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IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF :
TRANSPORTATION, ET AL., :

Petitioners : No. 13-1080

v. :

ASSOCIATION OF AMERICAN :
RAILROADS. :

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Washington, D.C.

Monday, December 8, 2014

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:08 a.m.

APPEARANCES:

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General, Department of Justice, Washington, D.C.; on
behalf of Petitioners.

THOMAS H. DUPREE, JR., ESQ., Washington, D.C.; on behalf
of Respondent.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 13-1080, Department of
5 Transportation v. Association of American Railroads.
6 Mr. Gannon.

7 ORAL ARGUMENT OF CURTIS E. GANNON
8 ON BEHALF OF THE PETITIONERS

9 MR. GANNON: Mr. Chief Justice, and may it
10 please the Court:

11 The court of appeals held that Section 207
12 of PRIIA was unconstitutional because it believed that
13 the statute constituted an actual delegation of
14 regulatory authority to a private entity. And none of
15 those three things is true about this statute.

16 First, under Lebron, Amtrak should not be
17 considered a private corporation for nondelegation
18 purposes. Second, the metrics and standards are not
19 regulatory. The regulatory effect here comes from the
20 longstanding statutory preference requirement, which was
21 enacted by Congress, not Amtrak, and is enforced by an
22 independent adjudicative agency, the Surface
23 Transportation Board. And third --

24 JUSTICE KENNEDY: Go ahead, please.

25 MR. GANNON: And third, requiring Amtrak to

1 approve the metrics and standards before they went into
2 effect is not a delegation outside the government under
3 this Court's cases.

4 JUSTICE KENNEDY: I think the Lebron
5 argument, Marsh v. Alabama, the company town case, no
6 one says that it was a governmental agency. It was just
7 exercising governmental-like powers which entitled the
8 person to exercise free speech. That's all Lebron can
9 stand for. You wouldn't say that Marsh v. Alabama, the
10 company town, was a governmental agency after reading
11 that opinion, would you?

12 MR. GANNON: No. I would say that after
13 reading the opinion in Lebron, that the Court concluded
14 that Amtrak is a governmental entity for things that
15 Congress doesn't have control over.

16 JUSTICE KENNEDY: Well, you could say the
17 same thing about Marsh v. Alabama.

18 MR. GANNON: Well, I think that the
19 difference is that the Court recognized in Lebron that
20 Amtrak is a government-created corporation that is under
21 the government's control and that under the government's
22 control both because of the management control that it
23 has over it and because it created the purposes for
24 which Amtrak exists and the things that it has to do.
25 And the Court there distinguished between whether Amtrak

1 is governmental for constitutional purposes that were
2 beyond Congress's control, but acknowledged that
3 Congress could control whether Amtrak was governmental
4 for other purposes, other powers and privileges of
5 government.

6 JUSTICE ALITO: If Amtrak is governmental
7 for nondelegation purposes, is it also governmental for
8 appointments clause purposes?

9 MR. GANNON: Well, I think that that follows
10 from the -- the way the Court approached the question
11 about the PCAOB and Free Enterprise Fund where Congress
12 had also enacted a statute that said the PCAOB was not
13 an agency or instrumentality of government, that no
14 board members or employees were going to be considered
15 officers or employees of the Federal government. The
16 parties in that case, which included the United States,
17 did not dispute that the appointments clause and
18 separation of powers concerns that were at issue there
19 were applicable to the PCAOB, notwithstanding those
20 general statements by Congress. And we do think here --

21 CHIEF JUSTICE ROBERTS: I was just going to
22 say your argument that Amtrak is governmental for
23 purposes of -- that doesn't get you to the finish line,
24 right? I mean, if you had a law that said the
25 Department of Defense and the Department of State will

1 consult and jointly issue regulations and if they don't,
2 this private individual resolved it for them, that would
3 still present the same problems.

4 MR. GANNON: Well, I think,
5 Mr. Chief Justice, you are referring to the arbitrator
6 provision.

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. GANNON: Before we get to the arbitrator
9 provision, I do think that -- that this would resolve
10 the question. And ultimately, if this is not regulatory
11 authority that cannot be conditioned --

12 JUSTICE SCALIA: Well, it wouldn't resolve
13 the question. Only -- only perhaps for delegation
14 purposes. But -- but it doesn't resolve the -- the
15 other issue in the case, which is due process. That is
16 to say, even if this is a governmental entity, there are
17 some things that governmental entities can't do. And,
18 indeed, I think that the case law in this area relies on
19 the due process clause more than on the distinction
20 simply between public and private entities.

21 MR. GANNON: Well, to be sure, the Carter
22 Coal case talked about both nondelegation ideas and also
23 due process issues. We -- we would be surprised if
24 the Court wanted to decide the due process issue here
25 since it wasn't decided by the court of appeals.

1 JUSTICE SCALIA: It was raised.

2 MR. GANNON: It certainty was raised.

3 JUSTICE SCALIA: And it's -- and it's argued
4 here.

5 MR. GANNON: It -- it has been argued in the
6 red brief here. And we do think that we're correct on
7 the merits with respect to the due process issue and
8 that -- for two principal reasons. One is that what is
9 at stake here is not the equivalent of what was going on
10 in the due process cases. This is not like the
11 de-licensing of optometrists in the Gibson v. Berryhill
12 case. It's not like the wage and hour requirements in
13 Carter Coal, because -- because the analogy to those
14 things here is the statutory preference requirement
15 rather than the antecedent metrics and standards.

16 JUSTICE SCALIA: Yes. But the statutory
17 preference requirement requires -- would require
18 consideration of whatever is determined by this body,
19 right?

20 MR. GANNON: The statutory preference
21 requirement is independent of the metrics and standards
22 and preexists them. That is what the Surface
23 Transportation Board would be enforcing in a proceeding
24 under Section 24308(f). The metrics and standards --

25 JUSTICE SCALIA: What must it consider?

1 MR. GANNON: The metrics and standards play
2 a triggering and gatekeeping role. The -- these
3 provisions are reprinted in the government's brief on
4 pages 15A and 16A of the appendix, that the -- the
5 investigation by the Surface Transportation Board is
6 triggered by their having been a failure by Amtrak to
7 satisfy the metrics and standards. But I think that --
8 that -- that is -- and if we're talking about the due
9 process cases, that is not the prohibition that
10 the Court has been concerned about. If you look at
11 cases like Roberge, which talked about Cusack, it said
12 that it's okay to have something that is presumptively
13 bad banned by the legislature.

14 Here, the analogy to that is the statutory
15 preference, and it's okay, then, to allow a private
16 party to relax its application in certain circumstances.
17 And we think that's the role that the metrics and
18 standards play here, because Congress could have allowed
19 Amtrak to ask for an STB investigation into violations
20 of the statute any time it wanted to. And instead what
21 they said is that it is only -- you are only going to
22 get that investigation when you have failed to -- to
23 perform at an adequate level such that we think there's
24 been adequate injury. And then in that investigation,
25 you are going to have to establish that the injury to

1 you was caused by the violation of the statute.

2 JUSTICE KENNEDY: So in your -- in your
3 view, the case would come out the same way if Amtrak
4 could issue these metrics and standards entirely on its
5 own, without consultation with the -- or cooperation
6 with the government. Same -- same case --

7 MR. GANNON: One of the --

8 JUSTICE KENNEDY: -- same result?

9 MR. GANNON: One prong of our argument is,
10 yes, that because this is not regulatory in that sense,
11 this is more like the neighbors being able to veto the
12 billboard in the neighborhood in Cusack, which the Court
13 said was okay in Roberge, because the statutory
14 preference is presumptively bad. Violations of the
15 statutory preference by the freight railroads were the
16 thing that Congress wanted to be enforceable here, and
17 the metrics and standards just cabin the circumstances
18 in which Amtrak can seek that kind of enforcement.

19 If I could return to the Chief Justice's
20 question about the --

21 CHIEF JUSTICE ROBERTS: You may. You may.

22 JUSTICE SOTOMAYOR: That doesn't stop -- do
23 the metes and standards stop you from initiating or stop
24 the agency from initiating a review, even if a carrier
25 meets the metes and standard?

1 MR. GANNON: Well, it's -- it's not the
2 carrier. It's not the host railroad that would meet the
3 standards.

4 JUSTICE SOTOMAYOR: No, it would be --

5 MR. GANNON: It would be Amtrak's own
6 performance.

7 But there is -- there is -- that would
8 depend upon the reading of the beginning clause of
9 (f) (1) which refers to if on-time performance fails to
10 satisfy 80 percent for two consecutive quarters or the
11 service quality isn't complied with for two quarters,
12 then those are the circumstances in which an
13 investigation could be requested and -- in which
14 instance the STB would need to start the investigation
15 or the STB could initiate the investigation.

16 And there is an open question about that
17 first clause about whether the 80 percent on-time
18 performance reference is something that has to be
19 predicated upon the metrics and standards. That's been
20 briefed before the Surface Transportation Board in the
21 proceeding brought against Canadian National, the
22 complaint of which is reprinted -- a snippet from which
23 is reprinted at the end of the joint appendix. And so
24 the question there would be whether on-time performance
25 there depends upon a pre-PRIIA definition rather than

1 the ones that are included in the metrics and standards.

2 So there's a possibility that the agency
3 could --

4 JUSTICE SOTOMAYOR: If we were -- if we were
5 to rule that this is not a regulatory action, would that
6 satisfy the entire case? We wouldn't have to go to the
7 delegation issue or to whether it was public or private,
8 et cetera.

9 MR. GANNON: I -- I think that that is
10 right. And I think even in those circumstances, because
11 it -- because if it's not regulatory, it's okay for
12 private persons to have that power, and I think that
13 would cover even the question of whether -- if -- if the
14 arbitrator is assumed to be private. That is not what
15 we think is the case.

16 And we also think that we don't have to win
17 on that agreement either on -- on the question of --

18 JUSTICE SOTOMAYOR: On --

19 CHIEF JUSTICE ROBERTS: If the -- if the
20 actions are not regulatory, why -- why did Amtrak's
21 performance drop dramatically as soon as the Court
22 issued its decision in this case?

23 MR. GANNON: Well, I think that's because of
24 the -- that it decreased the threat of enforcement of
25 the statutory preference. I do think that the -- it is

1 the statutory preference that is having the regulatory
2 impact here. The freight railroads are not going to be
3 held liable for Amtrak's failure to satisfy the metrics
4 and standards. They're going to be held liable for
5 failing to --

6 CHIEF JUSTICE ROBERTS: They're going to
7 be -- Amtrak can then force a proceeding at which the
8 freight carriers will have to defend, right?

9 MR. GANNON: That -- that is correct. And
10 the same thing --

11 CHIEF JUSTICE ROBERTS: Well, that's a
12 significant regulatory impact, to tell railroads I, a
13 private party, get to start a governmental proceeding
14 and you have to show up to defend it.

15 MR. GANNON: Yes. But that -- that
16 happens --

17 CHIEF JUSTICE ROBERTS: And, by the way, if
18 I don't -- it's triggered if I don't comply with
19 standards that I get to set.

20 MR. GANNON: It's -- but we allow private
21 parties to initiate governmental investigations and
22 enforcement proceedings all the time, either before
23 administrative agencies or courts, and we don't think
24 that that is a delegation of legislative power --

25 JUSTICE KAGAN: Mr. Gannon --

1 MR. GANNON: -- to the person who is
2 beginning the investigation.

3 JUSTICE KAGAN: Is the -- is the government
4 able to award damages without the showing that there's
5 been a violation of the metrics and standards?

6 MR. GANNON: No. That is -- that is going
7 to be a threshold determination. But as I said, that is
8 a -- it's serving as a threshold gatekeeping function
9 to -- of -- of limiting the circumstances in which the
10 investigation can begin and when there will be damages.

11 JUSTICE KAGAN: But I would think if that's
12 the case, if the statutory preference does not get -- is
13 a -- if a violation of the statutory preference doesn't
14 get you all the way to damages, if there is essentially
15 a second requirement which is a violation of the metrics
16 and standards, I mean, in effect what the -- a statute
17 does is it says there are two things you need to show, a
18 violation of the preference and a violation of the
19 metrics and standards, in order to get to damages. That
20 seems -- if -- if that's the case, it seems kind of
21 regulatory.

22 MR. GANNON: Well, I -- I -- I understand
23 the impulse, but I think that seems -- it -- it also
24 seems like the ability of the neighbors to veto the
25 billboards in Cusack because what Amtrak -- all Amtrak

1 has done is relax certain circumstances in which the
2 freight railroads can be held liable for violating the
3 statutory preference. A violation of the statutory
4 preference is presumptively a bad thing.

5 And what has happened here is Congress has
6 recognized that if it doesn't actually cause Amtrak to
7 be -- to have sufficiently subpar performance, then we
8 are not going to make a Federal case out of it and we're
9 not going to let Amtrak do so. But -- and -- and there
10 aren't going to be damages at the end of the day.

11 But I do think that the real-world reason of
12 why the freight railroads had greater incentive to
13 cooperate and Amtrak believes that it was their
14 cooperation under the regime in which the metrics and
15 standards were in effect, and there was still the
16 possibility that there would be enforcement proceedings
17 before the STB to determine whether the freight
18 railroads had failed to comply with the statute --

19 JUSTICE ALITO: The statute says that the --

20 JUSTICE GINSBURG: Can we -- can we get back
21 to the arbitrator? I think the Chief asked that
22 question that -- and we passed it and assume it's
23 regulatory.

24 MR. GANNON: Yes.

25 JUSTICE GINSBURG: The arbitrator, it's

1 argued, need not be a government officer. It could be a
2 private officer. I have a question to ask about that
3 provision.

4 Is it -- is this a one-time operation, that
5 is, the setting these metrics and standards? In -- in
6 fact, there were no arbitrator in this picture. Will
7 there be a renewal of this, a repetition where there
8 might be an arbitrator?

9 MR. GANNON: Well, I -- I don't think that
10 the terms of 207(d) contemplate that the arbitrator will
11 come into effect again. I think that because the
12 beginning of it says that it -- it is only triggered if
13 a development of the metrics and standard is not
14 completed within the 180-day period required by
15 subsection (a), which is the 180 days after PRIIA was
16 enacted in 2008.

17 And so the arbitration provision was, I
18 think, good for one time only. It was never invoked.

19 CHIEF JUSTICE ROBERTS: Well, but does that
20 matter? I mean, the idea is that having the
21 arbitrator -- arbitration provision there affected the
22 issuance of the regulations.

23 MR. GANNON: Yes, I -- I understand that
24 question, Mr. Chief Justice. I -- I think that's --
25 it -- it mattered the first time around. To the extent

1 that there may be any amendments to the metrics and --

2 CHIEF JUSTICE ROBERTS: If --

3 MR. GANNON: -- standards in the future --

4 CHIEF JUSTICE ROBERTS: Right.

5 MR. GANNON: -- the arbitrator wouldn't be
6 applicable. We do not think that the best reading of
7 the arbitrator reference is that that would be a private
8 person. We think that --

9 CHIEF JUSTICE ROBERTS: Well, I know -- if I
10 could -- there's -- the issues are pretty intertwined
11 here, so I know it's a difficult thing to keep track of
12 for you. But if -- if -- and for us. But if we think
13 that the regulations have a regulations -- not to load
14 the question --

15 MR. GANNON: The metrics and standards have
16 a regulatory affect.

17 CHIEF JUSTICE ROBERTS: Okay. Metrics and
18 standards are regulations. And if we think there is
19 nothing in the statute that requires -- well, I guess it
20 doesn't -- doesn't -- doesn't really matter.

21 If that's the case, is the arbitrator an
22 officer of the United States? In other words, if he is
23 the one that ends up issuing what we will hypothetically
24 conclude are regulations, I assume he has to be an
25 officer of the United States.

1 MR. GANNON: I -- I think that would
2 constitute significant governmental authority under
3 Buckley against Valeo, and that would be --

4 JUSTICE BREYER: Well, you know, I'm quite
5 interested in the government's view of this case, and I
6 hope you will calm me down.

7 The reason that I find it interesting is
8 because it seems to me there are hundreds, maybe
9 thousands of organizations that set standards for the
10 industry. And some of them operate under government
11 memoranda or authority that ask them to do it, most
12 noted being ICANN which sets all the standards for the
13 internet.

14 Now, it also seems to me very possible that
15 a member of such an organization that fails to follow
16 the standard could run afoul of other government rules
17 or other agency rules or other laws, for example, by
18 stalling the internet delivery of services and being
19 delayed, and violating some FCC requirement. And since
20 I know that there are about 2 or 300 international
21 organizations that we belong to, to do such things, I
22 just wonder what the implications would be if you lose
23 this case. That is to say, if this Court held here that
24 if a government, say, Congress, agency, Commerce
25 Department, says to a group of private people set

1 standards, and then if they fail -- or if they do so and
2 a member fails to meet a standard, it runs afoul of a
3 different rule, such as a rule that you have to have a
4 certain speed on the Internet or some such thing. Were
5 we to hold that unconstitutional, I have a feeling --
6 this is what I want assurance on that I'm wrong -- that
7 it would work havoc, possibly with the Internet,
8 possibly with industry throughout the United States, I
9 know not where, possibly in communications, possibly
10 with the 200 or so organizations regulated by treaty.

11 Now, you've looked into this more than I
12 and, therefore, I want you to calm me down and say no,
13 this isn't a big-deal case. Don't worry about it.

14 MR. GANNON: I think it depends upon how
15 broad the Court's ruling is. I think --

16 JUSTICE BREYER: No, no. The ruling is
17 narrow. It just says the following. It says, these are
18 standards which equal legislation and as a result of
19 these standards being legislated by this, I think,
20 Quango or something, or whatever, by -- by this
21 particular entity, bad things happen to freight trains
22 when they fail to meet the standards or something and
23 they violate some other law and that's all
24 unconstitutional.

25 MR. GANNON: And I frankly --

1 JUSTICE BREYER: Going back to Carter v.
2 Carter Coal.

3 MR. GANNON: Yes.

4 JUSTICE BREYER: We could go back to
5 Lochner.

6 MR. GANNON: I don't think that -- that
7 Respondent is asking for a ruling of that nature. And I
8 think that the question here would be because of the
9 role that the metrics and standards play in the STB
10 investigation. I think that would be the only way in
11 which the Court would conclude that it is -- is
12 tantamount to regulations. We don't believe that they
13 have that effect. We don't think that other standards
14 that are conditions for application of -- of the law out
15 there in the world have necessarily the same effects
16 under even Respondent's view of the case. But I -- and
17 so I -- I think that the one you want to get
18 reassurances from is actually Respondent, that the
19 nature of their challenge is -- is narrower than that.
20 But if I could return to the arbitrator --

21 CHIEF JUSTICE ROBERTS: Thanks.

22 I know it's a -- if he is an officer, is the
23 government's issue a principal officer or an inferior
24 officer?

25 MR. GANNON: I think that he would be an

1 inferior officer given the limited nature of the --

2 CHIEF JUSTICE ROBERTS: Okay. Then who --
3 which principal officer supervises him?

4 MR. GANNON: It -- it would be the STB that
5 appointed him.

6 CHIEF JUSTICE ROBERTS: But he's an
7 arbitrator.

8 MR. GANNON: He's an arbitrator.

9 CHIEF JUSTICE ROBERTS: One of the parties
10 to the arbitration.

11 MR. GANNON: I don't think the STB is a
12 party to the arbitration. I think that the -- the two
13 parties who have to issue the -- their metrics and
14 standards are Amtrak and the Federal Railroad
15 Administration. If they don't agree, then an
16 arbitration -- the arbitrator would be resolving a
17 dispute not -- the STB wouldn't be a party to that.

18 CHIEF JUSTICE ROBERTS: So if the STB
19 doesn't like the arbitrator's decision, can the STB
20 change it under the law?

21 MR. GANNON: I doubt it because it's
22 supposed to be a binding arbitration. But we think that
23 from the beginning, this is yet another reason to
24 construe the arbitrator as being somebody who is
25 governmental, probably somebody who is actually at the

1 STB.

2 JUSTICE SCALIA: I don't -- I don't see how
3 you can say he's an inferior officer. He's supervised
4 by nobody. That's what we have held to be the -- the
5 touchstone of principal versus inferior.

6 MR. GANNON: He's appointed by the super --
7 the Surface Transportation Board --

8 JUSTICE SCALIA: That's it. And supervised
9 by nobody.

10 MR. GANNON: -- to perform a limited task.
11 He could be removed by the STB.

12 JUSTICE SCALIA: A limited task is -- is not
13 the touchstone. I mean, that's what we said in Morrison
14 and we repudiated it in a later case, which said the
15 touchstone of a -- of a principal officer is whether
16 that person is not subject to control by somebody else.
17 And I don't see how this person is subject to any
18 control in -- in the task that he's assigned.

19 MR. GANNON: Well, in that sense, it's
20 consistent with Morrison, and it is not consistent with
21 what the Court said was sufficient to enter the question
22 in Edmund, but did not say was necessary to answer the
23 question in Edmund about there being review within the
24 Executive Branch of the decisions being made by the
25 Coast Guard judges there.

1 JUSTICE SCALIA: Let me -- let me talk about
2 regulatory effect. As I understand it, once these --
3 what do you call them?

4 MR. GANNON: The metrics and standards.

5 JUSTICE SCALIA: The metrics and standards.
6 Once they were issued, wow, the -- the on-time record of
7 Amtrak went way, way up. So they had a very immediate
8 and clear effect on the behavior of -- of the parties.

9 Now, do you think that because the
10 sentencing guidelines are now just advisory that we
11 could have the sentencing guidelines issued by some
12 private party that -- that is not appointed pursuant to
13 the requirements of the Constitution? Because after
14 all, they're just advisory. Now, the reality is, they
15 have a significant effect on -- on the behavior of -- of
16 lower courts. And I think it's the same thing here.
17 There's a significant effect. I don't know --

18 MR. GANNON: I -- I don't think that this is
19 the same as the sentencing guidelines, the effect that
20 it has on the judges, because those are advice to the
21 judges. Here, what the metrics and standards do is they
22 satisfy conditions in the world when -- when the Federal
23 statute is going to be applicable. It's in that sense,
24 just like the Court contemplated in *JW Hampton* or indeed
25 in cases like *Currin v. Wallace* and *Rock Royal*

1 Cooperative, where the policy was established by the
2 Federal government, the Secretary of Agriculture wanted
3 to put a price order in effect or to say that a
4 particular tobacco market would be subject to a Federal
5 inspection regime and that could not occur until --
6 until there was approval from private entities.

7 JUSTICE SCALIA: Why did the record improve
8 so -- so rapidly and so promptly?

9 MR. GANNON: Because for the first time in
10 decades there was a meaningful threat that there would
11 be an enforcement proceeding, not to enforce the metrics
12 and standards, but to enforce the statutory preference
13 requirement, which is not challenged here, which was not
14 written by Amtrak, and which would be enforced by the
15 Surface Transportation Board in an independent
16 adjudication in which they would take evidence from both
17 sides and determine what the real story was. There's --

18 JUSTICE SOTOMAYOR: Can -- can I go back to
19 my question, okay? Can the STB on its own start an
20 investigation?

21 MR. GANNON: I --

22 JUSTICE SOTOMAYOR: If -- if it gets --

23 MR. GANNON: That depends, Justice
24 Sotomayor, on -- on the answer to what I said is an
25 unresolved question about whether the 80 percent on-time

1 performance trigger at the beginning of 24308(f)(1)
2 is -- is read as being confined to the on-time
3 performance metrics and standards that were adopted
4 under PRIIA or whether that can be a reference to a
5 pre-PRIIA, on-time performance metric. And so for
6 decades, Amtrak, pursuant to ICC -- originally pursuant
7 to an ICC order used endpoint on-time performance
8 metrics that looked very much like the ones that were
9 ultimately adopted --

10 JUSTICE BREYER: So doesn't this show
11 something? Actually, the sentencing guidelines are a
12 pretty good example. You do have the Model Penal Code.
13 We have law professors telling judges what to do all the
14 time. We have judges who receive information in briefs.
15 We had lots of guidelines promulgated by the states.
16 There are all kinds of systems, and judges do use them,
17 and some of them do have a practical effect and make a
18 difference.

19 But once this Court starts down the road --
20 and it would be starting, because I am aware of no
21 precedent -- once we start down the road of saying
22 Congress cannot tell even a private agency to go and
23 make some standards, which we all know will be followed,
24 once we start down that road there is no stopping place
25 and, therefore, the measure has nothing to do with

1 separation of powers. It is exactly what Justices
2 Cardozo, Hughes, Brandeis and Stone said in *Carter Coal*,
3 the measure is the due process clause, and we're all off
4 on something of a wild goose chase in this case. That's
5 what is suggested to me by the sentencing guideline
6 analogy.

7 JUSTICE SCALIA: Wow, I didn't mean that.
8 (Laughter.)

9 MR. GANNON: To the extent that Justice
10 Scalia also doesn't see a nondelegation problem in
11 *Carter Coal*, then I -- I take it you are agreeing, but I
12 think here that -- that the criminal sentencing context
13 may present different issues. And I do think that the
14 basic -- the basic reasons why the due process issue is
15 not one where we would have a problem is both because of
16 the -- what we think is the -- the fact that this is
17 relaxing the regulatory effect of -- of the statutory
18 preference. And secondly, because those cases about
19 bias in the due process context involve the entity
20 that's actually doing the adjudication. And here the
21 analogy is that's the STB is acting as the Board of
22 Optometrists in -- in the *Gibson v. Berryhill*.

23 JUSTICE KENNEDY: I think it was the
24 Respondent's brief in which they gave the hypothetical.
25 Suppose that the government together with auto

1 manufacturer A made standards, but then auto
2 manufacturers B and C had to follow them. That seems
3 wrong. Why is this different?

4 MR. GANNON: I take the point that that
5 seems wrong. We don't think that this is the equivalent
6 of regulating the automotive industry because Congress
7 has put the regulation in place. That's the statutory
8 preference requirement. This is something in which
9 automobile manufacturer A would be, in advance, saying,
10 I, automobile manufacturer --

11 JUSTICE KENNEDY: Suppose Congress put that
12 in place? Suppose Congress said, and once this is
13 promulgated, all manufacturers have to obey it.

14 MR. GANNON: I think that that would --
15 without the federal agreement that we also have here,
16 the federal railroad administration contemporaneous
17 agreement with the standards, that would present non
18 delegation problems.

19 But, if I could reserve the remainder of my
20 time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Dupree.

23 ORAL ARGUMENT OF THOMAS H. DUPREE, JR.

24 ON BEHALF OF THE RESPONDENT

25 MR. DUPREE: Mr. Chief Justice and may it

1 please the Court:

2 The constitution does not permit Congress to
3 create a corporation, deem it non governmental, and then
4 launch it into the commercial sphere with a for-profit
5 mandate and then vest it with regulatory authority over
6 other companies in the same industry.

7 The text of the constitution places all
8 legislative power in the Congress. Although this Court
9 has approved, granted rulemaking authority to executive
10 branch agencies or judicial branch agencies, it has
11 never approved a grant of regulatory power to a private
12 corporation.

13 JUSTICE GINSBERG: What do you do about --

14 JUSTICE SCALIA: That's the big problem
15 here, regulatory authority. As far as I'm concerned,
16 that's the big difficulty. Why is this an exercise of
17 regulatory authority when all it does is enable an
18 investigation?

19 MR. DUPREE: Well, Justice Scalia, I don't
20 think it's quite correct to say all it does is enable an
21 investigation. For one thing, there is the provision in
22 Section 207 (c) that requires the freight railroads to
23 amend their contracts with Amtrak to the extent
24 practicable to incorporate the metrics and standards.
25 So there is a direct regulatory command on the freight

1 railroad.

2 JUSTICE KAGAN: Well, but to the extent
3 practicable, I mean, what does that mean?

4 MR. DUPREE: Well, unless it's a null set,
5 Justice Kagan, it has to mean something. And I don't
6 think the government has ever said that the freight
7 railroads --

8 JUSTICE SOTOMAYOR: So instead you want a
9 rule that lets the STB investigate even when you have
10 one failure to accommodate?

11 MR. DUPREE: Well, I'm not sure that's the
12 rule we want, Justice Sotomayor, but at least that would
13 have the merit --

14 JUSTICE SOTOMAYOR: But you would prefer
15 that?

16 MR. DUPREE: Well, it would at least have
17 the merit of being constitutional. In other words, the
18 problem here is not necessarily the scope of the
19 investigatory power. It's the fact that Congress gave
20 Amtrak the pen or co-authorship of the regulation.
21 That's the constitutional vice here --

22 JUSTICE BREYER: Just like the Department of
23 Commerce acting under authority from Congress gave Icon
24 the power to write standards for the internet.

25 MR. DUPREE: Well, and, Justice Breyer, let

1 me address your concern head on. Because we've been
2 litigating this case against the government for several
3 years now and to my knowledge no party involved -- the
4 parties, the amici have foreseen the dire consequences
5 that you honor posits --

6 JUSTICE BREYER: I'm not saying it's a dire
7 consequence. By coincidence, I happen to be reading
8 about the internet. I'm trying to learn about
9 something.

10 MR. DUPREE: Well, Justice Breyer, I can
11 make a few points in response. One is that in the Icon
12 case that's not a situation where you have a company
13 trying to regulate other competitors in the market.
14 That is one difference. Another difference is that a
15 lot of these organizations tender their proposed
16 standards to the agency for approval. So at the end of
17 the day, it's the agency that has the final say in many
18 cases. That's this model that Congress enacted.

19 And here, Congress plainly could have given
20 Amtrak an advisory role, Section 207 (a) gives all sorts
21 of entities and participants with a stake in these rules
22 an advisory role. And there is absolutely no reason
23 that Congress could not easily have drafted that statute
24 to give Amtrak an advisory role.

25 JUSTICE GINSBURG: But if the government

1 agency, the FRA, it says, you know, what Amtrak
2 proposes, the government's assent is essential to this
3 scheme, right?

4 MR. DUPREE: That's, Justice Ginsburg. But
5 I think the key point here is that Amtrak's assent is
6 also essential. So, to be sure, the government could
7 halt a regulation it wanted to put in effect, but the
8 constitutional advice here is that Amtrak has the same
9 power. It could prevent the government from putting the
10 government's preferred regulation in place. And that's
11 giving too much power to a private entity to be able to
12 dictate to the federal government what regulations will
13 be issued --

14 JUSTICE BREYER: You don't have to answer
15 this question, but have you thought through what this
16 means -- what I think is called the Baal conference
17 where you have groups of regulators and banks meeting
18 together to determine what they are going to do about
19 interest rates, money supplied, et cetera. You have
20 not, is the answer, and I don't know enough about it, so
21 skip it.

22 MR. DUPREE: Very good.

23 JUSTICE SOTOMAYOR: Well, but then, how do
24 you -- do you say that we were just plain wrong when we
25 let the tobacco industry and milk producers veto

1 regulations in our two prior cases Currin and Rock
2 Royal?

3 MR. DUPREE: Yes, the difference in those
4 cases, Justice Sotomayor, is that in those cases it was
5 a federal government that drafted the regulation. And
6 what happened at that point was that Congress gave the
7 industry -- or in those cases the super majority of the
8 industry the power to vote whether to subject themselves
9 to the regulation. And the distinction there is between
10 the government exercising the legislative authority and
11 the private company determining when that
12 authority becomes effective. That's --

13 JUSTICE SOTOMAYOR: That's -- that line is
14 too thin for me. Because consent to me means it has to
15 satisfy both parties. And that's no different than a
16 veto. This is the STB saying, this satisfies us, this
17 is what we would like to do. Amtrak is this -- are you
18 willing to be regulated, just like the tobacco produce
19 -- the tobacco industry and the milk producers.

20 MR. DUPREE: Well, for one thing my clients,
21 the regulated parties, were not given a say in this. So
22 to say Amtrak, is this what you want --

23 JUSTICE SOTOMAYOR: That's the due process.
24 That's the due process.

25 MR. DUPREE: Fair enough. Then, with regard

1 to Your Honor's point --

2 JUSTICE SOTOMAYOR: And that's fair enough
3 by the way. That's an issue that's fair enough. But --
4 and subject to more talk. But I'm not quite sure why
5 this becomes --

6 MR. DUPREE: With regard to Your Honor's
7 earlier point about that being a thin line, I understand
8 that but at the same time that is the line, the precise
9 line that this Court explicitly drew both in Curran and
10 in J.W. Hampton where it said that allowing this vote of
11 the regulated parties, that doesn't amount to
12 legislative action. Agreed it may be a fine line but it
13 is the line that this Court has reverted to time and
14 time again.

15 JUSTICE SOTOMAYOR: I don't know what they
16 meant because they were subjecting themselves to
17 standards.

18 MR. DUPREE: Well, and I would simply go
19 back to our point that we never had a vote in this
20 process.

21 JUSTICE ALITO: What do you make of the
22 provision to which you referred earlier that says that
23 the metrics and standards shall be incorporated into the
24 operating agreements to the greatest extent practicable
25 or to the extent practicable. If a particular railroad

1 took the position that it will never agree to the
2 incorporation of the metrics and standards into an
3 operating agreement, is there anything that the federal
4 government could do?

5 MR. DUPREE: Well, Justice Alito, I think in
6 that situation what would likely happen if Amtrak and
7 the freight railroad could not reach agreement and
8 therefore there was no agreement on the terms of the
9 operating agreement, is that the Surface Transportation
10 Board ultimately would be called upon to step in and
11 essentially dictate terms or help the parties reach
12 terms and proscribe the terms of the operating
13 agreement. And I think in that situation -- again, it
14 hasn't yet arisen but it would not surprise me in the
15 slightest if Amtrak's argument at that point to the
16 Surface Transportation Board was pointing to the
17 language of 207 (c) and saying, this freight railroad is
18 under a statutory mandate that it shall amend its
19 agreements to the extent practicable. And nothing in
20 the statute suggests that the determination as to
21 practicability is something that falls within the
22 exclusive jurisdiction of the freight railroads. The
23 statutory language doesn't suggest that. If this Court
24 were to hold that, I certainly wouldn't quarrel with it,
25 but I'm not quite sure the statutory language gets you

1 there.

2 I think one fundamental flaw with the
3 statute which we've not yet touched on, an additional
4 flaw, is the problem of accountability. That, of
5 course, is the concern that has animated this Court's
6 non delegation and due process jurisprudence. And here
7 you have a situation where Congress, the President and
8 Amtrak itself have repeatedly declared to the public in
9 explicit terms that Amtrak is not the government.

10 JUSTICE KAGAN: Do you think that's
11 dispositive? Because I've always thought that the
12 labels that Congress decides to put on these things is
13 not of particular relevance.

14 MR. DUPREE: I'm not so sure I would go so
15 far as to say it's dispositive, Justice Kagan. But I do
16 think it's highly relevant. I think when this Court has
17 spoken about transparency and accountability in the
18 legislative process, what it's been talking about is the
19 ability of the public to look at a regulation or a law
20 and make a judgment as to where to assign blame. And
21 when you have all parties involved assuring the public
22 that Amtrak is not a government actor, I think the
23 public is entitled to take the President and the
24 Congress at their word and say that this is not the --

25 JUSTICE GINSBURG: And not look at the

1 animal as it exists? Lebron said that the government
2 exerts control over Amtrak as a policy maker. This --
3 Amtrak, you will agree, is not like a private
4 corporation. It's -- there's a great deal of federal
5 involvement in Amtrak, right?

6 MR. DUPREE: I agree. I agree. But I think
7 what resolves this case is the fact that Amtrak operates
8 under a statutory mandate to conduct its affairs as
9 though it were a non-governmental entity and a
10 for-profit corporation. In fact, in the briefing --

11 JUSTICE KAGAN: Well, the post office is
12 supposed to be a for-profit corporation, too, to the
13 same extent, right?

14 MR. DUPREE: Well, yes, Justice Kagan, keep
15 in mind the post office is expressly created as a
16 federal entity, it's in our Constitution and in Federal
17 statutory law it says the post office is an agency or an
18 entity within the executive branch.

19 JUSTICE KAGAN: But then that all goes back
20 to labels. I mean, I guess I'm just wondering what
21 about Amtrak is not governmental other than the label.

22 MR. DUPREE: Well --

23 JUSTICE KAGAN: Subject to the policy
24 control of Congress, which Congress exercises pretty
25 much on a routine basis, it's entirely funded by

1 Congress, all the members of the board are appointed by
2 the President with the advice and consent of the Senate,
3 save the -- save one.

4 You know, I guess I'm just wondering other
5 than this label, what suggests that this is not the
6 government?

7 MR. DUPREE: Well, first, I would take issue
8 with just the label. In other words, the organic
9 statute of Amtrak in the US Code says it is not the
10 government. So it may be a little more than just a
11 label.

12 But taking Your Honor's point, I think what
13 makes Amtrak not the government for nondelegation
14 purposes is that Amtrak's officers and employees are not
15 Federal employees, they don't take an oath of office and
16 they are constrained by various financial incentives and
17 statutory mandates to operate Amtrak not in the common
18 good, not as a neutral, disinterested regulator would,
19 but as a for-profit commercial actor.

20 That's actually the very point that Amtrak
21 made to this Court in its Lebron brief where it said
22 keep in mind, we are not neutral government regulators,
23 we are hungry capitalists. That's how we run Amtrak.
24 We have a --

25 JUSTICE KAGAN: Yes. We rejected that

1 argument.

2 MR. DUPREE: Well, it rejected the ultimate
3 constitutional conclusion for purposes of the First
4 Amendment claim, but I don't think this Court took issue
5 with the fact that Amtrak's officers and directors have
6 said from day one very publicly that we don't govern in
7 any sense. We are not neutral, disinterested
8 regulators. We are a for-profit business. And that's
9 what makes this case different, Justice Kagan.

10 JUSTICE SCALIA: So for -- I mean, for that
11 purpose, what difference does it make whether it's a
12 governmental entity or not, so long as it is operating
13 on a for-profit basis and is giving -- is given the last
14 word on some regulatory matters that disadvantage its
15 competitors, there's a violation of due process. I -- I
16 don't see how it makes any difference whether you call
17 it governmental or not.

18 MR. DUPREE: Justice Scalia, I certainly
19 agree a hundred percent with you on the due process
20 point. I think that whether it is government or
21 nongovernmental may play a role if this Court were to
22 approach this case through the lens of nondelegation,
23 but as far as due process goes, Your Honor is exactly
24 correct. No matter what we call Amtrak, the question
25 ultimately at the end of the day is whether this

1 Federally-chartered corporation with all of the various
2 financial incentives, statutory mandates and commands,
3 can exercise regulatory power over other commercial
4 actors in the marketplace.

5 JUSTICE GINSBURG: The due process question
6 wasn't -- the due process question wasn't aired below at
7 all; isn't that so?

8 MR. DUPREE: It was aired below, Justice
9 Ginsburg. We have fully briefed due process at every
10 stage of this case, as has the government. The district
11 court resolved it on the merits and the D.C. Circuit
12 didn't need to reach it because it resolved it on
13 nondelegation grounds, but it did drop a footnote and
14 said, nondelegation and due process are so closely
15 intertwined in this context and, frankly, we're not
16 sure, as Justice Scalia suggested, whether ultimately it
17 would make a difference. So that's why I took the
18 nondelegation route. But there's no question that due
19 process is fully briefed, fully teed up for this Court's
20 review.

21 JUSTICE GINSBURG: And not decided by the
22 D.C. Circuit.

23 MR. DUPREE: I beg your pardon?

24 JUSTICE GINSBURG: And not decided --

25 MR. DUPREE: That's correct.

1 JUSTICE GINSBURG: -- because the D.C.
2 Circuit went on a delegation.

3 MR. DUPREE: That's correct. But as I said,
4 they said in the footnote, Footnote 3 toward the
5 beginning of the opinion, that they didn't see much of a
6 difference in this context because Carter Coal speaks
7 both to nondelegation and due process and it did an
8 analysis under Carter Coal.

9 So regardless if this Court thinks that
10 Carter Coal is more properly characterized as
11 nondelegation of due process, the merits of that
12 question are squarely before this Court.

13 JUSTICE SOTOMAYOR: So are you attacking the
14 statute that says that competitors have to accommodate
15 Amtrak? Is that what you're saying is the due process
16 violation?

17 MR. DUPREE: It's not, Justice Sotomayor.
18 The statute that we're attacking is Section 207 of
19 PRIIA.

20 JUSTICE SOTOMAYOR: But the -- but the
21 investigation is only going to determine whether you
22 violated the statute's failure to accommodate Amtrak.

23 MR. DUPREE: I don't think that's quite
24 right, Your Honor. In other words, the -- a necessary
25 predicate for liability is not just violation of the

1 preference statute, but also a violation of the metrics
2 and standards. The government needs to prove both. It
3 needs to prove violation of the metrics and standards
4 and violation of the preference requirement.

5 JUSTICE BREYER: Can the government -- what
6 is the due process violation? That is to say, if the
7 Department of Energy under delegated authority says that
8 the makers of the bulbs that are energy efficient must
9 use, and they may choose any one of the five methods
10 that produces green light or white light or whatever it
11 is, and they are -- they are to choose the method, and
12 that's just it. Now, that puts at a disadvantage those
13 competitors who do not use energy-efficient bulbs. Is
14 that a violation of due process?

15 MR. DUPREE: Well, if I'm understanding Your
16 Honor's hypothetical, it doesn't sound like it because
17 you have a situation where it's the government that's
18 prescribing the regulations.

19 JUSTICE BREYER: No. It gives them
20 considerable leeway as to make subsidiary decisions. I
21 was trying to make it realistic. They make subsidiary
22 decisions as to how they go about fulfilling the basic
23 energy efficiency mandate.

24 MR. DUPREE: Right. It -- it -- the way
25 Your Honor described that --

1 JUSTICE BREYER: Well, I just described it
2 now.

3 MR. DUPREE: Right.

4 JUSTICE BREYER: They have broad authority,
5 but they have to meet certain energy-efficient mandates
6 and they can prescribe standards and so forth that will
7 allow them to do it. Does that violate due process
8 because it hurts the manufacturers of ordinary energy
9 bulbs?

10 MR. DUPREE: If -- when you say "prescribe
11 standards," it would pose a problem if the standards
12 they're prescribing apply to others in the industry. If
13 the way Your Honor posited it originally, it sounded as
14 though Congress was essentially giving --

15 JUSTICE BREYER: It applies. They don't
16 have to meet it. What happens is it gives them an
17 advantage the way they choose over non-energy efficient
18 bulbs.

19 MR. DUPREE: That doesn't sound like a due
20 process violation.

21 JUSTICE BREYER: Then what is your violation
22 here? I'm trying to figure out what your violation --

23 MR. DUPREE: The violation here is that
24 Congress has given Amtrak the pen.

25 JUSTICE BREYER: The what?

1 MR. DUPREE: The pen. To write the Federal
2 regulations.

3 JUSTICE SCALIA: You have to posit that the
4 energy department manufactures bulbs.

5 MR. DUPREE: No.

6 JUSTICE SCALIA: And that it keeps the
7 profit from the bulbs on its own. It doesn't have to go
8 deposit it in the treasury. So the -- so the -- it is a
9 profit-making entity and it prescribes standards, as
10 Justice Breyer suggested, that harms other people. That
11 would be a parallel to this.

12 MR. DUPREE: Well -- and if that's the
13 situation where the government is both acting in the
14 marketplace as a commercial actor and as a regulator of
15 the industry, that's a problem.

16 But what makes this case, I think, so
17 difficult is that being a commercial for-profit actor is
18 fundamentally incompatible with the notion of being a
19 disinterested government regulator. That's because the
20 essence of a --

21 JUSTICE BREYER: That's what I was -- I'm
22 trying to get at -- I started with the statement, I
23 think, that due process -- your argument -- it didn't
24 matter whether you called them private or public; am I
25 right?

1 MR. DUPREE: That's right.

2 JUSTICE BREYER: Okay. Now, let's imagine
3 they're just a company, not the Department of Energy.
4 The Department of Energy has a broad energy efficient
5 standard. It delegates to the people who make that kind
6 of bulb all kinds of minor interstitial standards to
7 make. They make them. They hurt the energy bulbs, the
8 ordinary energy bulbs. Is that a violation of due
9 process? If so, why? If not, how is yours different?

10 MR. DUPREE: Well, that -- I think that
11 might be a violation of due process because in that
12 situation what happens is that the Department of Energy
13 is giving authority to private corporations to set
14 rules, standards that govern the conduct of other
15 private corporations.

16 JUSTICE BREYER: It will hurt the other
17 private organizations.

18 MR. DUPREE: Right.

19 JUSTICE BREYER: My reaction was the way you
20 deal with that normally is the statute would be
21 interpreted not to give them the authority to write
22 anticompetitive regulations and you'd attack it under
23 the antitrust laws. There may be other ways to do it.
24 I've never heard of an example where the due process
25 problem really was a constitutional problem under due

1 process.

2 Now -- now, maybe there's some cases I've
3 overlooked. The only one coming close, it seemed to me,
4 is Carter v. Carter Coal, which I always put in the same
5 box as Lochner. Now -- now, are we supposed to
6 resurrect that? Is there other authority for that
7 proposition? What is it?

8 MR. DUPREE: Well, Justice Breyer, I do
9 believe that this Court on multiple occasions subsequent
10 to the Lochner era has reaffirmed the core holding of
11 Carter Coal about delegations to private parties are
12 forbidden. This Court said that in Mistretta. A number
13 of justices have said in separate opinions that that
14 holding remains --

15 JUSTICE BREYER: But your due process, I
16 want some authority for your due process point on the
17 private agencies.

18 MR. DUPREE: Well, our -- the foundational
19 case we have for due process in this context is Carter
20 Coal. Absolutely. But again, I simply take issue with
21 Your Honor's suggestion that it's a remnant of the
22 Lochner era. I think it retains its vitality today as
23 many subsequent opinions of this Court have recognized.

24 Let me address Mr. Gannon's point very
25 briefly, if I may, on the notion that it was somehow the

1 preference requirement that was driving the dramatic
2 change in Amtrak's performance. The preference
3 requirement was enacted in the early 1970s. So Mr.
4 Gannon is unable to explain why this magical change
5 didn't occur until the metrics and standards came into
6 effect.

7 JUSTICE SCALIA: Well, he said the metrics
8 and standards for the first time made it realistic that
9 there would be enforcement of that requirement.

10 MR. DUPREE: Well, first, I would say if
11 that's true, that, to me, strikes me as a pretty plain
12 regulatory effect in that the metrics and standards are
13 on the books and the freight railroads know that they
14 now need to comply or they're going to face enforcement
15 actions. The government --

16 JUSTICE SCALIA: No. I think -- I think you
17 can allow a private party to bring an enforcement
18 action.

19 MR. DUPREE: You can allow a private
20 party --

21 JUSTICE SCALIA: I mean, even if they just
22 said an enforcement action shall be commenced if Amtrak
23 requests it. I think that would be perfectly
24 constitutional.

25 MR. DUPREE: I agree, Justice Scalia, but at

1 the same time the problem here is that Congress has
2 given Amtrak the power to define the terms and to draft
3 the regulations in which it may bring an enforcement
4 action. If --

5 JUSTICE KAGAN: Mr. Dupree, I mean, one way
6 to look at this on the delegation question, not on the
7 due process question but on the delegation question, is
8 that there is government all over this at every step,
9 that there is all kinds of supervision of Amtrak itself,
10 no matter what Amtrak does that; but with respect to the
11 metrics and standards, particularly, that there is no
12 way Amtrak is actually going to be able to get anything
13 unless the FRA comes aboard, and that furthermore, that
14 even those metrics and standards are useless unless the
15 Surface Transportation Board decides to enforce the
16 preference requirement.

17 So there is, like, no place at which a
18 private actor can do something itself in this scheme, it
19 would seem to me.

20 MR. DUPREE: Well, I -- I take the point
21 that the FRA is involved in the development of the
22 standards, but I don't think it follows from -- from
23 that premise to say that Congress can give a private
24 company and the Federal government joint ownership of
25 the pen in drafting the regulations. That's the

1 problem.

2 And with regard to the issue of government
3 control over Amtrak, the government conceded in the D.C.
4 Circuit that it did not control Amtrak on a day-to-day
5 basis and that includes, for present purposes, the
6 rulemaking at issue. In fact, Congress certainly did
7 not view the Federal government as controlling Amtrak in
8 the rulemaking, because if it did, it would not have
9 inserted the arbitration provision.

10 Congress clearly understood that in the
11 context of this rulemaking, the Federal government did
12 not control Amtrak. That is why the arbitration
13 provision is in there.

14 Unless there are further questions, I will
15 ask that the judgment below be affirmed.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Gannon, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF CURTIS E. GANNON

19 ON BEHALF OF PETITIONERS

20 MR. GANNON: Thank you, Mr. Chief Justice.

21 Mr. Dupree stressed the question of
22 accountability, and I think as Justice Kagan was just
23 pointing out that there is plenty of accountability here
24 for the Federal government. The Federal government's
25 fingerprints are all over not just Amtrak but also the

1 metrics and standards because the FRA had to approve
2 them.

3 On the Amtrak side here, the metrics and
4 standards were approved by Amtrak's president who is
5 somebody who is appointed by the eight presidential
6 appointees and serves at their pleasure. And so the
7 notion that this is just somebody down in the bowels
8 of -- of a corporation's day-to-day operations that the
9 Federal government had no connection with, I think, is
10 misguided.

11 JUSTICE SCALIA: Would you talk about the
12 contract provision?

13 MR. GANNON: Yes, we should have --

14 JUSTICE SCALIA: You should have raised that
15 in your -- I should have raised it in your principal.

16 MR. GANNON: We think that the contract's
17 provisions are -- the statutory provision there in 207
18 does require the contracts to be incorporated to the
19 extent practicable. We have actually said in our brief
20 that we think that that is something that is largely due
21 to negotiation between the parties. There are certain
22 aspects of the metrics and standards that it would not
23 make sense to incorporate in the contracts, and what the
24 statute --

25 JUSTICE SCALIA: But if they can't come to

1 an agreement, who decides what the contract --

2 MR. GANNON: As Mr. Dupree said, that the --
3 then the dispute goes before the surface transportation
4 board, it's in 24308 --

5 JUSTICE SCALIA: And the STB --

6 MR. GANNON: Will determine what are, quote,
7 "reasonable terms and conditions."

8 JUSTICE SCALIA: Which would include --
9 which would include the requirement that, to the extent
10 practicable, the standards set forth by Amtrak be
11 followed.

12 MR. GANNON: But we -- we don't think that
13 that requires they be -- they are not things that would
14 be binding on the freight railroads. The statute
15 provides that there needs to be an incentive payment.
16 For instance, the statute provides that there needs to
17 be an incentive payment in the contracts. But it
18 doesn't mean that that -- that the incentive payment now
19 has to correspond precisely to what the metrics and
20 standards are. That is something that's subject to
21 negotiation between the parties, and --

22 JUSTICE SCALIA: Well, as -- as your friend
23 said, to the extent practicable, unless the whole thing
24 is nugatory, certainly does not wash out the whole
25 provision.

1 MR. GANNON: Well, I think that --

2 JUSTICE SCALIA: It must have some bite.
3 What bite does it have?

4 MR. GANNON: I think it was to encourage the
5 parties to ensure that they are now collecting data in
6 systematic ways, that they can nationalize things,
7 that -- that they now measure things in the same
8 fashion, they use minutes instead of seconds or
9 whatever, and also that there are some parts of the
10 metrics and standards that wouldn't make sense to go in
11 the contracts at all, things that have to do with
12 customer service surveys about -- satisfaction surveys
13 about the cleanliness of the cars. And so -- and
14 ultimately even the canon of constitutional avoidance
15 could be used to prevent that from doing the work that
16 would -- that would make it regulatory in this context
17 if that were to make it a problem here.

18 I think that it's also the case that
19 Mr. Dupree is talking about Amtrak as a competitor of
20 the freight railroads, and we think that that's the
21 wrong analogy, that Amtrak is effectively like a
22 customer of a common carrier that is entitled to get
23 services from the railroads at a particular rate. And
24 that's the way it's always been. And under Respondent's
25 approach, there would be both nondelegation problems and

1 due process problems, apparently, with the type of thing
2 that occurred in Boston against Maine, where this Court
3 held that Amtrak was able to initiate a condemnation
4 proceeding for rail property before the ICC, and its
5 determination that it needed that particular property
6 had a strong presumption that it was going to be true
7 and governing in that proceeding. This Court held that
8 that was not an impermissible delegation of eminent
9 domain authority, because the ICC made the ultimate
10 determination there, notwithstanding the fact that
11 Amtrak had to trigger the proceeding and Amtrak's
12 decision to do so created a statutory presumption that
13 there would be need.

14 I think that Mr. Dupree also is concerned
15 about the need for Amtrak's consent here. This goes
16 back to the every first argument that we have in our
17 brief that under cases like Currin and Rock Royal
18 Cooperative, the fact that the government needed to
19 secure the consent of Amtrak is not something that makes
20 that a delegation outside the government. Even though
21 they had the pen along the way, the veto power is what
22 is most important, and we think it's especially easy to
23 get there in the context of an entity like Amtrak which
24 is, at worst, for us quasi-private rather than entirely
25 private.

1 And we think if you take that into account
2 here, also the limited effect that the metrics and
3 standards have, that this is not a non-delegation
4 problem for any of the three problems the court of
5 appeals believed.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:59 a.m., the case in the
9 above-entitled matter was submitted.)

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