more practical question of "whether the legislature would prefer not to have B if it could not have A as well." *Id*.

Severing Section 207(d) leaves intact Congress's objective of streamlining the process for formulating

metrics and standards, and even strengthens the statutory command that the Federal Railroad Administration and Amtrak work "jointly" to develop those standards, 2008 Rail Act § 207(a), 49 U.S.C. § 24101 note, by eliminating Amtrak's unilateral ability to break away from that collaborative process. And by preserving the duty to consult with other interested parties, including the freight railroads, severance of the arbitration provision would continue the process of obtaining broad input on the standards.

In addition, nothing in the statutory text, structure, or legislative history indicates that Section 207 was meant to be an all-or-nothing provision or, more to the point, that the binding-arbitration provision was a legislative deal-breaker. *Cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (holding that severance is impermissible where there is evidence that the legislature "would not have passed it had it known the challenged provision was invalid").

Fourth, the Railroad Association argues that the government waived its ability to argue for severance by waiting until we remanded to the district court to first propose severance of Section 207(d). That argument fails. To begin with, the question of severance arises only after a statute has been held unconstitutional. It is thus unsurprising that the government devoted its efforts to vigorously defending the constitutionality of the 2008 Rail Act, and did not broach the severability question until the remedial stage of this litigation. The cases on which the Railroad Association relies fall wide of the mark since they involve instances in which

the question of severability was not raised at all in the appellate briefing.[3]

In any event, severability is a doctrine borne out of constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government. Parties cannot, by litigation tactics or oversight, compel the courts to strike down more of a law than the Constitution or statutory construction principles demand.

For all of those reasons, we hold that the proper constitutional remedy in this case is to sever Section 207(d)'s binding-arbitration provision and leave the balance of Section 207 and the 2008 Rail Act intact.

C

When the Supreme Court remanded this case, it left open for this court's consideration a separate constitutional question: whether the appointment of Amtrak's president by its Board and not the President violates the Appointments Clause, given that

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[3] Even assuming that we would agree with these out- of-circuit decisions, they arose in a very different procedural posture. *See, e.g., Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 118 (2d Cir. 2017) (parties expressly sought invalidation of an entire ordinance, not severance); *Telecommunications Regulatory Bd. of Puerto Rico v. CTIA-Wireless Ass'n*, 752 F.3d 60, 63 n.2 (1st Cir. 2014) (noting that the parties only asked for invalidation of an Act "in toto" and maintained that argument on appeal); *Lozano v. City of Hazleton*, 620 F.3d 170, 182 (3d Cir. 2010) (finding a severability argument waived only because no party contested the district court's failure to sever), *vacated by City of Hazleton v. Lozano*, 563 U.S. 1030, 131 S.Ct. 2958, 180 L.Ed.2d 243 (2011).

Amtrak's president had a vote in establishing the metrics and standards. *American Railroads II,* 135 S.Ct. at 1234; *see* 2008 Rail Act § 202(a), Pub. L. No. 110-432, 122 Stat. at 4911. In *American Railroads III*, this court found it unnecessary to resolve that question given the separate determination that the statutory scheme stepped over the Due Process Clause line. 821 F.3d at 23.

The Railroad Association has raised the issue again in this appeal. We cannot answer that question because it is now moot. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983). The May 2010 metrics and standards in which Amtrak's president had a role have already been vacated by the district court, and that unappealed aspect of the district court's decision is final. Nor does the Railroad Association face any forward-going risk of such an allegedly unconstitutional intrusion into the rulemaking process because Congress amended the statute in 2015 to require that the voting members of Amtrak's Board be appointed by the President and confirmed by the Senate. 49 U.S.C. § 24302(a)(1). As a result, the Railroad Association's Appointments Clause claim is moot, and we lack jurisdiction to address it.

* * * * *

We at long last come to the end of the tracks in this lengthy litigation. We hold that the constitutional violations previously identified by this court can be fully remedied by excising the binding-arbitration provision in Section 207(d) of the 2008 Rail Act, and that Section 207(d) is properly severable. The Railroad Association's Appointments Clause challenge is moot.

We accordingly reverse the judgment of the district court and remand for the entry of judgment consistent with this opinion.

So ordered.

Tatel, Circuit Judge, dissenting:

Two years ago, this court held that the Passenger Rail Investment and Improvement Act of 2008 (the "2008 Rail Act") "violates due process" because it "endows Amtrak with regulatory authority over its competitors." *Ass'n of American Railroads v. United States Department of Transportation* (*American Railroads III*), 821 F.3d 19, 34 (D.C. Cir. 2016). Adhering faithfully to that holding, the district court fit the remedy to the flaw by invalidating Section 207 of the Act—the section that authorizes Amtrak to work with the Federal Railroad Administration to develop passenger-rail performance metrics and standards that, we explained, impose enforceable obligations on Amtrak's competitors. *See id.* at 32–34. Case closed? Apparently not. According to my colleagues, the district court ought to have discerned from this court's prior opinion that "the linchpin for Amtrak's ability to unconstitutionally exercise regulatory authority" somehow lies in a discrete, never-used statutory subsection that authorizes an independent arbitrator unaffiliated with Amtrak to take the reins if Amtrak and the Administration fail to reach agreement on the content of the metrics and standards. Majority Op. at 544. Properly read, my colleagues hold, the prior opinion ruled only that "the Due Process Clause does not allow Amtrak *to use an arbitration process* to impose its preferred metrics and standards on its competitors," *id.*

at 541 (emphasis added), such that the district court could—indeed should—have responded to the ruling by invalidating only the arbitration provision. Were our prior holding that narrow, I would agree that the district court was obliged to confine its declaratory remedy to the arbitration provision. In my view, however, our prior panel held that it is Amtrak's very participation in developing the metrics and standards under the Act— and not just the possibility that Amtrak might ultimately invoke the Act's arbitration provision—that contravenes due process. I would therefore affirm the district court's order invalidating Section 207 in full.

I.

Because understanding the background of this litigation, including the terms of the 2008 Rail Act and the specific challenges leveled against its constitutionality, will help readers to grasp the breadth of our prior holding, I begin with that background.

Congress enacted the 2008 Rail Act, Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907, to address the "poor service, unreliability, and delays" that have historically dogged Amtrak's operations, *Department of Transportation v. Ass'n of American Railroads* (*American Railroads II*), —— U.S. ——, 135 S.Ct. 1225, 1229, 191 L.Ed.2d 153 (2015). Central to this goal, Section 207 of the Act establishes, over the course of its four subsections, the regulatory regime at issue in this case. *See* 2008 Rail Act § 207, 122 Stat. at 4916–17 (codified at 49 U.S.C. § 24101 note). That regime's substantive core, laid out in subsection 207(a), is its requirement that Amtrak and the Department of Transportation's Federal Railroad Administration

(the "Administration") "jointly ... develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations," according to criteria such as cost-effectiveness and punctuality. 2008 Rail Act § 207(a). Although these metrics and standards principally regulate Amtrak's own operations, the freight railroads that host Amtrak's trains on their privately owned tracks can be liable for damages if their failure to "provide preference to Amtrak over freight transportation" causes Amtrak to fall short of the designated standards. 49 U.S.C. § 24308(f) (2); *see also id.* § 24308(c) (establishing private carriers' obligation to give preference to Amtrak).

Section 207's remaining three subsections facilitate the creation and implementation of the jointly authored metrics and standards envisioned in subsection 207(a). Subsection 207(b) requires the Administration to produce a quarterly report on Amtrak's performance under the metrics and standards. 2008 Rail Act § 207(b). Subsection 207(c) provides that the metrics and standards must, as far as practicable, be "incorporate[d]" into Amtrak's service agreements with private track-owners. *Id.* § 207(c). And subsection 207(d) provides that if Amtrak and the Administration cannot agree on the content of the metrics and standards, either party may request that the Surface Transportation Board appoint an arbitrator to "assist the parties in resolving their disputes through binding arbitration." *Id.* § 207(d).

In 2010, Amtrak and the Administration, without resort to arbitration, developed the metrics and standards required by the Act. *See* Metrics and Standards for Intercity Passenger Rail Service under Section 207

of the Passenger Rail Investment and Improvement Act of 2008, 75 Fed. Reg. 26,839 (May 12, 2010). Shortly thereafter, the Association of American Railroads (the "Railroad Association") initiated this now six-and-a-half-year-old suit in federal district court. Drawing no distinctions among the Act's various subsections, the Railroad Association contended that Section 207 violates due process by "[v]esting the coercive power of the government in interested private parties," *i.e.*, Amtrak, and also contravenes constitutional separation-of-powers principles by "placing legislative and rulemaking authority in the hands of a private entity that participates in the very industry it is supposed to regulate." Complaint at 16–17, *Ass'n of American Railroads v. Department of Transportation*, 865 F.Supp.2d 22 (D.D.C. 2012). As redress, the Railroad Association sought vacatur of the metrics and standards, as well as "an order declaring that Section 207"—in its entirety—"is unconstitutional." *Id.* at 3.

The district court granted summary judgment to the government, and the Railroad Association appealed, renewing its argument that "Amtrak's involvement in developing the metrics and standards" violates due process. *Ass'n of American Railroads v. Department of Transportation* (*American Railroads I*), 721 F.3d 666, 677 (D.C. Cir. 2013). We had no need to address that argument, however, because we held Section 207 unconstitutional on the alternative theory that it violates separation-of-powers principles by vesting regulatory authority in a "private corporation." *Id.* But after the Supreme Court vacated and remanded, holding that "for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity," *American Railroads II*, 135 S.Ct. at 1228, we

returned to the previously unresolved due-process issue.

On that issue, we held that the 2008 Rail Act "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor to regulate its competitors." *American Railroads III*, 821 F.3d at 23. Reasoning that "the due process of law is violated when a self-interested entity is 'intrusted with the power to regulate the business ... of a competitor,' " *id.* at 31 (alteration in original) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S.Ct. 855, 80 L.Ed. 1160 (1936)), we asked whether "Amtrak is (1) a self-interested entity (2) with regulatory authority over its competitors," *id.* As long as Section 207 remains in the picture, we held, the answer is "yes." Emphasizing Amtrak's statutory duty to maximize revenues, *see* 49 U.S.C. § 24101(d), we concluded that Amtrak is motivated by "economic self-interest" notwithstanding its governmental character, *American Railroads III*, 821 F.3d at 32. And, we went on, Section 207 grants Amtrak regulatory power over its competition because it gives Amtrak "the authority to develop metrics and standards—constrained very partially ... by the [Administration] and the arbitrator," *id.* at 33—and because those metrics and standards "force freight operators to alter their behavior," *id.* at 32.

We also separately discussed two Appointments Clause arguments the Railroad Association had added to the mix over the course of litigation. One was aimed at the makeup of Amtrak's board of directors, and the other at the Act's arbitration provision, subsection 207(d). Deeming it a "close[ ] call" as to whether the Railroad Association had properly preserved the first of these arguments, we found that "our

ultimate disposition" of the case "d[id] not require us to consider it." *Id.* at 24. But finding the second argument "properly presented for our review," *id.* at 27, we held that subsection 207(d) is unconstitutional because it empowers an arbitrator neither appointed through the constitutionally requisite procedures nor overseen by an officer so appointed "to render a final decision regarding the content of the metrics and standards" in the event of a dispute between Amtrak and the Administration, *id.* at 37.

Five months after our mandate issued, the government moved for entry of final judgment in the district court. Under the government's proposed order, the district court would, consistent with our holding, grant summary judgment to the Railroad Association and vacate the existing metrics and standards. But there was a catch. Rather than granting the Railroad Association the full relief it had sought, including a declaration that Section 207 is unconstitutional in its entirety, the proposed order would sever subsection 207(d)—the arbitration provision —from the remainder of Section 207 and invalidate only that subsection.

The district court rejected this gambit as "stand[ing] [the panel's decision] on its head." *Ass'n of American Railroads v. Department of Transportation*, No. 1:11-cv-01499, 2017 WL 6209642, at *2 (D.D.C. Mar. 23, 2017). The prior panel, the district court explained, "in addressing [subsection 207(d)], necessarily had the opportunity to find that the [2008 Rail Act] violated due process only insofar as it incorporated that subsection. . . . That it did not do so signals that the constitutional infection spread more broadly." *Id.* at *3. At any rate, the district court concluded, the prior panel's foregone opportunity to announce a holding

limited to subsection 207(d) "foreclose[d] [the district court] from repeating [that] inquir[y]" because "[o]n an issue the Court of Appeals duly considered, [a district court] will not propose a narrower possible holding than what it adopted." *Id.* Accordingly, the district court granted summary judgment to the Railroad Association, vacated the metrics and standards, and declared Section 207 unconstitutional in its entirety. *See id.*

II.

The government contends, and this court now agrees, that the district court committed legal error by declining to limit its declaratory remedy to subsection 207(d). I see things differently.

To begin on a point of agreement, it is well settled that the district court has "no power or authority to deviate from the mandate issued by an appellate court." *Independent Petroleum Ass'n of America v. Babbitt*, 235 F.3d 588, 596–97 (D.C. Cir. 2001) (quoting *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948)). Accordingly, the district court is foreclosed from fashioning a remedy that is "inconsistent with either the spirit or express terms of [an appellate panel's] decision." *Quern v. Jordan*, 440 U.S. 332, 347 n.18, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). It is likewise common ground that the prior panel's judgment binds this panel no less than it bound the district court. "When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). This

principle, we have observed, "encourages uniformity in the application of legal standards, enhances predictability in decisionmaking, promotes the interests of judicial efficiency and economy, and evinces respect for the efforts of earlier [panels] that have struggled to reduce the appropriate legal norms." *Brewster v. Commissioner*, 607 F.2d 1369, 1373–74 (D.C. Cir. 1979) (per curiam).

Where my colleagues and I disagree is over the breadth of our prior panel's ruling. They believe that the prior panel held that Section 207 violates due process only insofar as it "allow[s] Amtrak *to use an arbitration process* to impose its preferred metrics and standards on its competitors." Majority Op. at 541 (emphasis added). Under this reading, the government's proposed remedy, which would strip the arbitration provision from the statute but otherwise leave Amtrak's joint role in developing the regulatory scheme that binds its competitors entirely intact, would indeed be "[ ]consistent with" our prior panel's decision. *Quern*, 440 U.S. at 347 n.18, 99 S.Ct. 1139. In my view, however, our prior panel's ruling was far broader: Section 207's due-process defect lies in the fact that it allows Amtrak "to impose its preferred metrics and standards on its competitors" *at all*, Majority Op. at 541, whether by prevailing in a contested arbitration proceeding or simply by convincing the Administration to adopt its proposals. So understood, our prior holding permits no remedy short of the section's wholesale invalidation.

In concluding that the 2008 Rail Act violates due process, our prior panel never suggested that the constitutional flaw resides in any localized, potentially severable portion of Section 207—and certainly never

breathed so much as a hint that it resides in subsection 207(d). Instead, along with Amtrak's statutory duty to "maximize its revenues," 49 U.S.C. § 24101(d), the panel cited subsection 207*(a)*, which tasks "Amtrak, jointly with [the Railroad Association], ... with developing the metrics and standards for passenger train operations, which directly impact freight train operations," as one of the "[t]wo undisputed features of the unique Amtrak scheme [that] set the stage for [the due-process] controversy," *American Railroads III*, 821 F.3d at 27. Having thus trained its focus on Amtrak's very participation in the regulatory process, the panel proceeded to confront the "specific fairness question" before it: "whether an economically self-interested entity may exercise regulatory authority over its rivals." *Id.* Over the course of seven pages, the panel determined, (1) "that the due process of law is violated when a self-interested entity is 'intrusted with the power to regulate the business ... of a competitor,' " *id.* at 31 (alteration in original) (quoting *Carter Coal*, 298 U.S. at 311, 56 S.Ct. 855), (2) that Amtrak's "economic self-interest as it concerns other market participants is undeniable," *id.* at 32, and (3) that Section 207 "grants Amtrak, a self-interested entity, power to regulate its competitors," *id.* at 34, because it "gives Amtrak the authority to develop metrics and standards—constrained very partially ... by the [Administration] and the arbitrator—that increase the risk that [the Surface Transportation Board] will initiate an investigation" that could result in a private rail carrier's liability, *id.* at 33. Based on these three determinations, the panel concluded that the Act "violates due process" because it "endows Amtrak with regulatory authority over its competitors." *Id*.

Subsection 207(d), which allows an *independent arbitrator* to play a regulatory role under certain circumstances, can hardly be said to "endow[ ] *Amtrak* with regulatory authority." *Id.* (emphasis added). Quite to the contrary, the panel viewed the arbitrator as a "constrain[t]" on Amtrak's regulatory power. *Id.* at 33. To be sure, in an alternative holding, the panel also accepted the Railroad Association's "other" argument, that Section 207's arbitration provision runs afoul of the Appointments Clause. *Id.* at 36. But nothing in that discussion suggests that Section 207's *due-process* shortcomings likewise spring from that subsection.

Three additional considerations reinforce my view that the prior panel held Section 207 so fundamentally flawed as to be incapable of judicial salvage. First, not only did the panel conspicuously decline to signal that any remedial considerations remained for the district court to address on remand, but it also declared that although its ruling did not "foreclose *Congress* from tapping into whatever creative spark spawned the Amtrak experiment in public-private enterprise[,] ... the Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies." *Id.* (first emphasis added). Why would the panel have described its ruling as leaving Congress a choice as to Amtrak's future role had it anticipated that the constitutional deficiency could be addressed without disturbing Section 207's essential underpinnings by simply severing subsection 207(d)? Second, had the panel meant to confine its due-process holding to that subsection, it

surely would have addressed the Railroad Association's argument that Amtrak's board of directors is "constitutionally [in]eligible to exercise regulatory power." *Id.* at 23. Yet the panel declined to do so, concluding that the case's "ultimate disposition" obviated the need to resolve the issue. *Id.* at 24. This conclusion is self-explanatory if the panel believed that the Railroad Association's victory on the due-process issue entitled it to the full relief it sought, but not if the panel's holding handed the Railroad Association no more than a partial win. Finally, recall that neither Amtrak nor the Administration invoked Section 207's arbitration provision in the course of developing the now-vacated 2010 metrics and standards. Accordingly, the invalidation of that provision alone would leave Amtrak and the Administration free to follow exactly the same path they previously traveled and arrive at exactly the same result. Yet readers would search our prior opinion in vain for any hint that the metrics and standards that arose out of " '[a] statute which ... undertakes an intolerable and unconstitutional interference with personal liberty and private property' and transgresses 'the very nature of' governmental function" might be so easily resuscitated. *Id.* at 34 (quoting *Carter Coal*, 298 U.S. at 311, 56 S.Ct. 855).

Despite the foregoing, and the fact that our prior opinion says nothing at all about subsection 207(d) over the course of its seven-page explanation as to why Section 207 "violates due process," *id.* at 34, this court nonetheless reads the opinion to have "identifie[d] the arbitration provision as the critical constitutional fissure." Majority Op. at 545. In support, it points out that the prior panel, after having explained the basis

for its constitutional conclusion, twice cited the arbitration provision as part of its explanation as to why "[n]one of the Government's numerous counterarguments" altered that conclusion. *American Railroads III*, 821 F.3d at 34. These two fleeting references cannot bear the dispositive weight my colleagues assign to them.

Our prior panel first cited subsection 207(d) when rejecting the government's argument that the Administration's role in promulgating the metrics and standards "operates as an 'independent check' on Amtrak's self-interestedness." *Id.* at 35. The panel, however, never identified that subsection as essential to its reasoning. It wrote, and I quote in full:

> To be sure, [the 2008 Rail Act] does require Amtrak and [the Administration] to "jointly" develop the metrics, but it's far from clear whether and in what way [the Administration] "checks" Amtrak. Both are subdivisions within the same branch and work in tandem to effectuate the goals Congress has set. Nowhere in the scheme is there any suggestion that [the Administration] must safeguard the freight operators' interests or constrain Amtrak's profit pursuits. *Moreover*, [the Administration] is powerless to overrule Amtrak. As joint developers, they occupy positions of equal authority. When there is intractable disagreement between the two, the matter is resolved by an arbitrator, who may ultimately choose to side with Amtrak. [The Administration] cannot keep Amtrak's naked self-interest in

> check, and therefore the requirement of joint development does not somehow sanitize the Act.

Id. (emphasis added) (footnote and citation omitted). My colleagues construe this passage as holding that, absent the arbitration provision, the 2008 Rail Act would pass constitutional muster by allowing for "the controlling intermediation of a neutral federal agency." Majority Op. at 545. But this reading leapfrogs over the panel's principal concern—reread the first three sentences—that the Administration is *not* a "neutral federal agency," *id.*, to focus exclusively on the panel's secondary rationale, hanging on by a "moreover," for holding that the Administration's involvement does not cure the Act's due-process deficiencies. Certainly, as my colleagues point out, *see id.* at 548, our prior panel noted that the Administration would be "presumptively disinterested" if left to develop the metrics and standards "*alone*," *American Railroads III*, 821 F.3d at 35 (emphasis added) (quoting *Carter Coal*, 298 U.S. at 311, 56 S.Ct. 855). But the panel doubted the Administration's ability to remain impartial under the actual joint scheme at issue here, given that Section 207 requires the Administration to "work in tandem" with a self-interested "subdivision[ ] within the same branch" to regulate parties whose interests neither regulator has any incentive to "safeguard." *Id.*

The panel's second (and final) reference to subsection 207(d) in the due-process context appears in a footnote distinguishing a line of cases, including *Currin v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381,

60 S.Ct. 907, 84 L.Ed. 1263 (1940), in which "the [Supreme] Court has upheld arrangements under which regulatory burdens can be imposed by the joint action of a self-interested group and a government agency." *American Railroads III*, 821 F.3d at 34 n.4. The panel believed that these cases were "inapplicable" to Amtrak's position "because [the Administration's] authority to hold the line against overreaching by Amtrak is undermined by the power of the arbitrator." *Id.* But the mere fact that the panel found subsection 207(d) *sufficient* to distinguish the statutory scheme at issue here from those upheld in *Currin* and *Adkins* hardly suggests that, under the panel's theory of unconstitutionality, those cases would govern *but for* that subsection. Indeed, prior to this case's run up to the Supreme Court, that same panel in an earlier opinion found that Section 207 bore only "a passing resemblance to the humbler statutory frameworks in [*Currin*] and [*Adkins*]" and went on to distinguish those cases on grounds entirely unrelated to the arbitration provision. *American Railroads I*, 721 F.3d at 671; *see also id.* (noting that "[t]he industries in *Currin*," unlike Amtrak, "did not craft [industry] regulations" but merely had the opportunity to vote on whether to approve agency-written regulations, and that "the agency in *Adkins* could unilaterally change regulations proposed to it by private parties, whereas" under the Act, "Amtrak enjoys authority equal to" the Administration's). The ready availability of alternate grounds for distinguishing *Currin* and *Adkins* strongly counsels against reading the panel's cursory, footnoted treatment of these cases to suggest that the due-process violation we held to inhere in Amtrak's "coercive regulatory power" under the Act, *American Railroads III*, 821 F.3d at 34, could somehow be cured

by removing an independent "constrain[t]" on that power, *id.* at 33.

The broader point is this: these two references to subsection 207(d) nowhere suggest that removing the arbitrator as the final decision-maker, and thereby effectively allowing the Administration to veto Amtrak's regulatory proposals, would render Section 207 constitutional. Even accepting, as do my colleagues, that these references can be read together to establish our prior panel's acknowledgment that the Constitution would not "prohibit Amtrak from exercising some measure of joint control with a disinterested governmental agency, as long as that agency's duty to protect the 'public good' could check Amtrak's self-interest," Majority Op. at 545 (quoting *American Railroads III*, 821 F.3d at 29), we cannot ignore the panel's express determination that the Administration is neither disinterested nor tasked with "constrain[ing] Amtrak's profit pursuits," *American Railroads III*, 821 F.3d at 35, or acting as "a steward for the interests of freight operators" that are bound by the Amtrak-influenced metrics and standards, *id.* at 35 n.5. The "government's increasing reliance on public-private partnerships," the panel explained, "portends an ... ill-fitting accommodation between the exercise of regulatory power and concerns about fairness and accountability." *Id.* at 31. Even if, as my colleagues see it, subsection 207(d) "empowered Amtrak to impose on its competitors rules formulated with its own self-interest in mind" because "[a]ll Amtrak had to do was persuade the arbitrator to rule in its favor," Majority Op. at 545, removing that subsection would do nothing to satisfy our prior panel's concern that Amtrak could easily persuade the *Administration* to accede to its

self-interested demands. After all, the Administration, more so than an independent arbitrator, lacks any structural incentive to stand up to Amtrak, a "subdivision[ ] within the same branch." *American Railroads III*, 821 F.3d at 35.

To the contrary, and for the reasons I have already given, removing subsection 207(d) would not correct the due-process deficiencies our prior panel perceived in Section 207. Put simply, the panel held that Section 207 violates due process because it allows "a self-interested entity" to exercise "regulatory authority over its competitors." *American Railroads III*, 821 F.3d at 31. The panel nowhere indicated that the arbitration provision renders Amtrak any more self-interested than it otherwise would be, and, far from viewing that provision as effectuating Amtrak's regulatory authority, the panel described the provision as a "constrain[t]" on that authority. *Id.* at 33. To be sure, as my colleagues point out, the prior panel, in so characterizing the arbitration provision, referenced its later "discuss[ion]" of *Currin* and *Adkins*. Majority Op. at 547 (quoting *American Railroads III*, 821 F.3d at 33). But nothing in that discussion says that the statutory subsection that "constrain[s]" Amtrak's regulatory authority is, paradoxically, the very source of that authority. *American Railroads III*, 821 F.3d at 33.

In my view, then, the district court correctly concluded that the government's proposed remedy would not address the 2008 Rail Act's constitutional flaws as the prior panel explained them. My colleagues are able to arrive at the opposite conclusion only by im-

puting to our prior panel a far narrower theory of Section 207's unconstitutionality than it ever endorsed or even suggested.

III.

The court today emphasizes the "grav[ity]" of invalidating a duly enacted statute and our duty as the judiciary to do as little damage as possible to the work of the elected branches of government. Majority Op. at 544. "[W]hen a constitutional question must be joined," my colleagues observe, "courts must choose the narrowest constitutional path to decision." *Id*. But these important concerns, which I share, also bound our prior panel. *See El Paso & Northeastern Railway Co. v. Gutierrez*, 215 U.S. 87, 96, 30 S.Ct. 21, 54 L.Ed. 106 (1909) ("[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the *duty* of [a] court to so declare ...." (emphasis added)). Out of "respect for [its] efforts," *Brewster*, 607 F.2d at 1373, I would presume that our prior panel well heeded its obligation to "act cautiously" when "review[ing] the constitutionality of a legislative Act," *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion), and that its decision not to confine its due-process holding to any single statutory subsection reflects its considered judgment that Section 207's constitutional flaws are fatal to the whole.

If the government disagrees with this assumption and believes that our prior panel simply neglected its obligation to consider whether it could dispose of the Railroad Association's due-process challenge on narrower grounds, then it should have said as much in its petition for rehearing en banc. After all, if a panel that

holds an Act of Congress unconstitutional fails to consider whether it can cast its holding more narrowly, it commits an error that may well justify en banc review. *See generally* D.C. Cir. R. 35(a) (allowing for en banc review where a matter "involves a question of exceptional importance"). But in its en banc petition, the government did not argue that the panel should have considered a more targeted constitutional holding—say, for example, the one this court adopts today. Had it done so, I might well have voted to rehear the case en banc. But that argument having never been made and rehearing en banc having been denied, we are now bound by that panel's holding— whatever we think of it. *See, e.g.*, *United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995) ("This panel would be bound by [a prior panel's] decision even if we did not agree with it."); *Ass'n of Civilian Technicians, Montana Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985) (*stare decisis* principles "would be undermined if previous decisions were open to reconsideration merely because they were debatable").

Once our prior panel's opinion became final, the "legal donnybrook over the bounds of congressional power" that this case once posed came to an end. Majority Op. at 541. The only task that remained for the district court was to enter relief that honored this court's binding resolution of the legal issues in play. Because I believe the district court fulfilled its obligation, giving our prior panel's opinion its most natural reading, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN RAILROADS, **Plaintiff,** **v.** **DEPARTMENT OF TRANSPORTATION, *et al*.,** **Defendants.**	**Civil Action No. 11-1499 (JEB)** [Dated: March 23, 2017]

MEMORANDUM OPINION AND ORDER

The present railway-regulation case against Defendants Department of Transportation and others has at last reached its terminus. Plaintiff Association of American Railroads has traveled to the Supreme Court and back down, with local stops at the D.C. Circuit each time. Both parties now ask this Court to enter judgment, but it is clear that their engines have not yet cooled, as they disagree as to its substance. While the Department believes that only a subsection of the provision at issue should be declared unconstitutional, AAR contends that this is the end of the line for the entire section. The Court ultimately sides with Plaintiff and grants it the full remedy that it seeks.

I. Background

Only a brief factual recitation is necessary given the narrow question presented here. This suit involves the Passenger Rail Invest and Improvement Act of 2008 (PRIIA), Pub. L. No. 11-432, which tasked Amtrak and DOT's Federal Railroad Administration with "jointly" developing metrics and standards governing rail lines on which Amtrak and private freight companies both run their trains. See PRIIA, § 207(a) (codified at 49 U.S.C. § 24101 note). If the two could not complete this task in a set timeframe, either had the option of petitioning the Department's Surface Transportation Board to appoint an arbitrator. Id. § 207(d). (The rest of § 207 also involves those metrics and standards by mandating quarterly compliance reports and requiring rail carriers to make efforts to adopt the rules. Id. § 207(b), (c).) In this case, Amtrak and the FRA agreed without an arbitrator on a set body of metrics and standards in May 2010, after which AAR (a group of freight operators) challenged the statute as unconstitutional.

This Court originally sided with the Department. It held that the PRIIA, first, did not violate the Due Process Clause's prohibition against "interested private parties['] . . . wielding regulatory authority" because Amtrak was not truly private and, second, did not constitute an unlawful delegation of legislative power to a non-governmental entity because the FRA jointly participated. See Ass'n of Am. R.Rs. v. Dep't of Transp. (AAR I), 865 F. Supp. 2d 22, 29, 32-33 (D.D.C. 2012). The D.C. Circuit reversed, declining to address the former due-process issue but holding on the latter

that § 207 was in fact an improper delegation to a private actor. See Ass'n of Am. R.Rs. v. Dep't of Transp. (AAR II), 721 F.3d 666, 670 (D.C. Cir. 2013).

The Supreme Court then heard the case, ultimately vacating AAR II as relying on a "flawed premise." Dep't of Transp. v. Ass'n of Am. R.Rs. (AAR III), 135 S. Ct. 1225, 1233 (2015). It held that "Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case." Id. But it did not venture further. Still-uncharted issues included whether the Act violated due process by giving a for-profit corporation regulatory authority over its own industry and whether § 207(d) violated the Appointments Clause. Id. at 1234. The Supreme Court instructed that, "[o]n remand, the Court of Appeals" should address these questions after "identifying the issues that are properly preserved and before it." Id.

The D.C. Circuit did just that. Its ensuing opinion first concluded that "the freight operators' due process claim and arbitration claim are both properly presented for our review." Ass'n of Am. R.Rs. v. Dep't of Transp. (AAR IV), 821 F.3d 19, 27 (D.C. Cir. 2016). On that first count, the Circuit then held that "PRIIA violates due process" because it "gives a self-interested entity regulatory authority over its competitors." Id. As to the second issue, the opinion concluded that § 207(d) violated the Appointments Clause because the arbitrator would act as a "principal officer" who required appointment by the President and confirmation by the Senate, as opposed to mere selection by the Surface Transportation Board. Id. at 36.

II. Analysis

These long and winding tracks lead back to this Court's doorstep. The last appellate decision did not specify a remedy, so both sides now ask for the Court to execute the D.C. Circuit's mandate by entering judgment for Plaintiff. See Mot. at 5; Opp. at 3. They agree that the Court must declare § 207(d) void and unconstitutional and vacate the May 2010 metrics and standards. They dispute, however, whether the whole of § 207 must go as well.

One would think that AAR IV's discussion resolved the remedial question decisively. The Circuit framed its inquiry broadly, on several occasions, as whether the "PRIIA violates due process." Id. at 27; e.g., id. at 31 ("PRIIA only violates due process if Amtrak is (1) a self-interested entity (2) with regulatory authority over its competitors."), 34 ("Put simply, PRIIA . . . transgresses 'the very nature' of governmental function.'") (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)). After ten pages of discussion on § 207, the Court of Appeals held, "Because PRIIA endows Amtrak with regulatory authority over its competitors, that delegation violates due process." Id. at 34.

Defendant offers in response that severing the § 207(d) arbitration provision, which separately violates the Appointments Clause, will also remedy the Due Process Clause problems discussed by the Circuit. See Mot. at 7. As severance is the preferred remedy for constitutional flaws, DOT asks the Court to jettison § 207(d) and let the rest of the Act stand. Id. at 8.

This request leans heavily on a section of AAR IV that analyzed "the Government's numerous counter-arguments." 821 F.3d at 34. Principally, the Department argued on appeal that, because "the federal government has considerable oversight and control over Amtrak," there was no due-process problem with the entity's regulating its competitors. Id. After dismissing this contention, the Circuit distinguished in a footnote several cases where the Supreme Court upheld joint public–private regulatory actions on the basis that, here, "the FRA's authority to hold the line against overreaching by Amtrak is undermined by the power of the arbitrator." Id. at 34 n.4 (citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388, 399 (1940); Currin v. Wallace, 306 U.S. 1, 6, 15-16 (1939)). Because the Court of Appeals premised its due-process holding (in part) on the presence of § 207(d), Defendant contends there would be no constitutional issue absent that clause.

That is a ticket this Court cannot punch. The Department's reasoning stands AAR IV on its head. Just because there certainly is a due-process violation with § 207(d) does not mean there is not a violation without it. Nothing in the D.C. Circuit's opinion expresses this latter reading, and this Court refuses to place this footnote four in the constitutional-law pantheon. Cf. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

Whether the Circuit should have or could have crafted a narrower due-process holding centering on § 207(d) is, in fact, a question this Court cannot touch. It must instead "give full effect to the mandate" from the Circuit. Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 428 (1978) (quoting In re Sanford Fork & Tool

Co., 160 U.S. 247, 255 (1895)). This Court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." In re Sanford, 160 U.S. at 255. The D.C. Circuit, in addressing § 207(d), necessarily had the opportunity to find that the PRIIA violated due process only insofar as it incorporated that subsection. The opinion likewise could have embraced the Department's counterargument or said more in its footnote four. That it did not do so signals that the constitutional infection spread more broadly — at the very least, it forecloses this Court from repeating these inquiries. See United States v. Ins. Co. of N. Am., 131 F.3d 1037, 1041 (D.C. Cir. 1997) (foreclosing on remand "issues that were decided either explicitly or by necessary implication"). On an issue the Court of Appeals duly considered, this Court will not propose a narrower possible holding than what it adopted; otherwise, AAR would be correct that this Court would essentially be "overrid[ing] the holding of the D.C. Circuit and transform[ing] AAR's hard-earned win into a loss." Opp. at 2.

Even if the Circuit had left open the question of whether there would be a due-process issue absent § 207(d), severance does not necessarily follow as the relief. The severability inquiry starts with asking whether "it is evident that the Legislature would not have enacted those provisions which are within its power[] independently of that which is not." New York v. United States, 505 U.S. 144, 186 (1992) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)). But the Circuit separately made clear that,

in this case, Congress should answer this question itself:

> Make no mistake; our decision today does not foreclose Congress from tapping into whatever creative spark spawned the Amtrak experiment in public–private enterprise. But the Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may either compete, as market participants, or regulate, as official bodies. After all, "[t]he difference between producing . . . and regulating . . . production is, of course, fundamental." To do both is an affront to "the very nature of things," especially due process.

AAR IV, 821 F.3d at 36 (quoting Carter, 298 U.S. at 311). In effect, by identifying the legislature as the proper actor, the Circuit directed that this Court have no further role in making repairs to the PRIIA.

III. Conclusion

For these reasons, the Court ORDERS that:

1. Defendant's Motion for Entry of Judgment is GRANTED IN PART and DENIED IN PART;
2. Judgment is ENTERED in favor of Plaintiff;
3. Section 207 of the Passenger Rail Investment and Improvement Act of 2008 is DECLARED void and unconstitutional; and
4. The Department of Transportation and Federal Railroad Administration's Metrics and

Standards for Intercity Passenger Rail Service, Docket No. FRA-2009-0016 (effective May 12, 2010) are VACATED.

IT IS SO ORDERED.

/s/ *James E. Boasberg*
James E. Boasberg
United States District Judge

Dated: March 23, 2017

APPENDIX C

821 F.3d 19
United States Court of Appeals,
District of Columbia Circuit.

ASSOCIATION OF AMERICAN RAILROADS,
Appellant

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al, Appellees.

No. 12-5204

Argued
November 10, 2015.

Decided
April 29, 2016.

Rehearing En Banc Denied September 9, 2016*

Attorneys and Law Firms

Thomas H. Dupree Jr. argued the cause for appellant. With him on the briefs were Amir C. Tayrani, Lucas C. Townsend, and Louis P. Warchot.

David B. Rivin, Jr., Andrew M. Grossman, Shannen W. Coffin, and Michael J. Edney were on the brief for amici curiae Chamber of Commerce of the United States, et al. in support of appellant.

* Chief Judge Garland did not participate in this matter.

Richard B. Katskee and Craig W. Canetti were on the brief for amicus curiae Association of Independent Passenger Rail Operators in support of appellant. Dan Himmelfarb entered an appearance.

Christopher J. Paolella was on the brief for amicus curiae Professor Alexander Volokh in support of plaintiff-appellant.

Michael S. Raab, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Vincent H. Cohen, Jr., Acting U.S. Attorney, and Mark B. Stern, Daniel Tenny, Patrick G. Nemeroff, Attorneys, Paul M. Geier, Assistant General Counsel for Litigation, U.S. Department of Transportation, Peter J. Plocki, Deputy Assistant General Counsel for Litigation, and Joy Park, Attorney.

Before: BROWN, Circuit Judge and WILLIAMS and SENTELLE, Senior Circuit Judges.

Opinion

Opinion of the Court by Circuit Judge BROWN.

BROWN, Circuit Judge:

With the Rail Passenger Service Act of 1970, Congress created Amtrak, a for-profit corporation indirectly controlled by the President of the United States. This public venture into private enterprise was, and remains, unprecedented. With the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Congress piled anomaly on top of anomaly. *See* 122 Stat. 4907. It endowed this wholly unique statutory creature with agency powers, authorizing it to regulate its resource competitors. *See* PRIIA § 207(a). It further

permitted, under certain conditions, an arbitrator of unspecified constitutional authority to issue binding final agency rulings. *Id*. § 207(d).

The first time this case was before us, we invalidated PRIIA as an unconstitutional delegation of regulatory power to what we believed was a private entity. *Ass'n of Am. R.R. v. Dep't of Transp.,* 721 F.3d 666, 677 (D.C.Cir. 2013). The Supreme Court reversed. *Dep't of Transp. v. Ass'n of Am. R.R.,* —— U.S. ——, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015). It held that Amtrak's designation and operation as a for-profit corporation doesn't mean we can't *also* consider it a governmental entity. *Id.* at 1232–34.

For the freight operators who challenged PRIIA, however, that decision left three questions unanswered. Conceding Amtrak's governmental status, the operators—represented by the Association of American Railroads—ask: Does it violate due process for an entity to make law when, economically speaking, it has skin in the game? Does it violate the Appointments Clause for Congress to vest appointment power of a principal officer in the Surface Transportation Board? And is a government corporation whose board is only partially comprised of members appointed by the President constitutionally eligible to exercise regulatory power? We decline to reach the latter question, but we side with the freight operators on the former two. We conclude PRIIA violates the Fifth Amendment's Due Process Clause by authorizing an

economically self-interested actor to regulate its competitors[1] and violates the Appointments Clause for delegating regulatory power to an improperly appointed arbitrator.

I

Since this controversy's factual and legal backdrop has been ably set forth now on two occasions, once in our prior opinion and again in the Supreme Court's, we needn't spill much more ink repeating what's already been said. However, some recitation of the pertinent statutory scheme is necessary, as well as a brief update on the procedural history of this case.

Section 207 of PRIIA tasks Amtrak and the Federal Railroad Administration (FRA) with jointly developing performance metrics and standards as a means of enforcing Amtrak's statutory priority over other trains. *See* PRIIA § 207(a). These standards are intended to measure 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." *Id.* In the event Amtrak and FRA can't agree on the composition of these "metrics and standards," either "may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.* § 207(d). Once these metrics and standards have been finalized, Amtrak and its host rail carriers "shall incorporate"

[1] Amtrak and freight railroads do not compete for passengers but do compete for scarce resources (i.e. train track) essential to the operation of both kinds of rail service.

them into their operating agreements "[t]o the extent practicable." *Id.* § 207(c).

In our prior ruling, we determined PRIIA constituted an unconstitutional delegation of legislative authority to a private entity. *See Ass'n of Am. R.R.,* 721 F.3d at 677. In our view, "[t]hough the federal government's involvement in Amtrak is considerable," the fact that "Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit" disqualified it from exercising regulatory power. *Id.* The Supreme Court reversed. *See Dep't of Transp.,* 135 S.Ct. at 1228. Relying on *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), the Court concluded "Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case." *Dep't of Transp.,* 135 S.Ct. at 1233. The Court remanded the case for us to consider the freight operators' remaining challenges to the constitutionality of PRIIA "to the extent they are properly before" us. *Id.* at 1234.

Here on remand, the freight operators advance the three challenges to PRIIA described above. Because these claims are still before us pursuant to the district court's summary judgment ruling, our review is de novo. *See Edwards v. District of Columbia,* 755 F.3d 996, 1000 (D.C.Cir. 2014).

II

Before we reach the merits of the freight operators' challenge, we first pause to consider whether their claims are properly preserved. Our responsibility as an appellate court is to review the decisions of lower tribunals, and "[t]he very word 'review' presupposes

that a litigant's arguments have been raised and considered in the tribunal of first instance." *Freytag v. C.I.R.,* 501 U.S. 868, 895, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). Where a claim was not properly preserved below, our authority to decide it on appeal is "strictly circumscribed." *Puckett v. United States,* 556 U.S. 129, 134, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

Given the unique procedural history of this case, preservation questions attach to each of the freight operators' three claims. We conclude the due process claim was properly preserved, and the arbitration clause claim is properly before us due to the government's waiver, the detailed merits briefing, and the purely legal and potentially jurisdictional nature of the issue. The freight operators' board of directors argument is a much closer call, but because our ultimate disposition in this case does not require us to consider it, we offer no opinion here as to whether it was properly preserved.

A

In its summary judgment, the district court declined to reach the freight operators' due process argument because it was, in the court's view, "outside the scope of [the] Complaint" and not "raised in [the freight operators'] initial brief." 865 F.Supp.2d 22, 31 (D.D.C. 2012). We disagree. The freight operators raised the argument they now advance on appeal at every stage of this litigation—in their complaint and in each brief, from summary judgment to their prior appeal before this panel to their appeal to the Supreme Court.

The district court's opposite conclusion derives from a misreading of the complaint. The freight operators asserted two claims. AAR Compl. 16–17. The first

was unconstitutional nondelegation to a private entity, the sole issue addressed in our prior opinion. *Id.* at 16. The second, though, was due process. Specifically, the freight operators alleged, at paragraphs 53 and 54 under a heading titled "Violation of the United States Constitution (Due Process)," PRIIA is unconstitutional because it (1) vests rulemaking authority in the hands of interested private parties, and (2) empowers Amtrak with power to enhance its commercial position relative to other market participants. *Id.* at 16–17.

The district court did not overlook the due process claim entirely, but did fail to notice the freight operators' complaint made not one, but two due process arguments. The court rejected the freight operators argument because their complaint's due process claim was "premised on Amtrak's status as a private entity." 865 F.Supp.2d at 29. However, that is only half-true. Paragraph 53 of the complaint alleged the PRIIA "violates the due process rights of regulated third parties" by "[v]esting the coercive power of the government in interested private parties." AAR Compl. At 17. Then, paragraph 54 outlined a separate due process theory, one premised on Amtrak's status as a government entity operating as a market participant. It alleged PRIIA also "violates the due process rights of the freight railroads because it purports to empower Amtrak to wield legislative and rulemaking power to enhance its commercial position at the expense of other industry participants." *Id.* The freight operators' due process claim thus can only be seen as premised solely on Amtrak's status as a private entity by reading paragraph 54 as redundant of 53, a view we

do not share, especially considering our well-established practice of "constru[ing] the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged." *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C.Cir.2004).

Our reading of the freight operators' complaint is corroborated by their summary judgment briefing, which attacks PRIIA's constitutionality "even if Amtrak were somehow deemed a government agency." District Court ECF No. 12 at 15–16. In two cogent, detailed paragraphs, the freight operators made their case, explaining why Amtrak's wielding of regulatory authority as a market participant violated due process and belying the district court's view of the argument as "raised only cursorily." 865 F.Supp.2d at 32. To be sure, the freight operators could have made a more robust due process argument, as they did in their briefing here on appeal. But what they did below was enough to preserve the issue for our review.

B

The freight operators failed to preserve their arbitration clause claim. They never so much as hinted at this argument until their first brief filed in our court. That said, several considerations convince us that deciding the arbitration claim is an appropriate exercise of our appellate authority.

First, and most important, the government never argued the arbitration claim was not properly preserved. Instead, the government devoted more than

eight pages of its brief to the merits of the claim without mentioning preservation.[2] This objection is waivable and the government seems to have waived any waiver argument. *See United States v. Layeni,* 90 F.3d 514, 522 (D.C.Cir. 1996) ("Arguments not raised in the district court are generally deemed waived on appeal.... The government, however, has waived the waiver argument by not raising it."); *United States v. Quiroz,* 22 F.3d 489, 490–91 (2d Cir. 1994) ("[W]hen [the government] has neglected to argue on appeal that a defendant has failed to preserve a given argument ... courts have consistently held that the government has 'waived waiver.'"); *Ehrhart v. Sec. of Health & Human Servs.,* 969 F.2d 534, 537 (7th Cir. 1992) (addressing an unpreserved argument because "the government did not object, so it has waived waver").

Second, as mentioned above, the government thoroughly briefed the claim. This is not, then, a case in which "the opposing party los[t] its opportunity to contest the merits" nor does it risk "an improvident or ill-advised opinion on the legal issues tendered." *Se. Mich. Gas Co. v. FERC,* 133 F.3d 34, 42 n. 3 (D.C.Cir. 1998).

Third, the arbitration claim is an abstract legal question, one that does not turn on facts that would have been developed in district court. In our previous opinion, we discussed the question at some length, *see AAR,* 721 F.3d at 673–74, as did Justice Alito

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[2] The only language that comes close is the government's reference to the "never-invoked arbitration provision." Gov. Br. 40. But this has nothing to do with preservation. The government is merely noting that the parties settled their dispute and thus never entered (or "invoked") arbitration.

in his concurring opinion, *Dep't of Transp.,* 135 S.Ct. at 1235– 39. Deciding fully briefed, purely legal questions is a quotidian undertaking for an appellate court.

Fourth, the Supreme Court has treated certain objections premised on a violation of the Appointments Clause as "nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag,* 501 U.S. at 878–79, 111 S.Ct. 2631; *see also Glidden Co. v. Zdanok,* 370 U.S. 530, 535–36, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) (reaching challenge even though not raised below because "[t]he alleged defect of authority here relates to basic constitutional objections designed in part for the benefit of the litigants"); *Lamar v. United States,* 241 U.S. 103, 117–18, 36 S.Ct. 535, 60 L.Ed. 912 (1916) (deciding an appointments power claim despite the fact that it had not been raised below or even in the Supreme Court until the filing of a supplemental brief upon a second request for review).

Perhaps none of these considerations would be sufficient on their own to justify our review of an unpreserved claim. *Cf. Empagran S.A. v. F. Hoffman–LaRoche, Ltd.,* 388 F.3d 337, 344 (D.C.Cir.2004) (reaching an argument because appellants both "consistently raised the claim" *and* "appellees do not purport to have argued ... the claim was waived"). But taken together, the government's failure to object, the extensive briefing, the purely legal character of the freight operators' arbitration claim, and the significant structural constitutional rights at stake convince us that reaching it is an appropriate exercise of our appellate authority. *See Singleton v. Wulff,* 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("The

matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.").

Accordingly, we conclude the freight operators' due process claim and arbitration claim are both properly presented for our review.

III

No clause in our nation's Constitution has as ancient a pedigree as the guarantee that "[n]o person ... shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. Its lineage reaches back to 1215 A.D.'s Magna Carta, which ensured that "[n]o freeman shall be ... disseised of his ... liberties, or ... otherwise destroyed ... but by lawful judgment of his peers, or by the law of the land." Magna Carta, ch. 29, *in* 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). Since the Fifth Amendment's ratification, one theme above all others has dominated the Supreme Court's interpretation of the Due Process Clause: fairness. *See Snyder v. Com. of Mass.,* 291 U.S. 97, 116, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (Cardozo, J.) ("Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results.").

The specific fairness question we face here is whether an economically self-interested entity may exercise regulatory authority over its rivals. Two undisputed features of the unique Amtrak scheme set the stage for this controversy. First, Amtrak is operated "as a for-profit corporation" charged with "undertak[ing]

initiatives ... designed to maximize its revenues." 49 U.S.C. § 24301(a)(2); *id.* § 24101(d). Second, Amtrak, jointly with FRA, is tasked with developing the metrics and standards for passenger train operations, which directly impact freight train operations. *See* PRIIA § 207(a). The freight operators perceive a due process defect in this scheme. They argue an economically self-interested actor may not exercise regulatory power, and yet here, Amtrak is a self-interested market participant wielding regulatory power. The Government denies Amtrak's self-interest is constitutionally relevant and avers the established procedures accord all the process freight operators are due.

We agree with the freight operators. Our view of this case can be reduced to a neat syllogism: if giving a self-interested entity regulatory authority over its competitors violates due process (major premise); and PRIIA gives a self-interested entity regulatory authority over its competitors (minor premise); then PRIIA violates due process.

A

The abstract legal question at the heart of this case is whether it violates due process for Congress to give a self-interested entity rulemaking authority over its competitors. The Supreme Court has confronted the question only once. *See Carter v. Carter Coal Co.,* 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). The *Carter Coal* Court invalidated a delegation that empowered one set of competitors to regulate a rival set. *Id.* at 311–12, 56 S.Ct. 855. That decision predates the Administrative Procedure Act and the birth of the Court's modern administrative law jurisprudence. But aside from *Carter Coal,* the only other case to

comment on the propriety of rulemaking bias is our circuit's *Association of National Advertisers, Inc. v. FTC (ANA),* and it cut the other direction, sanctioning the bias. 627 F.2d 1151 (D.C.Cir. 1979).[3] That decision, however, dealt with a different kind of bias than in *Carter Coal;* it involved prejudgment rather than financial bias. *See id.* at 1154. Thus, all we have as our guide are two imperfect precedents, and unsurprisingly, the freight operators rely on *Carter Coal,* while the Government relies on *Association of National Advertisers*.

The freight operators' case of choice, *Carter Coal,* involved a challenge to the Bituminous Coal Conservation Act, which *inter alia* prohibited the United States or any other contractor from purchasing bituminous coal from any mine that did not comply with certain

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[3] Freight operators invite us to reject the delegation to Amtrak based on cases like *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), in which "rigid requirements" of impartiality were applied to invalidate official action tainted by bias. *See also Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (finding a due process violation where the mayor, sitting as judge over a criminal trial, retained whatever fines he imposed); *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (extending *Tumey* to a more remote incentive, when the town's budget, controlled by the mayor, depended on fines imposed by the mayor's court); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) (finding a due process violation where a Board of Optometry's "efforts would possibly redound to the personal benefit of members of the Board"). These cases, however, involved officials acting in an *adjudicatory* capacity, where due process demands are stricter and courts enforce them with a heavy appellate touch. But our appellate touch is far lighter when bias presents in the rulemaking context. *See* ANA, 627 F.2d at 1168–69. For this reason, we do not rely on these adjudicatory cases.

wage and hour requirements. But the Act itself did not articulate those requirements. *See* 298 U.S at 310, 56 S.Ct. 855. It delegated the authority to determine them to "the producers of more than two-thirds of the ... tonnage production for the preceding calendar year" and "more than one-half the mine workers employed." *Id.* Put simply, the Act endowed these majority producers and employers with the authority to set wage and hour requirements the minority producers and employers had to comply with or else forfeit all their customers.

In the Court's view, for the minority producers "[t]o 'accept,' in these circumstances [was] not to exercise a choice, but to surrender to force." *Id.* at 311, 56 S.Ct. 855. The provision "subject[ed] the dissentient minority ... to the will of the stated majority," and conferred on that majority "the power to regulate the affairs of [the] unwilling minority." *Id.* Disapproving the scheme, the Court reasoned:

> This is legislative delegation in its most obnoxious form; for it is not even delegation *to an official or an official body, presumptively disinterested, but to private persons* whose interests may be and often are adverse to the interests of others in the same business.

Id. (emphasis added). At first blush, it's not clear precisely which aspect of the delegation offended the Court. By one reading, it was the Act's delegation to "private persons" rather than official bodies. By another, it was the delegation to persons "whose interests may be and often are adverse to the interests of others in the same business" rather than persons

who are "presumptively disinterested," as official bodies tend to be. Of course, the Court also may have been offended on both fronts. But as the opinion continues, it becomes clear that what *primarily* drives the Court to strike down this provision is the self-interested character of the delegatees':

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, *in the very nature of things,* one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.

Id. (emphasis added). The power to self-interestedly regulate the business of a competitor is, according to *Carter Coal,* anathema to "the very nature of things," or rather, to the very nature of governmental function. Delegating legislative authority to official bodies is inoffensive because we presume those bodies are *disinterested,* that their loyalties lie with the public good, not their private gain. But here, the majority producers "may be and often are adverse to the interests of others in the same business." *Id.* That naked self-interest compromised their neutrality and worked "an intolerable and unconstitutional interference with personal liberty and private property." *Id.* Accordingly, the Court invalidated the Act as "so

clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Id.*

The Government's case of choice, *Association of National Advertisers*, manifests a higher tolerance for administrative bias than the Court's in *Carter Coal.* It involved a different kind of rulemaking bias: prejudgment. An FTC commissioner, speaking at a public conference, unequivocally expressed his desire for limitations on TV advertisements targeted at children. Soon thereafter, the FTC proposed a rule to precisely that end. The Association of National Advertisers petitioned to set the rule aside because, in their view, the commissioner had prejudged the outcome and his participation in the rulemaking violated the Due Process Clause. *See ANA,* 627 F.2d at 1169–70.

The Association built its argument around this court's disqualification test in *Cinderella Career & Finishing Schools, Inc. v. FTC,* 425 F.2d 583 (D.C.Cir. 1970), which asked "whether a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.* at 591 (alterations omitted). But the court declined to apply the *Cinderella* test to rulemaking procedures and upheld the FTC's action under a standard far more tolerant of bias. *ANA,* 627 F.2d at 1168–69. Effective exercise of legislative or quasi-legislative authority demands the official "engage in debate and discussion about the policy matters before him." *Id.* at 1169; *see also Home Box Office, Inc. v. FCC,* 567 F.2d 9, 57 (D.C.Cir. 1977) (per curiam) ("[I]nformal contacts between agencies and the public are the bread and butter of the process of administration...."). Analogizing to Congress, the court observed that "any suggestion that congressmen

may not prejudge factual and policy issues is fanciful. A legislator must have the ability to exchange views with constituents and to suggest public policy that is dependent upon factual assumptions." *ANA,* 627 F.2d at 1165.

But the court stopped short of declaring rulemakers could never be disqualified for prejudgment. The panel decided instead that "clear and convincing" evidence (or, later, "the most compelling proof") that an "agency member has an unalterably closed mind on matters critical to the disposition of the proceeding" would suffice to disqualify a decisionmaker. *Id.* at 1170, 1175. "There is no doubt," the court acknowledged, "that the purpose of [a rulemaking proceeding] would be frustrated if a Commission member had reached an irrevocable decision on whether a rule should be issued prior to the Commission's final action." *Id.* at 1170. Under this new test, the court found the evidence insufficient to disqualify the FTC Commissioner. *Id.* at 1174–75.

What is most instructive about *Association of National Advertisers* is not its holding, which is not directly controlling here, but rather its theory about permissible bias. Ultimately, it came down to the court's concern over the propriety of judicial interference in policy debates. Applying the usual standard of a "neutral and detached adjudicator" to the rulemaking context "would plunge courts into the midst of political battles concerning the proper formulation of administrative policy." *Id.* at 1174. The court observed, "[w]e serve as guarantors of statutory and constitutional rights, but not as arbiters of the political process." *Id.* at 1174–75. If the FTC Commissioner's strident views on advertisements targeted at

children troubled the public, the proper recourse was at the polls, not the courts. This view is perhaps what motivated the district court to opine, in its denial of the freight operators' summary judgment motion, the "potential for bias appears remote" on account of "Amtrak's political accountability." *AAR,* 865 F.Supp.2d at 32.

To conclude that Amtrak's political accountability—remote as it is—removes the taint of any potential for bias would be a simple way to resolve this case. After all, legislators may legislate in pursuit of their own naked self-interest. Congress had to pass the STOCK Act just to put a stop to congressional insider trading. *See* Tamara Keith, *How Congress Quietly Overhauled Its Insider–Trading Law,* NPR, http://www.npr.org/sections/itsallpolitics/2013/04/16/177496734. Those whose rights may be trammeled by legislators brazen enough to pursue their own economic self-interest "are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi–Metallic Inv. Co. v. State Bd. of Equalization,* 239 U.S. 441, 445, 36 S.Ct. 141, 60 L.Ed. 372 (1915) (Holmes, J.). In fact, our Constitution's ingenious system of checks and balances *assumes* government officials will act self-interestedly. "Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good," the very first installment of the *Federalist Papers* opined. The Federalist No. 1, at 33 (C. Rossiter ed., 1961) (Hamilton). "But it is a thing more ardently to be wished than seriously to be expected." *Id.* And as Alexander Hamilton observed elsewhere: "We may

preach till we are tired of the theme, the necessity of disinterestedness in republics, without making a single proselyte." Alexander Hamilton, *The Continentalist No. IV,* in 3 *The Papers of Alexander Hamilton* 99, 103 (Harold C. Syrett ed., 1962). Self-interested lawmaking was not some shocking aberration;it was an unwelcomed expectation, one our Constitution endeavored to channel and check. *See* The Federalist No. 51, at 321–22 (Madison) (C. Rossiter ed., 1961) ("Ambition must be made to counteract ambition.").

However, despite acknowledging that "[a] dependence on the people is, no doubt, the primary control on the government," *id.* at 322, the Framers never expected political accountability would be sufficient on its own to check self-interest. *Id.* "[E]xperience has taught mankind the necessity of auxiliary precautions." *Id.* So the Framers fashioned devices that would "supply [ ], by opposite and rival interests, the defect of better motives." *Id.* But of one thing we may be sure, these "auxiliary precautions" against "ambition" that were built into our Constitution —bicameralism, presentment, judicial independence and life tenure, etc.—were designed for a government of three branches, not four. The Framers "could not have anticipated the vast growth of the administrativestate," which "with its reams of regulations would leave them rubbing their eyes." *Fed. Maritime Comm'n v. S.C. State Ports Auth.,* 535 U.S. 743, 755, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). Those original checks on self-interest, custom-fitted for legislators, presidents, and judges, loosely drape administrators like outsized hand-me-downs.

Indeed, government's increasing reliance on public-private partnerships portends an even more ill-fitting

accommodation between the exercise of regulatory power and concerns about fairness and accountability. Curbing the misuse of public power was the aim of the Magna Carta, and the Supreme Court has consistently concluded the delegation of coercive power to private parties can raise similar due process concerns. *See Eubank v. City of Richmond,* 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912); *City of Eastlake v. Forest City Enters., Inc.,* 426 U.S. 668, 677–78, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976); *see also Silverman v. Barry,* 727 F.2d 1121, 1126 (D.C.Cir. 1984). Wherever Amtrak may fall along the spectrum between public accountability and private self-interest, the ability —if it exists—to co-opt the state's coercive power to impose a disadvantageous regulatory regime on its market competitors would be problematic. *See, e.g.,* Alexander Volokh, *The New Private–Regulation Skepticism: Due Process, Non–Delegation, and Antitrust Challenges,* 37 Harv. J.L. & Pub. Pol'y 931 (2004).

For these reasons, *Carter Coal,* not *Association of National Advertisers*, dictates our answer to this constitutional conundrum. We conclude, as did the Supreme Court in 1936, that the due process of law is violated when a self-interested entity is "intrusted with the power to regulate the business ... of a competitor." *Carter Coal,* 298 U.S. at 311, 56 S.Ct. 855. "[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property" and transgresses "the very nature of [governmental function]." *Id.*

B

We next consider the minor premise of our syllogism. PRIIA only violates due process if Amtrak is (1) a self-interested entity (2) with regulatory authority over its competitors.

1

In its opinion reversing our prior judgment, the Supreme Court did not decide whether Amtrak is a self-interested entity. Affirming Amtrak's status as a governmental entity, the Court highlighted how Amtrak's operations are directed by and dependent on the federal government. It noted that "rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute" including "provid[ing] efficient and effective intercity passenger rail mobility," "minimiz[ing] Government subsidies," "provid[ing] reduced fares to the disabled and elderly," and "ensur [ing] mobility in times of national disaster." *Dep't of Transp.*, 135 S.Ct. at 1232. Moreover, "certain aspects of Amtrak's day-to-day operations" are dictated by congressional directive. *Id.* For example, Amtrak is required to "maintain a route between Louisiana and Florida" and to purchase materials "mined or produced in the United States." *Id.* Finally, Amtrak is "dependent on federal financial support" to the tune of more than "$1 billion annually." *Id.* "Given the combination of these unique features and its significant ties to the Government," the Court concluded, " Amtrak is not an autonomous private enterprise." *Id.*

We are bound by the Court's conclusion, and we do not disagree with it. Amtrak is clearly dependent on the government in ways other for-profit corporations are

not. But concluding "Amtrak is not an autonomous private enterprise" is not the same as concluding it is not economically self-interested. Though a government entity, Amtrak is still statutorily obligated to "be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2). Consistent with that obligation, Amtrak is "to make agreements with the private sector and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies." *Id.* § 24101(d). Moreover, Congress built financial incentives into its scheme to coax its profit-maximizing efforts, allowing Amtrak's officers to receive pay greater than "the general level of pay for officers of rail carriers with comparable responsibility" for any year in which Amtrak does not receive federal assistance. *Id.* § 24303(b). Amtrak's lack of full autonomy does nothing to relieve it of its statutory charge to maximize company profits.

The Government relies on Amtrak's obligation to fulfill numerous other statutory goals for the public good as evidence that it is not economically self-interested. But many corporations are obligated to compromise profit-seeking ambitions pursuant to statutory goals aimed at public goods. Corporations must, for instance, comply with the Americans with Disabilities Act, the Clean Air Act, and the Affordable Care Act, even though doing so may not otherwise have been the most economically prudent choice. Compliance with these statutory directives does not somehow negate economic self-interest. Neither does Amtrak's compliance with its statutory directives negate its concrete economic self-interest. The Government

identifies no way in which Amtrak's special obligations in any way obstruct it from the pure pursuit of profit in the standard-setting exercise that is before us.

Amtrak's self-interest is readily apparent when viewed, by contrast, alongside more traditional governmental entities that are decidedly not self-interested. The government of the United States is not a business that aims to increase its bottom line to achieve maximum profitability. Unlike for-profit corporations, government strives—at least in theory—for an equilibrium of revenues and expenditures, where the revenue obtained is no more and no less than the operating costs of the services provided. Amtrak's charter stands in stark contrast. Its economic self-interest as it concerns other market participants is undeniable.

2

We next consider whether Amtrak has power to regulate its competitors. Another way to put this question is whether the "metrics and standards" force freight operators to alter their behavior. According to the Government, PRIIA merely allows Amtrak "to participate in the development of metrics and standards for assessing its own performance." Gov. Br. 30. And it further asserts that any effect those metrics and standards have on freight operators is due either (1) to the operators' own voluntary consent to "incorporate" the metrics into their operating agreements or (2) to their violation of the statutory preference they agreed to back in 1970.

As to the first, the Government suggests the bargaining positions of Amtrak and the host rail carriers

are no different than those enjoyed by ordinary market entities negotiating at arm's length. PRIIA only requires freight operators "incorporate the metrics and standards" into their agreements "to the extent practicable." PRIIA § 207(c). And to the extent it is impractical and an agreement between Amtrak and a host rail carrier cannot be reached, the Surface Transportation Board (STB) will "prescribe reasonable terms and compensation." 49 U.S.C. § 24308(a)(2)(A)(ii). But ordinarily, one party doesn't face statutory pressure to acquiesce in the other's demands "to the extent practicable." That "the railroads may avoid incorporating the metrics and standards by arguing that incorporation is impracticable" doesn't render the scheme nonregulatory—"they [still] have a legal duty to try." *Dep't of Transp.,* 135 S.Ct. at 1253 (Thomas, J., concurring in the judgment). And since the pressure to accept Amtrak's demands might have force when the STB "prescribe[s] reasonable terms and compensation" in cases where Amtrak and a carrier cannot reach agreement, *see* 49 U.S.C. § 24308(a)(2)(A)(ii), carriers may face a heightened risk of disadvantageous terms or rates as a result of metrics and standards developed in part by Amtrak.

And as to the second, the Government attempts to downplay the enforcement effects of these metrics and standards on freight operators. PRIIA permits the STB to "initiate an investigation" whenever Amtrak's on-time performance "averages less than 80 percent for any 2 consecutive calendar quarters," regardless whether the metrics and standards were incorporated into the operating agreements of any affected freight operators. *See* PRIIA § 213(a), *id.* § 24308(f)(1). PRIIA also triggers STB investigation

where the "service quality of intercity passenger train operations for which minimum standards are established under section 207 ... fails to meet those standards for 2 consecutive calendar quarters." *Id.* The STB's investigation will determine, in part, whether the "failure to achieve minimum standards" is "attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." *Id.* § 24308(f)(1)-(f)(2). In the Government's view, the ability to initiate an enforcement proceeding is not regulatory authority. But the fact is these "metrics and standards lend definite regulatory force to an otherwise broad statutory mandate." *AAR,* 721 F.3d at 672. Certainly, the preference is the ultimate source of freight operators' liability, but, as we said before, "the metrics and standards are what channel its enforcement." *Id.* In public comments, FRA and Amtrak acknowledged the STB "is the primary enforcement body *of the standards.*" *Id.*

The extent to which the metrics and standards could affect ultimate damages and relief, if at all, in a given case is not clear to us. *See* 49 U.S.C. § 24308(f)(3)(A). We need not know that, however, to see that the statute gives Amtrak the authority to develop metrics and standards— constrained very partially, as discussed below, by the FRA and the arbitrator—that increase the risk that STB will initiate an investigation, thereby increasing the number of cases in which the STB may find a failure to provide Amtrak its statutory preference. "Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. That is regulatory power." *Dep't of Transp.,* 135 S.Ct. at 1236 (Alito, J., concurring) (citation omitted).

Accordingly, the Government's arguments are unpersuasive. Both PRIIA's mandate that freight operators incorporate the metrics and standards "to the extent practicable" and its grant of authority to STB to investigate freight operators in the event the metrics and standards are not satisfied confirm that, in fact, PRIIA grants Amtrak, a self-interested entity, power to regulate its competitors.

C

The syllogism we introduced at the outset is complete. Because PRIIA endows Amtrak with regulatory authority over its competitors, that delegation violates due process. Amtrak is required both to "maximize its revenues" and to develop new performance metrics, a set of responsibilities that, if adhered to, will inevitably boost Amtrak's profitability at the expense of its competitors. The actual metrics Amtrak produced in this instance were unfavorable to the freight operators. The on-time performance standards required the freight railroads to modify their operations, causing delays. AAR Br. 32. On some routes, adhering to the standards was simply impractical, exposing those rail operators to investigation by the STB and financial penalties payable to Amtrak. *Id.* Armed with coercive regulatory power, Amtrak wields a weapon of considerable advantage in its competitive battle for scarce track. And while the Constitution may grudgingly accept the reality of self-interestedness, it does not endorse it as an unmitigated good.

Congress delegated its legislative power to an entity that it designed to be the *opposite* of "presumptively disinterested." *Carter Coal,* 298 U.S. at 311, 56 S.Ct.

855. Like coal competitors, whose "diversity of view[s]" concerning the challenges of the industry "[arose] from their conflicting and even antagonistic interests," *id.,* the antagonistic interests of freight operators and Amtrak transform the development of new performance metrics and standards into an unfair game of zero sums. While freight operators and Amtrak may not directly compete for customers, they compete for scarce track, and Amtrak's authority to manipulate that competition entails the power to modify freight schedules to accommodate Amtrak trains, reschedule maintenance work, or reroute freight traffic. Put simply, PRIIA entrusts Amtrak "with the power to regulate the business ... of a competitor." *Id.* "[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property" and transgresses "the very nature of" governmental function. *Id.*

None of the Government's numerous counterarguments persuade us otherwise. First, the Government argues *Carter Coal* is distinguishable because unlike the empowered private coal producers, the federal government has considerable oversight and control over Amtrak. There's no doubt this is true. But then, there was also no suggestion that it was the coal producers' lack of accountability to government oversight that offended the *Carter Coal* Court either. Instead, what was offensive about the statute was its "attempt[ ] to confer" the "power to regulate the business of another, and especially of a competitor." *Id.* Subjecting the coal producers to government oversight would

not have cured a grant of regulatory power antithetical to the very nature of governmental function.[4]

Second, the Government suggests the FRA's required assent to any proposed metrics operates as an "independent check" on Amtrak's self-interestedness. To be sure, PRIIA does require Amtrak and FRA to " jointly" develop the metrics, but it's far from clear whether and in what way FRA "checks" Amtrak. PRIIA § 207(a). Both are subdivisions within the same branch and work in tandem to effectuate the goals Congress has set. Nowhere in the scheme is there any suggestion that FRA must safeguard the freight operators' interests or constrain Amtrak's profit pursuits.[5] Moreover, FRA is powerless to over-

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[4] We recognize that in some cases the Court has upheld arrangements under which regulatory burdens can be imposed by the joint action of a self-interested group and a government agency. *See Currin v. Wallace,* 306 U.S. 1, 6, 15–16, 59 S.Ct. 379, 83 L.Ed. 441 (1939); *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 388, 399, 60 S.Ct. 907, 84 L.Ed. 1263 (1940). Those cases are inapplicable here, however, because the FRA's authority to hold the line against overreaching by Amtrak is undermined by the power of the arbitrator, an individual who is appointed, and as we show below appointed unconstitutionally, by the STB. *See* Section IV, *supra* (explaining that any disputes between Amtrak and the FRA are to be resolved by an arbitrator through binding arbitration).

[5] Nor does the FRA's charter suggest it is a steward for the interests of freight operators. *See generally* 49 U.S.C. § 103. The charter requires FRA "consider the assignment and maintenance of safety as [its] highest priority," *id.* § 103(c), and requires, as additional duties, that it "develop and enhance partnerships with the freight and passenger railroad industry"; "ensure that programs and initiatives ... benefit the public and work toward achieving regional and national

rule Amtrak. As joint developers, they occupy positions of equal authority. When there is intractable disagreement between the two, the matter is resolved by an arbitrator, who may ultimately choose to side with Amtrak. FRA cannot keep Amtrak's naked self-interest in check, and therefore the requirement of joint development does not somehow sanitize the Act.

Third, the Government cites *Friedman v. Rogers,* 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979), as proof that some forms of bias are inoffensive. Gov. Br. 24–25. *Friedman* involved a Texas statute requiring a majority of the state optometry board be members of the Texas Optometric Association (TOA), which is restricted to optometrists who comply with state ethics requirements. 440 U.S. at 6, 99 S.Ct. 887. The plaintiffs, who were ineligible for membership because their business model conflicted with those ethics requirements, alleged the Board was unconstitutionally biased against them. *Id.* The Court disagreed, stating they had "no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of optometry." *Id.* at 18, 99 S.Ct. 887. Here, the Government asserts that *Friedman* "cannot be reconciled with" a due process reading of *Carter Coal*. Gov. Br. 24. But the *Friedman* plaintiffs never alleged the Board members would act out of self-interest instead of fairness, only that the board's composition itself was unfair. The Supreme Court rejected the idea anyway, noting there was "no support in the record" that "the TOA members on the Board will act in

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transportation goals"; and "facilitate and coordinate efforts to assist freight and passenger rail carriers ... by providing neutral assistance at the joint request of affected rail service providers," *id.* § 103(j).

excess of their authority by discouraging lawful advertising by optometrists," a decision that would have evidenced naked self-interest. *Friedman,* 440 U.S. at 19 n. 20, 99 S.Ct. 887.

Finally, the Government argues the Constitution does not prohibit Congress from empowering Amtrak to develop metrics and standards because Congress itself could have developed the metrics and standards or could have directed FRA to develop them alone. Gov. Br. 25. Perhaps. But notice that, in either of these alternative scenarios, the power to regulate freight operators would be in the hands of "official bod[ies], presumptively disinterested." *Carter Coal,* 298 U.S. at 311, 56 S.Ct. 855. Pointing to Congress or FRA's capacity to develop these metrics is nothing but a red herring—the due process question *Carter Coal* and the freight operators put before us in this appeal centers on the propriety of self-interested actors exercising regulatory power.

* * *

The Supreme Court's conclusion that Amtrak is a government entity resolved the nondelegation issue that was the primary focus of our earlier decision. But it left a due process one. Make no mistake; our decision today does not foreclose Congress from tapping into whatever creative spark spawned the Amtrak experiment in public-private enterprise. But the Due Process Clause of the Fifth Amendment puts Congress to a choice: its chartered entities may *either* compete, as market participants, *or* regulate, as official bodies. After all, "[t]he difference between producing ... and regulating ... production is, ofcourse, *fundamental.*"

Id. (emphasis added). To do both is an affront to "the very nature of things," especially due process.

Next, we consider the other challenge to PRIIA preserved for our review: whether the arbitration provision violates the Appointments Clause.

IV

As the foregoing analysis suggests, among the Framers' chief concerns at the constitutional convention were questions of who should be permitted to exercise the awesome and coercive power of the government. Tyrannous abuse of that power precipitated revolution against Great Britain. Overly restrictive access to it crippled our young nation under the Articles of Confederation. The novel equipoise the Constitution struck was to vest the legislative, executive, and judicial powers in independent branches of government and then empower each to check the others.

The Appointments Clause, at issue here, is one of "the significant structural safeguards of th[at] constitutional scheme." *Edmond v. United States,* 520 U.S. 651, 659, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997). It requires every "Officer of the United States" exercising "significant authority pursuant to the laws of the United States" to be appointed in a specific manner, as prescribed in Article II, section 2, clause 2. *Buckley v. Valeo,* 424 U.S. 1, 126, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The prescribed manner differs depending on the type of "Officer" to be appointed. "Principal officers" are appointed by the President with the "advice and consent of the Senate," ensuring "public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond,* 520 U.S. at 660, 117 S.Ct. 1573. But Congress,

for the purpose of "administrative convenience," *id.,* may vest the exclusive appointment power of inferior officers—those "whose work is directed and supervised at some level" by principal officers, *id.* at 663, 117 S.Ct. 1573— in "the President alone, in the Courts of Law, or in the Heads of Department," *id.* at 660, 117 S.Ct. 1573. These limitations on the appointment power "ensure that those who wield[ ] it [are] accountable to political force and the will of the people." *Freytag,* 501 U.S. at 884, 111 S.Ct. 2631.

The freight operators claim PRIIA's arbitration provision violates this important safeguard. PRIIA requires that, in the event Amtrak and FRA cannot agree, either party "may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." PRIIA § 207(d). Conspicuous by its absence in this provision is any mention whether the appointed arbitrator is a private individual or public official. But in the freight operators' view, it hardly matters as the provision is unconstitutional regardless. Either the arbitrator is a private individual and the clause unlawfully deputizes a private person to issue binding regulations, or she is a public official and her appointment by the STB, rather than "the President with the advice and consent of the Senate," violates the Appointments Clause.[6]

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[6] The Government contends it is improper to reach this question because the arbitration provision was "never invoked." Gov. Br. 40–42. For reasons we explained in our previous opinion, this argument fails to acknowledge how the provision "still polluted the rulemaking process" by "stack[ing] the deck in favor of compromise." *AAR,* 721 F.3d at 674; *see also Dep't of Transp.,*

We needn't concern ourselves much here with the amici's arguments concerning the propriety of giving regulatory power to private individuals. Our prior opinion detailed extensively why private entities cannot wield the coercive power of government, *AAR,* 721 F.3d at 670–74, and seeing as the Supreme Court reversed on other grounds, we stand by that analysis. *See also Dep't of Transp.,* 135 S.Ct. at 1237 (Alito, J., concurring) ("When it comes to private entities [exercising governmental powers], however, there is not even a fig leaf of constitutional justification."). More importantly, even assuming, as the Government insists, the STB appoints a "governmental arbitrator" rather than a private one, the appointment is nonetheless unconstitutional.

A

Antecedent to deciding the ultimate issue, we first turn to a central premise of the freight operators' claim, namely that the arbitrator is an "Officer of the United States." After all, the Appointments Clause is concerned only with the appointment of officers, not nonofficers. *See Edmond,* 520 U.S. at 662, 117 S.Ct. 1573. The question is whether the "appointee exercis[es] significant authority pursuant to the laws of the United States." *See Buckley,* 424 U.S. at 126, 96 S.Ct. 612; *see also Edmond,* 520 U.S. at 662, 117 S.Ct. 1573 (noting the "significant authority" test "marks,

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135 S.Ct. at 1236 (Alito, J., concurring) ("[W]hen Congress enacts a compromise-forcing mechanism, it is no good to say that the mechanism cannot be challenged because the parties compromised."); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 264–65, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991).

not the line between principal and inferior officer ... but rather ... the line between officer and nonofficer").

To see why we answer this question with a resounding "yes," it is helpful to take stock of the arbitrator's duty. The arbitrator is called upon to resolve any impasse between Amtrak and FRA through "binding arbitration."PRIIA § 207(d). In other words, it is the arbitrator's responsibility to render a final decision regarding the content of the metrics and standards. That decision would appear in the Federal Register, *see Metrics and Standards for Intercity Passenger Rail Service under Section 207 of the Passenger Rail Investment and Improvement Act of 2008,* 75 Fed.Reg. 26839, 26839 (2010), and would immediately impact the freight railroads obligations vis-à-vis Amtrak. The arbitrator's power to alter the railroad industry through final agency action constitutes "significant authority pursuant to the laws of the United States." *See Edmond,* 520 U.S. at 665, 117 S.Ct. 1573 (noting the judges in question "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers"); *see also Dep't of Transp.,* 135 S.Ct. at 1239 (Alito, J., concurring) (asserting that "nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it").

For these reasons, the STB's appointed arbitrator qualifies as an "Officer of the United States," and "must, therefore, be appointed in the manner prescribed by" the Appointments Clause. *See Buckley,* 424 U.S. at 126, 96 S.Ct. 612. We must consider, then, whether PRIIA—which vests the STB with power to appoint an arbitrator—accords with the manner prescribed by the Constitution.

B

Perhaps the best explanation of the Appointments Clause is found in the Supreme Court's 1878 decision in *United States v. Germaine,* 99 U.S. 508, 25 L.Ed. 482 (1878). The Court stated:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.

Id. at 509–10.

Accordingly, the starting place for assessing the constitutionality of an officer's appointment is determining to which class the officer belongs. Here, if the arbitrator is a principal officer, her appointment would clearly violate the constitution because PRIIA vests the appointing power in the STB alone, not the President with the advice and consent of the Senate.

See PRIIA § 207(d). Likely in anticipation of this obvious defect, the Government characterizes the arbitrator's authority as "confined to the single impasse over the metrics and standards," and asserts it is therefore of such a "limited nature" that it "would have made the arbitrator an inferior, rather than a principal, officer." Gov. Br. 46. If the Government's assertion were correct, the appointment would be valid, since the STB is a "department" within the meaning of the Clause. *See* 49 U.S.C. § 1301(a), (b) (establishing the STB as "an independent establishment" whose board members are "appointed by the President");*Free Enter. Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 477, 511, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (defining a department as "a free-standing component of the Executive Branch, not subordinate to or contained within any other such component").

However, as the Supreme Court's opinion in *Edmond* clarified, the degree of an individual's authority is relevant in marking the line between officer and nonofficer, not between principal and inferior officer. *Edmond,* 520 U.S. at 662, 117 S.Ct. 1573. Recognizing its cases had not yet "set forth an exclusive criterion for distinguishing between principal and inferior officers," *id.* at 661, 117 S.Ct. 1573, the *Edmond* Court identified the dispositive feature as whether an officer is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," *id.* at 663, 117 S.Ct. 1573. Thus, the Government's reliance on the "limited nature" of the arbitrator's duties confuses a question of supervision for one of authority.

And while it may seem peculiar to demand "primary class" treatment for a position as banal as the PRIIA arbitrator, it also seems inescapable. Nowhere does PRIIA suggest the arbitrator "is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." PRIIA doesn't provide any procedure by which the arbitrator's decision is reviewable by the STB. Instead, it empowers the arbitrator to determine the metrics and standards "through binding arbitration." *See Dep't of Transp.,* 135 S.Ct. at 1239 (Alito, J., concurring) ("As to that 'binding' decision, who is the supervisor?"). The result? A final agency action, the promulgation of metrics and standards as though developed jointly by Amtrak and the FRA. Without providing for the arbitrator's direction or supervision by principal officers, PRIIA impermissibly vests power to appoint an arbitrator in the STB.

V

> Train schedules are a matter of pride and of apprehension to nearly everyone. When, far up the track, the block signal snapped from red to green and the long, stabbing probe of the headlight sheered the bend and blared on the station, men looked at their watches and said, 'On time.' There was pride in it, and relief too. The split second has been growing more and more important to us. And as human activities become more and more intermeshed and integrated, the split tenth of a second will emerge, and then a new name must be made for the split hundredth, until one day, although I

> don't believe it, we'll say, 'Oh, the hell with it. What's wrong with an hour?' ... One thing late or early can disrupt everything around it, and the disturbance runs outward in bands like the waves from a dropped stone in a quiet pool.

JOHN STEINBECK, EAST OF EDEN 533 (Penguin Books 2002).

It may be said that PRIIA's architects shared Steinbeck's pride in the punctuality of train schedules. But as we've shown, there are limits to how far Congress may go to ensure Amtrak's on-time performance. The Constitution's drafters may not have foreseen the formidable prerogatives of the administrative state, but the Due Process Clause effectively guarantees the regulatory power of the federal government will be wielded by "presumptively disinterested" and "duly appointed" actors who, in exercising that awesome power, are beholden to no constituency but the public good. Because PRIIA grants this power to the economically self-interested Amtrak and to an unconstitutionally appointed arbitrator, it transgresses that vital guarantee. We therefore

Reverse.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5123	**September Term, 2018**
Association of American Railroads, Appellee v. United States Department of Transportation, et al., Appellants	**1:11-cv-01499-JEB** **Filed On:** October 24, 2018

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, and Katsas, Circuit Judges

O R D E R

Upon consideration of appellee's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5123	**September Term, 2018**
Association of American Railroads, Appellee v. United States Department of Transportation, et al., Appellants	**1:11-cv-01499-JEB** **Filed On:** October 24, 2018

BEFORE: Garland, Chief Judge; Tatel and Millett, Circuit Judges

O R D E R

Upon consideration of appellee's petition for panel rehearing filed on August 31, 2018, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 –

Codified at:

49 U.S.C. § 24101 note.

(a) IN GENERAL.—Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, ontime performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.

(b) QUARTERLY REPORTS.—The Administrator of the Federal Railroad Administration shall collect the necessary data and publish a quarterly report on the performance and service quality of intercity passenger train operations, including Amtrak's cost recovery, ridership, on-time performance and minutes of delay, causes of delay, onboard services, stations, facilities, equipment, and other services.

(c) CONTRACTS WITH HOST RAIL CARRIERS.—To the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements.

(d) ARBITRATION.—If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.

* * *

Section 213(a) of the Passenger Rail Investment and Improvement Act of 2008 –

Codified at:

49 U.S.C. § 24308. Use of facilities and providing services to Amtrak

* * *

(f) PASSENGER TRAIN PERFORMANCE AND OTHER STANDARDS.—

(1) INVESTIGATION OF SUBSTANDARD PERFORMANCE.—If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the Passenger Rail Investment and Improvement Act of 2008 fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board (referred to in this section as the "Board") may initiate an investigation, or upon the filing of a complaint by Amtrak, an intercity passenger rail operator, a host freight railroad over which Amtrak operates, or an entity for which Amtrak operates intercity passenger rail service, the Board shall initiate such an investigation, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators. As part of its investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute

to delays. In making its determination or carrying out such an investigation, the Board shall obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.

(2) PROBLEMS CAUSED BY HOST RAIL CARRIER.—If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.

(3) DAMAGES AND RELIEF —In awarding damages and prescribing other relief under this subsection the Board shall consider such factors as—

(A) the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards; and

(B) what reasonable measures would adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.

(4) USE OF DAMAGES.—The Board shall, as it deems appropriate, order the host rail carrier to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service. Such damages shall be used for capital or operating expenditures on the

routes over which delays or failures to achieve minimum standards were the result of a rail carrier's failure to provide preference to Amtrak over freight transportation as determined in accordance with paragraph (2).

(Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 911; 110-432, div. B, title II, § 213(a), (d), Oct. 16, 2008, 122 Stat. 4925, 4926.)