

No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, et al.,
Petitioners,

v.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

*On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit*

**BRIEF OF AMICI CURIAE ENVIRONMENTAL LAW AND
POLICY CENTER, NATIONAL ASSOCIATION OF RAILROAD
PASSENGERS, ALL ABOARD OHIO, AND VIRGINIANS
FOR HIGH SPEED RAIL IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Section 207(a) of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, 122 Stat. 4916, requires that the Federal Railroad Administration (FRA) and Amtrak “jointly . . . develop” the metrics and standards for Amtrak’s performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak’s passenger trains that is required by 49 U.S.C. § 24308(c)(Supp. V 2011). In the event that the FRA and Amtrak cannot agree on the metrics and standards within 180 days, Section 207(d) of the Act provides for the STB to “appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.” 122 Stat. 4917.

The question presented is whether Section 207 effects an unconstitutional delegation of legislative power to a private entity.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. Congress’s Delegation of Authority under
Section 207 of PRIIA Is Constitutional 6

 A. Amtrak Is Not a Private Entity for Purposes
 of Determining Whether the Delegation of
 Authority under Section 207 of PRIIA Is
 Constitutional 7

 1. Congress Created Amtrak to Ensure That
 There Would Be Intercity Passenger Rail
 Service in the United States 7

 2. The Statutory Text and Legislative
 History of Relevant Statutes Support the
 Conclusion That Amtrak Is a Public
 Entity for Purposes of Nondelegation
 Analysis 14

 B. The Government Retained Sufficient Control
 over the Exercise of Authority under Section
 207 of PRIIA Thereby Avoiding
 Constitutional Nondelegation Concerns ... 20

II. The Court of Appeals Decision, Which Invalidates Amtrak’s On-time Performance Measures, Thwarts Congress’ Intent and Threatens the Future of Passenger Rail in the United States	21
A. History of Intercity Passenger Rail in the United States	21
B. On Time Performance Is Critical to the Success of Intercity Passenger Rail Service in the United States	23
C. A System of Performance Metrics and Standards Is Essential to Sustain Amtrak’s On-time Performance	24
CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936)	4, 20
<i>Currin v. Wallace</i> , 306 U.S. 1 (1939)	4, 21
<i>Ernst & Ernst v. Hochfelder</i> , 425 U.S. 185 (1976)	14
<i>Lebron v. National Railroad Passenger Corp.</i> , 513 U.S. 374 (1995)	<i>passim</i>
<i>National R.R. Passenger Corp. v. Boston & Maine Corp.</i> , 503 U.S. 407 (1992)	9
<i>National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry.</i> , 470 U.S. 451 (1985)	7, 8, 9
<i>Reno v. Koray</i> , 515 U.S. 50 (1995)	14
<i>Sunshine Anthracite Coal Co. v. Ad</i> , 310 U.S. 381 (1940)	21
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	14
<i>United States v. Rock Royal Co-op., Inc.</i> , 307 U.S. 533 (1939)	21
<i>Zuni Public School District No. 89 v. Department of Educ.</i> , 127 S. Ct. 1534 (2007)	14

CONSTITUTION AND STATUTES

45 U.S.C. § 541	15
49 U.S.C. § 703(c)	10
49 U.S.C. § 2308(c)	9
49 U.S.C. § 24101	11, 12, 13
PRIIA § 207	<i>passim</i>
PRIIA § 207(a)	<i>passim</i>
PRIIA § 207(c)	13
PRIIA § 222	12
49 U.S.C. § 24101(b)	16
49 U.S.C. § 24101(d)	16
49 U.S.C. § 24104	17
49 U.S.C. § 24105	17
49 U.S.C. § 24301(a)(3)	14, 18
49 U.S.C. § 24301(e)	17
49 U.S.C. § 24302(a)(1)	19
49 U.S.C. § 24308(a)	9
49 U.S.C. § 24308(c)(Supp. V 2011)	i, 3
§ 207	<i>passim</i>
§ 207(a)	<i>passim</i>
49 U.S.C. § 24308(f)(1)	12, 13
49 U.S.C. § 24308(f)(2)	13

49 U.S.C. § 24315	18
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49 U.S.C. § 24710(b)	12
Amtrak Authorization and Development Act, Pub. L. No. 102-533, 106 Stat. 3515 (1992)	10
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Amtrak Improvement Act of 1978 (P.L. 95-1478) .	16
Amtrak Improvement Act of 1981, Pub. L. No. 97- 35, Tit. XI, Subtit. F, 95 Stat. 687	10
Amtrak Reauthorization Act of 1985, Pub. L. No. 99-272, Tit. IV, Subtit. A, 100 Stat. 106	10
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Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, 125 Stat 552, 660	19
Consolidated Appropriations Act, 2010, Pub. L. 111- 117, 123 Stat 3034, 3061	19
Freedom of Information Act, 5 U.S.C. § 552	17
Government Corporation Control Act, 31 U.S.C. § 9101 et seq.	18
Inspector General Act of 1978, 5 U.S.C. App. § 2	18
§ 8G(a)(2)	18
Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907	11
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No. 91-518, 84 Stat. 1327 3

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No. 91-518, § 101, 84 Stat. 1328 8, 14

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518, §301, 84 Stat. 1328, 1330 14

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§ 1501 et seq. 18

U.S. CONST. art. I, §1 6

RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

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H.R. Rep. No. 690, 110 th Cong., 2d Sess. (2008)	11
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RANDALL PETERMAN, CONG. RESEARCH SERVICE., RL31473, AMTRAK PROFITABILITY: AN ANALYSIS OF CONGRESSIONAL EXPECTATIONS AT AMTRAK'S CREATION (2002)	15, 16
ELIZABETH PINKSTON, CONG. BUDGET OFFICE, THE PAST AND FUTURE OF U.S. PASSENGER RAIL SERVICE (2003)	7

*Reviewing Alternatives to Amtrak’s Annual Losses
in Food and Beverage Service Before the
Subcomm on Government Operations of the
Committee on Oversight and Government
Reform, 113th Cong. 3 (2013) 19*

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D.J. Stadtler, Vice President of Operation, Amtrak,
*Testimony Before the Surface Transportation
Board* (April 10, 2014), [www.amtrak.com/ccurl/
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U.S. Government Manual (2014) 19

INTEREST OF *AMICI*¹

Amici are four not-for-profit organizations that share the common goal of advancing the development and operation of intercity passenger rail service in the United States. All five organizations have members who regularly ride Amtrak trains and are impacted by the on-time performance of those trains.

The Environmental Law and Policy Center of the Midwest (“ELPC”) is a not-for-profit public interest environmental legal advocacy organization. Founded in 1993, ELPC develops and leads successful strategic advocacy campaigns to improve environmental quality and protect our natural resources through the advancement of clean air, clean transportation and clean energy policies at the regional and national levels. ELPC has worked to advance intercity passenger rail in the Midwest and nationwide for almost twenty years.

The National Association of Railroad Passengers (“NARP”) is the largest national membership advocacy organization for train and rail transit passengers consisting of 28,000 individual members nationwide. Since its founding in 1967, NARP has worked to expand the quality and quantity of passenger rail in the United States. NARP’s mission is to work for a

¹ *Amici* affirm that Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and in accordance with Rule 37.3(a), that no person other than *amici* or their counsel contributed any money to fund its preparation or submission. Counsel of record for all parties graciously consented in writing to the filing of this *amici* brief, and copies of their letters of consent are on file with the Clerk’s office.

modern, customer-focused national passenger train network that provides a travel choice Americans want.

The Ohio Association of Railroad Passengers (dba “All Aboard Ohio”) is comprised of citizens, businesses and organizations that advocate for more and better transportation choices in Ohio, including more passenger trains, better public transit and improved rail infrastructure. All Aboard Ohio exists to achieve a modern, consumer-focused, state-wide passenger rail system.

Virginians for High Speed Rail (“VHSR”) is a not-for-profit coalition of citizens, localities, economic development agencies, community organizations, and businesses that educate and advocate for the expansion of fast, frequent, and reliable rail service. Founded in 1994, VHSR promotes passenger rail as an energy efficient, cleaner mode of transportation that provides significant economic benefits.

ELPC, NARP, All Aboard Ohio and VHSR seek to present the collective views of their supporters in this brief since the determination of the constitutionality of Section 207 of PRIIA will have a direct effect on the viability of intercity passenger rail in the United States. Accordingly, amici submit that, for the reasons set forth in this brief and the brief of the petitioner, the decision of the court of appeals should be reversed.

SUMMARY OF ARGUMENT

1. As Amtrak celebrated its 40th anniversary in 2011, Americans were riding Amtrak passenger trains in record numbers. Ridership had increased from 16 million in 1972 to 31 million passengers in 2012. For most of the past decade, ridership records have been

shattered year over year despite the fact that Amtrak service is extremely limited, typically running only two trains a day on most long distance routes.

2. The court of appeals in this matter reversed the ruling of the district court, and held that metrics and standards under Section 207 of the Passenger Rail Investment and Improvement Act (PRIIA), 49 U.S.C. § 24308(c)(Supp. V 2001), constitutes an unlawful delegation of regulatory power to a private party. The court of appeals based its decision on two separate grounds: (1) an erroneous finding that Amtrak is a private entity and (2) a complete disregard of the factors indicating sufficient governmental control over the development and implementation of the metrics and standards.

First, the court of appeals decision invalidating Section 207 runs afoul of the plain text reading of the relevant statutes, the extensive and informative legislative history and applicable case law, all of which demonstrate that Amtrak is not a private entity for purposes of the non-delegation doctrine.

In 1970, Congress created Amtrak to advance the national goal of providing intercity passenger rail service in the United States as a for-profit entity under Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, 84 Stat. 1327. However, Congress subsequently amended RPSA in 1978 to provide that Amtrak shall be “operated and managed” as a for-profit entity. The legislative history clearly acknowledges that while Amtrak should be “operated and managed” as a for-profit entity, it is not, in fact, a private for-profit corporation.

Further, in *Lebron v. National Railroad Passenger Corp.*, this Court held that Amtrak “is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 394 (1995).

Second, the authority Congress granted to Amtrak is extremely limited and the government retains sufficient control over the exercise of this authority. Amtrak must act “jointly with” FRA to develop the metrics and standards that quantify Amtrak’s performance and service. While the metrics and standards can serve as a basis for the initiation of an investigation by the Surface Transportation Board as to whether the freight railroads failed to grant preference to passenger trains, no penalty or damages can be ascribed to any party for Amtrak’s failure to meet the metrics and standards.

Accordingly, the statutory scheme in PRIIA is similar to other statutory frameworks this Court has sustained against delegation challengers. *See e.g. Currin v. Wallace*, 306 U.S. 1 (1939). Assuming, *arguendo* that Amtrak is considered to be a private entity, Section 207 of PRIIA is still a valid constitutional delegation because the government retains sufficient control over the exercise of this authority. It has been 80 years since this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Unlike *Carter Coal*, here a federal agency, FRA, was involved in the promulgation of the metrics and standards. Further stakeholders, including the freight railroads, were

consulted prior to publication in the Federal Register, and also submitted public comments after notice in the Federal Register.

3. As a matter of public policy, the decision by the court of appeals, which invalidates Amtrak's on-time performance measures, thwarts the intent of Congress and threatens the future of passenger rail service in the United States.

In 2008, Congress enacted PRIIA, in part, because it recognized that on-time performance was critical to the success of achieving viable national intercity passenger rail service in the United States. Prior to the passage of PRIIA, Amtrak's on-time performance for long-distance trains was below 40%. Following the passage of PRIIA, Amtrak's on-time performance increased dramatically. Section 207(a) of PRIIA required the development of metrics and standards. The metrics and standards that were finalized in May 2010 required that Amtrak achieve on-time performance of 80% to 95%. Just two years later, in 2012, Amtrak achieved its highest ever on-time performance level of 88.7% system-wide, and 81.2% for long distance.

Shortly after the 2013 court of appeals decision in this matter, however, Amtrak's on-time performance levels dropped significantly. As of June 2014, the system-wide rate had fallen to 69.7%, and the long-distance rate had fallen to 41.2%, half of what it had been just 29 months earlier. Due in large part to poor on-time performance, Amtrak's ridership and ticket revenues have fallen by 15% over the past year to date.

Congress' enactment of Section 207 of PRIIA had the intended effect of increasing the level of service and performance of Amtrak. If affirmed, the decision by the court of appeals will likely result in further intercity passenger train delays and plummeting revenues. This dynamic not only thwarts the intent of Congress to build a balanced national transportation system, but also, as a practical matter, threatens the future of intercity passenger rail service in the United States.

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

ARGUMENT

I. Congress's Delegation of Authority under Section 207 of PRIIA Is Constitutional

This case concerns the constitutionality of the Congressional delegation of authority to the FRA and Amtrak to “jointly develop” metrics and standards for Amtrak’s performance under Section 207(a) PRIIA. No one questions the delegation of authority to the FRA; the sole issue before the Court is whether Congress improperly delegated responsibility to Amtrak as a “private entity.” There are two principal reasons why Congress’ delegation of authority under Section 207 of PRIIA does not violate the nondelegation doctrine under the United States’ Constitution.² First, the statutory text and legislative history of the relevant statutes leave no doubt that Amtrak is a governmental

² Article I Section 1 of the Constitution which provides that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.” U.S. CONST. art. I, §1

entity. Second, the government has retained sufficient control over the exercise of its authority to avert any constitutional nondelegation concerns.

A. Amtrak Is Not a Private Entity for Purposes of Determining Whether the Delegation of Authority under Section 207 of PRIIA Is Constitutional

1. Congress Created Amtrak to Ensure That There Would Be Intercity Passenger Rail Service in the United States

Prior to Amtrak's creation, the American rail sector was in steep decline. From approximately 1950 to 1970, the private railroads, which operated both passenger and freight services, faced mounting financial problems. Intercity passenger rail service had to compete with explosive growth in the highway and airline industries, and freight rail suffered from high fixed operating costs, which were difficult to offset in the face of stiffer competition for the trucking industry.³ Although the rail industry sought to discontinue the cost-prohibitive passenger rail business on certain lines, as "common carriers" they were required to provide passenger service as well as freight service, and thus were prohibited from ceasing service until the Interstate Commerce Commission (ICC) and state regulatory commissions issued an order allowing the cessation of passenger service. *National R.R.*

³ ELIZABETH PINKSTON, CONG. BUDGET OFFICE, THE PAST AND FUTURE OF U.S. PASSENGER RAIL SERVICE, 5 (2003).

Passenger Corp.v. Atchinson, Topeka & Santa Fe Ry., 470 U.S. 451, 454(1985).

In 1968, the ICC issued a warning to Congress and the President that “[w]ithout immediate action on the part of the Federal Government, significant segments of the country will soon face the loss of their last remaining rail [passenger] service.”⁴

In 1970, Congress created Amtrak “to avert the threatened extinction of passenger train in the United States.”⁵ See, Rail Passenger Service Act of 1970 (RPSA) Pub. L. No. 91-518, § 101, 84 Stat. 1328 (creating the National Railroad Passenger Corporation, now known as Amtrak). RPSA expressly states that Congress considers passenger rail service to be a “public convenience and necessity” and “that federal financial assistance as well as investment from the private sector of the economy” was needed to achieve the national goal of continuing and improving passenger rail service in the United States. RPSA, Pub. L. No. 91-518, § 101, 84 Stat. 1328.

As a condition of relieving railroads of their intercity passenger rail service obligations, Congress required, among other things, that the private railroads allow Amtrak to operate passenger trains on their tracks and facilities at rates either agreed to by Amtrak and the host railroads or prescribed by the

⁴ *Interstate Commerce Commission’s Report to the President and the Congress Effectiveness of the Act*, March 15, 1978, p.2, <http://www.fra.dot.gov/eLib/Details/L04184>.

⁵ *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

ICC, and later the Surface Transportation Board (STB). See 49 U.S.C. § 24308(a); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 410 (1992); *Atchinson, Topeka & Santa Fe Ry.*, 470 U.S. at 455.⁶

In 1973, Congress investigated concerns that some of the railroads were continually impeding the movement of Amtrak trains and instituting slow orders. Senator Vance Hartke, Chairman of the Surface Transportation Subcommittee stated that: “[I]n Indiana, the James Whitcomb Riley is forced to run at speeds of 10 miles per hour because of slow orders on bad track between Indianapolis and Chicago. Running a passenger train over track like that is a public disservice.” *Amtrak Oversight and Authorization: Hearing on S. 1763: Before the Surface Transportation Subcomm. of the S. Comm. on Commerce, 93rd Cong.* 88 (1973)(statement of Senator Vance Hartke). Accordingly, Congress granted Amtrak a “general preference” over freight transportation in using rail facilities, specifying that Amtrak has “preference over freight transportation in using a rail line, junction or crossing, subject to the objection of a rail carrier, and the [STB] orders otherwise under this subsection after section 553 of Title 5 hearing.” 49 U.S.C. § 2308(c). See also Amtrak Improvement Act of 1973, Pub. L. No. 93-

⁶ Today, except for routes along the Northeast Corridor (Washington D.C. to Boston) Amtrak trains continue to operate almost entirely on tracks owned and dispatched by the freight railroads.

146, §10(2), 87 Stat. 552 (initial version).⁷ While the STB is administratively affiliated with the DOT, its decisions cannot be reviewed by the Secretary of Transportation or any other DOT official. See 49 U.S.C. § 703(c).

Again and again over the last 40 years, Congress has emphasized that passenger rail, in addition to freight rail, is a critical component to maintaining a balanced transportation system in United States.⁸ Congress has consistently emphasized that “[i]nter-city passenger rail is an increasingly necessary transportation alternative to highway and air travel, particularly in congested parts of the country....

⁷ This, in spite of the fact that AAR’s President, Stephen Ailes testified before Congress that “it is the policy of all participating [rail]roads to give preference to Amtrak passenger trains, even at the cost of delay to freight service.” *Amtrak Oversight and Authorization: Hearing on S. 1763 Before the Surface Transportation Subcomm. of the S. Comm. on Commerce*, 93rd Cong. 134 (1973)(statement of Stephen Ailes, President, American Railroad Administration).

⁸ See, e.g., Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548; Amtrak Improvement Act of 1974, Pub. L. No. 93-496, 88 Stat. 1526; Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90; Amtrak Improvement Act of 1976, Pub. L. No. 94-555, Tit. I, 90 Stat. 2613; Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923; Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, Tit. I, 93 Stat. 537; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, Tit. XI, Subtit. F, 95 Stat. 687; Amtrak Reauthorization Act of 1985, Pub. L. No. 99-272, Tit. IV, Subtit. A, 100 Stat. 106; Amtrak Reauthorization and Improvement Act of 1990, Pub. L. No. 101-322, 104 Stat. 295; Amtrak Authorization and Development Act, Pub. L. No. 102-533, 106 Stat. 3515 (1992); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570 (1997).

Further it is critical to decrease our dependence on foreign oil and alleviate the impacts of global climate change.” H.R. Rep. No. 690, 110th Cong., 2d Sess. 32 (2008). To date, Congress has invested more than \$40 billion to support Amtrak operations and infrastructure.

At the same time, Congress has acknowledged that, without federal involvement and oversight, it was unlikely that Amtrak would be self-sufficient, profitable, and thus able to meet the country’s needs for intercity passenger rail. Congress noted that “Amtrak’s service is unique in comparison to the Federal approach of financing the nation’s other major passenger transportation modes. The nation’s highway, public transportation, and aviation systems all receive robust Federal investment, significantly financed by user fees. While this expectation helped justify efforts of significantly restricting or eliminating Federal investment for intercity passenger rail, it has also undermined efforts to develop a national intercity passenger rail system that is capable of meeting the needs of the nation in the 21st century” *Id.* at 33.

In 2008, Congress passed the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, 122 Stat. 4907, to give Amtrak the tools to address this problem. PRIIA required FRA and Amtrak to “jointly in consultation with the Surface Transportation Board, rail carriers, States, and other stakeholders, where appropriate,” to “develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.” 49 U.S.C. § 24101 note (PRIIA § 207(a)).

Amtrak uses these metrics and standards for various purposes, including annual evaluations of its performance, reports to Congress, the development of performance improvement plans for long-distance routes, and the development and implementation of a plan to improve on board service. 49 U.S.C. § 24710(a)-(b); 49 U.S.C. § 24101 note (PRIIA § 222). PRIIA is significant because for the first time Congress legislated requirements that quantify the performance and service quality of intercity passenger rail in the United States.

In addition, under PRIIA, Congress gave the STB enforcement authority for the general preference rule in the Amtrak Improvement Act of 1973. PRIIA authorizes the STB to adjudicate[e] disputes between Amtrak and the freight railroads, including disputes about when Amtrak’s “on-time performance problems” stem from the freight railroads’ failure to “provide preference to Amtrak over freight trains.” S. Rep. No. 67, 110th Cong., 1st Sess. 25-26 (2007)(*2007 Senate Report*). The STB may initiate an investigation if on-time performance averages less than 80 percent for two consecutive calendar quarters, 49 U.S.C. § 24308(f)(1), 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.” *Ibid.*

As required under Section 207(a) of PRIIA, FRA and Amtrak jointly developed a draft version of the metrics and standards (J.A. 11-75) and FRA published a notice in the Federal Register seeking public comment (J.A. 75-77). Upon consideration of the written comments, including those submitted by the freight railroads, final

metrics and standards were issued in May 2010 (J.A. 77-156). Most notably, the metrics and standards require Amtrak to achieve a minimum on-time performance rate of 80% to 95% of the time for each route, depending on the route and year. (J.A. 133).

PRIIA's metrics and standards are binding only on Amtrak, not the freight railroads. Moreover, the operating agreements between Amtrak and the railroads are not supplanted by the metrics and standards. Although Section 207(c) provides for the incorporation of the metrics and standards into the operating agreement between Amtrak and the railroads, it is only "[t]o the *extent practicable*," 49 U.S.C. § 24101 note (emphasis added), and there is no penalty for failing to do so. Further, while the metrics and standards may serve as a trigger for initiating an STB investigation, they do not serve as a basis to impose any kind of sanctions against the freight railroads. STB may seek "damages and other relief" only if the STB finds that a host railroad failed to provide the mandated preference for intercity passenger rail trains after a review of all relevant evidence from all parties, 49 U.S.C. § 24308(f)(1), and further finds that the delays or failures "are attributable to the rail carriers' failure to provide preference to Amtrak over freight transportation." 49 U.S.C. § 24308(f)(2). Any potential for harm to the freight railroads in terms of assessing damages, emanates only from Congress' directive in the 1973 reauthorization of RPSA requiring passenger rail preference over freight, not from PRIIA's metrics and standards.

2. The Statutory Text and Legislative History of Relevant Statutes Support the Conclusion That Amtrak Is a Public Entity for Purposes of Nondelegation Analysis

The relevant statutory language and the legislative history clearly show that Amtrak is not a for-profit corporation. “The starting point in every case involving construction of a statute is the language itself.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *TVA v. Hill*, 437 U.S. 153, 173 (1978). Moreover, in interpreting a statute, the Court will consider its place in a broader statutory scheme, rather than viewing statutory language in isolation. *Zuni Public School District No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1541(2007); *Reno v. Koray*, 515 U.S. 50, 56 (1995).

In 1970, when Congress created Amtrak under RPSA, Congress declared that Amtrak is “not a department, agency, or instrumentality of the United States Government.” 49 U.S.C. § 24301(a)(3). “As initially conceived, Amtrak was to be a for-profit corporation.” *Lebron*, 513 U.S. at 384-385. Section 301 stated that “[t]he Corporation shall be a for profit corporation” the purpose of which is to provide intercity passenger rail service to meet the Nation’s intercity passenger transportation requirements. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, §301, 84 Stat. 1328, 1330. While the law can be characterized as unusual, the legislative history shows, that Congress used this language to encourage Amtrak to limit taxpayer funding necessary to operate intercity passenger rail in the United States. A. Daniel O’Neal, majority counsel for the Senate Transportation

Subcommittee recalled that during the drafting of RPSA, “We added the for-profit clause because we thought this new entity should have high aspirations. It would be wonderful if such service could be self-sustaining, but nowhere in the world has any nation been able to avoid subsidizing rail passengers.”⁹

By 1978, Congress recognized that Amtrak, due to a badly deteriorating passenger equipment fleet and a generally declining level of track maintenance by the railroads, would never be a for-profit corporation. “Problems with the thesis arose in the very beginning, when the Secretary of Transportation published a report which provided for a passenger train network that was merely a “cut and paste” of the pre-existing railroad-operated system in that the basic system merely entailed a series of discontinuance from the old pattern of service.” H.R. Rep. No. 1182 at 6-7, 95th Cong., 2d Sess. (1978).

Accordingly, during the 1978 reauthorization of RPSA, Congress modified the “for profit corporation” status of Amtrak. “The second sentence of section 301 of the Rail Passenger Service Act (45 U.S.C. § 541) is amended by inserting “operated and managed as” immediately before “a for profit corporation.” Amtrak Improvement Act of 1978, Pub. L. No. 95-421, §11, 92 Stat. 923, 928. In referencing the revision of Section 301, the committee of jurisdiction explained that:

⁹ RANDALL PETERMAN, CONG. RESEARCH SERVICE., RL31473, AMTRAK PROFITABILITY: AN ANALYSIS OF CONGRESSIONAL EXPECTATIONS AT AMTRAK’S CREATION CRS-4 (2002).

“Section 9 amends section 301 of the RPSA is to conform the law to reality, providing that Amtrak shall be “operated and managed as” a for-profit corporation. **This amendment recognizes that Amtrak is not a for-profit corporation.**” H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978)(*emphasis added*).¹⁰

Since then Congress has revised Amtrak’s “mission” that is “to provide efficient and effective intercity passenger rail mobility” while using good business judgment to “minimize Government subsidies.” 49 U.S.C. § 24101(b) and (d).

Even the Respondent has previously recognized that Amtrak is not a private entity. “[F]or all practical purposes the intercity rail passenger business has been nationalized now. When you look at the size of government payments that you are talking about here, that have to made to ... sustain it. And you look at –you know—the distance down the road before there is any possibility of Amtrak’s operation becoming a profitable one, so that the stock gets to be worth something, if it’s not nationalization now, it’s pretty hard to distinguish it from nationalization.” *Amtrak Oversight and Authorization: Hearing on S. 1763 Before the Surface Transportation Subcomm. of the S. Comm. on Commerce, 93rd Cong. 130 (1973)*(Testimony

¹⁰ “Amtrak is not now a for-profit company; it was originally created as such, but that status was changed by the Amtrak Improvement Act of 1978 (P.L. 95-1478),” D. RANDALL PETERMAN, CONG. RESEARCH SERVICE., RL31473, AMTRAK PROFITABILITY: AN ANALYSIS OF CONGRESSIONAL EXPECTATIONS AT AMTRAK’S CREATION (2002) at CRS-1.

of Stephen Ailes, President, the American Association of Railroads).

The relevant statutory language as well as the legislative history defines an entity imbued with a public purpose and mission subject to extensive congressional oversight and administrative control that is more akin to a governmental agency than a private for-profit corporation. In addition, consideration of numerous other facts support the conclusion that Amtrak is not a private entity for constitutional nondelegation purposes.

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court considered whether Amtrak should, despite its “nominal []” status as “a private corporation,” be regarded as a Government entity for First Amendment purposes.” 513 U.S. at 383. The Court held that Amtrak “is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.” *Id.* at 394. As this Court explained, Congress’s characterization of Amtrak is “assuredly dispositive of Amtrak’s status as a Government [or non-Government] entity for purposes of matters that are within Congress’s control- for example, whether it is subject to statutes.” *Id.* at 392.

Consistent with Amtrak’s unique government status, Congress has specified that Amtrak is subject to federal operating subsidies and specific federal grant programs, 49 U.S.C. §§ 24104 and 24105, and to the Federal Freedom of Information Act to provide a public accounting of its expenditures. *See, e.g.* 49 U.S.C. § 24301(e), notes that “Section 552 of Title 5, United State Code [the Freedom of Information Act (“FOIA”)],

applies to Amtrak for any fiscal year in which Amtrak receives a Federal subsidy and Amtrak has an Inspector General pursuant to the Inspector General Act of 1978, 5 U.S.C. App. § 2.¹¹ Amtrak is also under a statutory mandate to provide an annual report to Congress on its activities, and subject itself to audits, 49 U.S.C. § 24315, and the Department of Transportation also has to approve Amtrak's budget. All of these statutory requirements are indicative of Amtrak's status as a governmental entity.

Admittedly, Congress has omitted Amtrak from certain other statutes such as the Government Corporation Control Act, 31 U.S.C. § 9101 et seq. See Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, Tit. IV, § 415(d) (2), 111 Stat. 2590; Title 31 of the United State Code, setting forth the money and finance obligations of the United States government, See 49 U.S.C. § 24301(a)(3) and the Unfunded Mandate Reform Act of 1995, 2 U.S.C. § 1501 et seq. However, on the whole, Congress has subjected Amtrak to more "public" statutory obligations than "private" entity statutory exemptions.

Moreover, as noted in *Lebron*, Amtrak's governance structure is in large part determined by Congress, and the Executive Branch offering further credence that Amtrak is more like a governmental entity than not. Unlike typical private corporations, the structure of Amtrak's Board of Directors is set forth in public law

¹¹ Amtrak is defined as a "designated Federal entity" for purposes of the Inspector General Act—the same category that includes, *inter alia*, the EEOC, the FCC, the National Archives and Records Administration, the National Security Agency, and the SEC. See § 8G(a)(2), 5 U.S.C. App. § 2, at 521-522.

rather than corporate bylaws. The President appoints eight of the nine members of the board subject to the advice and consent of the Senate, including the Secretary of the Department of Transportation and a consumer representative, 49 U.S.C. § 24302(a)(1).

Consistent with Amtrak's public status, the U.S. Government Manual lists the National Railroad Passenger Corporation (AMTRAK) in the category entitled "Independent Establishments and Government Corporations" along with other organizations, including the Tennessee Valley Authority, Federal Deposit Insurance Corporation, Overseas Private Investment Corporation, and Pension Benefit Guaranty Corporation.¹² Consistent with Amtrak's true role as a public entity, Congress continues to take a hands-on approach in operating Amtrak, not only through appropriations, but also through oversight hearings and legislative action. Congress has, among other things, required Amtrak to allow passengers to carry firearms on trains. Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat 3034, 3061, and prohibited Amtrak from discounting tickets by more than 50%. The Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, 125 Stat 552, 660. Oversight hearings regularly review Amtrak's performance on particular routes and even question the price Amtrak charges for hamburgers. *Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service Before the Subcomm on Government Operations of the Committee on Oversight and Government Reform*, 113th Cong. 3 (2013).

¹² U.S. Government Manual, p. 22 (2014).

Contrary to the court of appeals decision, the statutory language, legislative history, the Presidentially appointed board, and other indicia, show that Amtrak is not a private entity for purposes of assessing the constitutionality of Congress delegation of authority under Article I.

B. The Government Retained Sufficient Control over the Exercise of Authority under Section 207 of PRIIA Thereby Avoiding Constitutional Nondelegation Concerns

The most recent case in which this Court invalidated an Act of Congress on the ground that it delegated too much authority to a private party was 80 years ago. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a statute that required all coal producers to accept the maximum labor hours and minimum wages negotiated by the producers of more than two-thirds of annual coal tonnage and representatives of more than half of the mine workers. *Id.* at 282-284, 310-312. In *Carter Coal*, the government had no involvement in the creation or approval of the binding labor provisions, which were instead divided and approved entirely by private entities and then deemed to be “accepted” by all code members in the relevant district or districts. *Id.* at 284.

Subsequently, this Court, in sustaining the validity of statutes permitting private parties to play a significant role in formulating or implementing new regulatory provisions, recognized that “[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and

practicality” in fashioning statutory schemes involving private parties. *Currin v. Wallace*, 306 U.S. 1, 15 (1939)(citation omitted); see also *Sunshine Anthracite Coal Co. v. Ad*, 310 U.S. 381 (1940); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

Even assuming *arguendo* that Amtrak is considered to be a private entity, Section 207 of PRIIA is a valid constitutional delegation. Unlike *Carter Coal*, here, a federal agency, FRA, was involved in the promulgation of the metrics and standards; further, stakeholders including the freight railroads, were consulted prior to publication in the Federal Register and then submitted public comments after notice in the Federal Register. See, e.g. J.A. 77-156.

II. The Court of Appeals Decision, Which Invalidates Amtrak’s On-time Performance Measures, Thwarts Congress’ Intent and Threatens the Future of Passenger Rail in the United States

A. History of Intercity Passenger Rail in the United States

By the time Amtrak celebrated its 40th anniversary in 2011, Americans were riding Amtrak passenger trains in record numbers. Ridership increased from 16 million in 1972 to 31 million passengers in 2012. For most of the past decade, ridership records have been shattered year over year despite obstacles such as the fact that Amtrak service is extremely limited, typically running only two trains a day on most long distance routes. In addition, Amtrak operates on outdated equipment, which has been described as “obsolete stage coaches which should be permitted to die a horrible

death.” *Amtrak Oversight and Authorization: Hearing on S. 1763 Before the Surface Transportation Subcomm. of the S. Comm. on Commerce, 93rd Cong. 88 (1973)*(statement of Anthony Haswell, Chairman, National Association of Railroad Passengers). Finally, unlike airplanes whose dispatching priorities are determined by federal air traffic controllers not the airlines, Amtrak passenger trains operate in large part on tracks owned and operated by freight railroads and are therefore subject to dispatching orders by freight rail employees.

Notwithstanding the foregoing, Amtrak posted a cumulative on-time performance rate of 83% in 2012, and for long distance trains, 71%.¹³ The record indicates a strong correlation between increased ridership and on-time performance.

This success rate changed in 2013, when the court of appeals held that Section 207 “constitutes an unlawful delegation of regulatory power to a private entity,” Pet. App. 3a, thereby invalidating Congress’ directive to FRA and Amtrak to set and implement metrics and standards. Since 2013, Amtrak’s on time performance has dropped by *half*, to approximately 42 percent.¹⁴

¹³ Amtrak, Annual Report for Fiscal Year 2012. <http://www.amtrak.com/ccurl/103/360/Amtrak-Annual-Report-2012.pdf>

¹⁴ D.J. Stadler, Vice President of Operation, Amtrak, *Testimony Before the Surface Transportation Board* (April 10, 2014), www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadler-STBApr-09-2014.pdf

B. On Time Performance Is Critical to the Success of Intercity Passenger Rail Service in the United States

The successful movement of people, necessarily requires a reasonable degree of punctuality. In 2008, the Inspector General of the Department of Transportation reported that:

[P]oor OTP [on time performance] reduces ridership on Amtrak trains because potential passengers cannot predict when their train will arrive. It also increases costs, primarily by extending shifts, increasing staffing requirements, and utilizing more fuel. Improving OTP could significantly improve Amtrak's finances. It would generate funds Amtrak could use to increase the incentives to host railroads both to improve the performance of Amtrak trains operating on their tracks or [sic] reduce its reliance on Federal operating subsidies. Office of Inspector General, U.S. Dept. of Transportation, Report CR-2008-047, *Effects of Amtrak's Poor On-Time Performance, Federal Railroad Administration*, (March 28, 2008), p 2., https://www.oig.dot.gov/sites/default/files/effects_of_otp_report_FINAL.pdf.

Realizing the importance that on-time performance plays in the success of achieving a national intercity passenger rail program, Congress mandated the promulgation and implementation of metrics and standards to “give Amtrak an effective set of tools to ensure a high level of host railroad performance and included on-time performance specifically.” *Id.* at 2.

Prior to the passage of PRIIA, Amtrak's on-time performance for long distance trains was below 40

percent.¹⁵ In less than two years after the metrics and standards were finalized, Amtrak's achieved its highest level of on-time performance ever. In February 2012, its system-wide OTP level was 88.7% and on its long-distance routes, the OTP level was 81.2 % as compared to just 30% in 2006.¹⁶

C. A System of Performance Metrics and Standards Is Essential to Sustain Amtrak's On-time Performance

The 2013 court of appeals decision, which invalidated Amtrak's performance metrics, had an almost immediate negative impact on Amtrak's on-time performance. In its 2014 performance report, Amtrak found that host (freight) railroad delays accounted for roughly two-thirds of all of its delays.

Appearing before the STB, Amtrak's vice president of operations testified that: "[Amtrak] saw an immediate drop in on-time performance across the board that was directly attributable to train handling by the host carriers. . . . Freight train interference rates have nearly tripled, and this indicates not only that there are more delays, but that those delays are of longer duration. In response, ridership and ticket

¹⁵ D.J. Stadtler, Vice President of Operation, Amtrak, *Testimony Before the Surface Transportation Board* (April 10, 2014), www.amtrak.com/ccurl/899/180/Amtrak-VP%20Operations-Stadtler-STBApr-09-2014.pdf. (*Stadtler testimony*)

¹⁶ See Amtrak, *Monthly Performance Report for February 2012*, at E-7 (rev. Sept. 14, 2012), www.amtrak.com/ccurl/395/557/Amtrak-Monthly-Performance-Report-February-2012,0.pdf.

revenues have fallen by 15% year over year to date.” *Stadtler Testimony* at 3, 5.

As of May 2014, only seven of Amtrak’s 48 routes had a better on-time rate than in the prior year, before the ruling by the court of appeals. Eight of the 33 routes, including most of the long-distance cross-country lines, experienced on-time arrivals less than 50 percent over the past 12 months. The Empire Builder, running from Chicago to Washington, ran on time only 21 percent of the time in the past year. Only one in three California Zephyr trains made their trips between Chicago and San Francisco on time.¹⁷

By June 2014, the system-wide rate had fallen to 69.7%, and the rate for long-distance routes was only 41.2%, half of what it had been 29 months earlier. See Amtrak, Monthly Performance Report for June 2014, at E-7 (July 31, 2014), www.amtrak.com/ccurl/621/650/Amtrak-Monthly-Performance-Report-June2014.pdf.

As intercity trains are increasingly delayed, ridership and revenues will continue to plummet. This dynamic not only thwarts the intent of Congress to build a balanced national transportation system, but also, as a practical matter, threatens the future of intercity passenger rail in the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

¹⁷ <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/10/the-sorry-state-of-amtraks-on-time-performance-mapped/>

Respectfully submitted,

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