No. 12-5204

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION;
ANTHONY FOXX, SECRETARY OF TRANSPORTATION;
FEDERAL RAILROAD ADMINISTRATION;
SARAH FEINBERG, ADMINISTRATOR, FEDERAL
RAILROAD ADMINISTRATION,

Defendants-Appellees.

On Appeal From The United States District Court For The District Of Columbia

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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GLOSSARY

FRA	Federal Railroad Administration
PRIIA	Passenger Rail Investment and Improvement Act of 2008
STB	Surface Transportation Board

INTRODUCTION AND SUMMARY

A unanimous panel of this Court found two separate constitutional flaws in a statute that grants Amtrak—a Government-chartered, for-profit corporation—rulemaking power over private companies with which it competes for limited track space.

The statute at issue is the Passenger Rail Investment and Improvement Act of 2008 (PRIIA). Section 207 of PRIIA, codified at 49 U.S.C. § 24101 note, grants Amtrak and the Federal Railroad Administration (FRA) co-equal authority to develop and promulgate regulations governing private freight railroads—and further provides that if Amtrak and the FRA cannot agree on the substance of the regulations, an unspecified, potentially private arbitrator may step in to draft and issue the federal regulations.

The panel's ruling is correct and rehearing is not warranted.

Although the Government summarily declares that this case presents a question of "exceptional importance," Reh'g Br. 2, it never explains why its interests in *this* statutory scheme are exceptional enough to warrant rehearing. In fact, the Government's rehearing petition downplays the significance of this case, arguing that the statute and regulations at issue "have only limited effect." Reh'g Br. 14. Notably, the Government never claims that the panel decision calls into question the constitutionality of any other statute, or that it hampers the ability of

Congress to achieve its objectives through constitutionally permissible means. Indeed, throughout this litigation, the Government has come up empty when asked to identify a statute like PRIIA § 207. *See, e.g.*, CADC Tr. of Oral Arg. at 25 (Feb. 19, 2013) (statement of Government counsel that "I'm not sure I'm aware of any" when asked for analogues). The unique nature of Section 207—a statute without precedent in our constitutional history—underscores that rehearing is unwarranted.

Moreover, the panel's decision is plainly correct. In remanding this case, the Supreme Court noted the "substantial questions" concerning "the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1228, 1234 (2015) (citation omitted). In fact, the Court went out of its way to flag for resolution on remand the argument that "Congress violated the Due Process Clause by giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry." *Id*. at 1234 (quotation omitted).

The panel correctly held that Section 207 violates due process because Amtrak, as a for-profit corporation, cannot be a disinterested regulator of other industry participants with which it directly competes for limited track capacity. The panel was also correct in holding Section 207 unconstitutional on a separate and independent ground: it vests an unspecified, and potentially private, arbitrator

who is not appointed pursuant to the Appointments Clause with the power to issue "binding" regulations in the event Amtrak and the FRA cannot agree.

Because the panel's decision was correct—and because the Government has conspicuously failed to identify any substantial interest at stake in this unique statutory provision—the Court should deny rehearing.

STATEMENT

1. In 1970, Congress established the National Railroad Passenger Corporation, better known as Amtrak, to engage in the commercial enterprise of providing intercity passenger rail service. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985). Congress's purpose was to "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking." H.R. Rep. No. 91-1580 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4735, 4735.

Congress provided that Amtrak "is not a department, agency, or instrumentality of the United States Government," but rather "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2)-(3). Describing Amtrak as a private corporation was consistent with historic practice, as "[o]peration of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not . . . government[ ]." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 686 (1982).

Amtrak began offering passenger service on May 1, 1971. Because essentially all of the nation's rail infrastructure was owned at the time by the freight railroads, the only viable option was to operate Amtrak's passenger trains over the freight railroads' tracks. The same is true today: 97 percent of the 22,000 miles of track over which Amtrak operates is owned by freight railroads. JA155.[1]

The tracks used by Amtrak trains are also used by host railroads to move freight traffic. Just as an air-traffic controller manages departures and landings at a busy airport, the freight railroads must carefully schedule and manage the timing and sequencing of the passenger and freight trains operating on their tracks to minimize back-ups and delays. JA257, 265, 272, 280. Amtrak trains limit the host railroads' ability to move freight and serve their customers. Thus, while "Amtrak and freight railroads do not compete for passengers," they "do compete for scarce resources (i.e. train track) essential to the operation of both kinds of rail service." Slip op. 3 n.1.

Amtrak has entered into contracts with the freight railroads that host its trains. These contracts—commonly known as operating agreements—are painstakingly negotiated documents that were executed soon after Amtrak's

[1] The major exception is the Northeast Corridor—the route connecting Washington, D.C. to Boston—which consists of tracks almost entirely owned by Amtrak.

creation and have been amended or renegotiated over the years. JA 256-83. The operating agreements establish the agreed-upon conditions governing Amtrak's use of the freight railroads' tracks, and spell out the rights and duties of the parties. *Atchison*, 470 U.S. at 455.

2. Section 207(a) of PRIIA empowers Amtrak and the FRA to "jointly" develop and promulgate regulations establishing on-time performance standards. If Amtrak trains do not meet these standards, the Government may launch an investigation and potentially assess damages, payable directly to Amtrak, against the host freight railroad. *Id*. § 213. The statute further provides that the freight railroads "shall" amend their existing contracts with Amtrak by "incorporat[ing]" the regulations into their contracts to the extent practicable. *Id*. § 207(c). In addition, the statute provides that if Amtrak and the FRA cannot agree on the content of the regulations, either party may ask the Surface Transportation Board (STB) to appoint an arbitrator to write the regulations. *Id*. § 207(d).

Amtrak and the FRA jointly issued their regulations—known as the "metrics and standards"—in 2010. JA 59-97. The metrics and standards are unrealistic and have proven impossible to meet as a practical matter on many routes. JA 258-81. Amtrak has filed a complaint with the STB to commence an action against Canadian National, claiming that the freight railroad "refused to adopt measures necessary to satisfy the standards developed pursuant to Section 207." JA 377.

The metrics and standards have forced the freight railroads to make immediate and substantial changes to their business operations, including delaying their own freight traffic and redirecting capital spending and resources in an effort to comply. *See Ass'n of Am. R.R. v. Dep't of Transp.*, 721 F.3d 666, 672 n.6 (D.C. Cir. 2013) ("The record is replete with affidavits from the freight railroads describing the immediate actions the metrics and standards have forced them to take."). And more is yet to come: Amtrak officials "have told [the freight railroads] that they expect us to begin incorporating the Metrics and Standards into the [operating agreements] pursuant to the statute, when [they are] next re-negotiated." JA 276.

3. The Association of American Railroads, whose members include North America's largest freight railroads, challenged PRIIA § 207 on several constitutional grounds. This Court initially held that Section 207 "constitutes an unlawful delegation of regulatory power to a private entity," 721 F.3d at 668, but the Supreme Court vacated and remanded for further proceedings on the premise that Amtrak should be deemed a Government entity "for purposes of determining the validity of the metrics and standards." 135 S. Ct. at 1228.

"Although Amtrak's actions here were governmental," the Court stated, "substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers

and the Appointments Clause—may still remain in the case" and "should be addressed in the first instance on remand." *Id*. at 1228, 1234 (citation omitted). Two Justices issued concurring opinions to provide additional guidance. *See id*. at 1240 (Alito, J., concurring) (discussing nondelegation and Appointments Clause concerns and stating: "The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded."); *id*. at 1254 (Thomas, J., concurring in the judgment) (concluding that "Section 207 . . . violates the Constitution").

On remand, this Court held that Section 207 "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor to regulate its competitors and violates the Appointments Clause for delegating regulatory power to an improperly appointed arbitrator." Slip op. 3.

ARGUMENT

As the panel correctly recognized, PRIIA § 207 creates an unprecedented and untenable situation: a for-profit Government corporation exercising regulatory authority over private companies with which it competes for an essential limited resource, and wielding its power to gain a commercial advantage. Section 207 would make Amtrak an entity without precedent in our constitutional system: a corporation that simultaneously acts as a profit-seeking commercial actor *and* as a Government regulator of its competitors. The panel also correctly held that

Section 207's arbitration provision compounds the statute's constitutional infirmities by granting an unspecified and potentially private arbitrator—not appointed pursuant to the Appointments Clause—the power to develop and promulgate binding federal regulations.

I. THE PANEL CORRECTLY HELD THAT PRIIA § 207 VIOLATES DUE PROCESS.

The panel correctly held that it violates the Due Process Clause for Congress to give an economically self-interested actor rulemaking authority over its competitors. Slip op. 10-28. In *Carter v. Carter Coal Co*., 298 U.S. 238 (1936), the Court held that granting a corporation "the power to regulate the business of another, and especially of a competitor," is "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Id*. at 311-12 (collecting cases). Due process requires that a regulator be "presumptively disinterested" and act in the public interest rather than for its own commercial benefit. *Id*. at 311. Just as a for-profit Government Cola Corporation should not be allowed to regulate Coke and Pepsi, Amtrak cannot regulate the freight railroads because Amtrak has commercial "interests [that] may be and often are adverse to the interests of others in the same business." *Id*.

The Government argues that the due process rule articulated in *Carter Coal* should apply to for-profit *private* corporations but not to for-profit *Government* corporations. In the Government's view, a for-profit Government corporation

should be allowed to seize a commercial advantage by regulating its competitors. Although the Government contends that applying *Carter Coal* to an entity like Amtrak is "unprecedented," Reh'g Br. 8, the truth is that *Section 207* is unprecedented—the Government has never identified another instance in which a for-profit Government corporation was given the power to regulate its competitors.

The Government argues that the panel should have resolved the due process challenge by using the more relaxed "prejudgment" standard set forth in *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979) (looking to whether an agency member has "an unalterably closed mind on matters critical to the disposition of the proceeding"). But that standard applies to procedural defects in a particular rulemaking: the "unalterably closed mind" standard presumes that the disinterested agency officials given rulemaking power are constitutionally eligible to wield it in the first place. Indeed, as the panel explained (slip op. 14-15), *Association of National Advertisers* presented the question whether an FTC commissioner had prejudged the outcome of a rulemaking by making public statements at a conference. *See* 627 F.2d at 1169-70. Here, in contrast, the due process violation was the statutory grant of rulemaking power to Amtrak.

In arguing that the panel ignored the ways in which Amtrak is "political[ly] accountab[le]," Reh'g Br. 8-9, the Government attacks a straw man. The panel

repeatedly acknowledged and engaged this very point. *See* slip op. 16-17, 19-21, 25. The panel concluded, correctly, that even though "Amtrak is clearly dependent on the government in ways other for-profit corporations are not," the involvement and oversight of the political branches "does nothing to relieve [Amtrak] of its statutory charge to maximize company profits." *Id*. at 20. And it explained that there was "no suggestion that it was the coal producers' lack of accountability to government oversight" that led the Court in *Carter Coal* to find a due process violation. *Id*. at 25. Instead, the panel noted, "what was offensive about the statute was its 'attempt[] to confer' the 'power to regulate the business of another, and especially of a competitor.'" *Id*. (quoting 298 U.S. at 311).

In issuing the metrics and standards, Amtrak was not motivated to regulate the railroad industry in an evenhanded and disinterested manner, but with the goal of benefiting itself—just as any commercial actor would if Congress happened to grant it regulatory power over its rivals.

The Government errs in relying on *Friedman v. Rogers*, 440 U.S. 1 (1979), a case that involved the composition of a state licensing board. Reh'g Br. 10. *Friedman* does not suggest that Congress can give rulemaking power to a self-interested Government corporation. Indeed, the lower court in *Friedman* noted that the challenged board "has *no* rule-making power, but only power to enforce what the legislature has mandated." *Rogers v. Friedman*, 438 F. Supp. 428, 433

(E.D. Tex. 1977) (emphasis added). In *that* context, the Supreme Court held only that the challengers had "no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of optometry." 440 U.S. at 18. Moreover, "the *Friedman* plaintiffs never alleged the Board members would act out of self-interest instead of fairness, only that the Board's composition itself was unfair." Slip op. 27. Here, the freight railroads *are* arguing that Amtrak's regulatory decisions are driven by its own financial self-interest.

Next, the Government recycles its argument that Amtrak did not actually exercise "regulatory authority" when it drafted and promulgated (along with the FRA) binding federal regulations to govern private freight railroads. Reh'g Br. 11. As the panel observed, the "metrics and standards lend definite regulatory force to an otherwise broad statutory mandate" and "channel its enforcement." Slip op. 23 (quotation omitted); *see also Dep't of Transp.*, 135 S. Ct. at 1236 (Alito, J., concurring) ("Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. That is regulatory power.") (citation omitted). Indeed, the contract provision, PRIIA § 207(c), standing alone makes this a regulatory scheme by requiring freight railroads to amend their operating agreements with Amtrak to the extent practicable. That the STB may ultimately resolve disputes over what is "'practicable,'" Reh'g Br. 11, does not eliminate the regulatory effect.

Finally, the Government faults the panel for deeming certain "joint action" cases "inapplicable," arguing that "the joint participation of the FRA would address any due process problem" posed by giving Amtrak rulemaking power. Reh'g Br. 12 (citing *Currin v. Wallace*, 306 U.S. 1 (1939) and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)). But even the Government did not deem these cases "applicable"; its brief to the panel did not cite any of them. In any event, these cases hold that while private parties may be given a role in rulemaking, they "must be limited to an advisory or subordinate role in the regulatory process." *Ass'n Am. R.R.*, 721 F.3d at 673. Here, in contrast, Amtrak shares co-equal rulemaking power with the FRA, and the FRA "is powerless to overrule Amtrak." Slip op. 26. In addition, as the panel correctly noted, the FRA's power is further undermined by the fact that if the FRA refused to capitulate to Amtrak's demands in the rulemaking, Amtrak could outsource the rulemaking entirely to an arbitrator who can bind the FRA over the agency's objection. *Id.* at 25 n.4.[2]

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[2] Even if the arbitration provision could somehow be deemed constitutional, the scheme would still not be analogous to the scheme in *Currin*. There, a disinterested Government entity wrote the regulation and set a condition on it becoming effective (approval of a supermajority of the regulated parties). *Currin* did *not* involve a scheme like this one, where a single interested party writes regulations governing its competitors. *See* 306 U.S. at 15 ("[t]his is not a case where a group of producers may make the law and force it upon a minority").

II. THE PANEL CORRECTLY HELD THAT PRIIA § 207 VIOLATES THE APPOINTMENTS CLAUSE.

The panel correctly held that PRIIA § 207 violates the Constitution in another respect: it improperly delegates regulatory power to an arbitrator who is not constitutionally permitted to wield it. *See* slip op. 30-33. Section 207(d) provides that if Amtrak and the FRA cannot reach agreement, an unspecified—and potentially private—arbitrator may step in to draft and promulgate the federal regulations. Here too, the Government has never identified any analogous statute.

The Government begins by arguing that there could be no Appointments Clause violation because the arbitration provision was not invoked. Reh'g Br. 12-14. But as the panel correctly explained, in both its initial and subsequent opinions, the arbitration provision "still polluted the rulemaking process" by "stack[ing] the deck in favor of compromise." *Ass'n Am. R.R.*, 721 F.3d at 674; slip op. 29 n.6; *see also Dep't of Transp.*, 135 S. Ct. at 1236 (Alito, J., concurring) ("The D.C. Circuit is correct that when Congress enacts a compromise-forcing mechanism, it is no good to say that the mechanism cannot be challenged because the parties compromised."). In fact, the Government made this same argument to the Supreme Court, both sides argued before the Court at length about the arbitration provision, and the Court remanded with instructions to address the

"substantial" Appointments Clause challenge—an odd result if, as the Government claims, the provision is immune from judicial review.

The panel's holding is correct for many reasons. First, the provision is unconstitutional because it allows a *private* arbitrator to issue Government regulations—an outcome the Government has conceded would be unconstitutional. *See* slip op. 30; *Ass'n Am. R.R.*, 721 F.3d at 670. As the panel explained in its initial decision, "[t]he statute's text precludes the government's suggestion that we construe the open-ended language 'an arbitrator' to include only federal entities." *Ass'n Am. R.R.*, 721 F.3d at 673 n.7. The Government's insistence at the panel stage that the statute be "construed" to require appointment of a *Government* arbitrator amounted to statutory redrafting, not interpretation, and a court "will not rewrite a law to conform it to constitutional requirements." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (quotation and alteration omitted).

Second, even if the statute were rewritten to require a Government arbitrator, the process by which the arbitrator is appointed does not satisfy the Appointments Clause. Relying on two nineteenth-century cases that it did not cite in its panel-stage briefing, the Government argues that the arbitrator does not qualify as an "officer" because he or she "would have had authority only to resolve a discrete, one-time dispute." Reh'g Br. 14. But the test for qualifying as an "officer" is whether the appointee "exercis[es] significant authority pursuant to the laws of the

United States." *Edmond v. United States*, 520 U.S. 651, 662 (1997). As the panel explained, slip op. 30-31, that test is satisfied here: the arbitrator drafts and promulgates federal regulations that are published in the *Federal Register* and would bind the United States Government, Amtrak, and the entire railroad industry.

Finally, the Government argues that even if the arbitrator is an "officer," he or she is an inferior officer and thus may permissibly be appointed by the STB. Reh'g Br. 14-15. That argument fails because, as *Edmond* holds, an inferior officer is one who is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. As the panel correctly observed, there is nothing in the statute that provides for the arbitrator to be directed or supervised by *anyone*. Slip op. 33. The argument that the STB's appointment power includes an "implicit" removal power that provides "adequate authority" to direct the arbitrator, Reh'g Br. 15, is not persuasive. The statute itself grants no removal power, and the fact the arbitrator may issue rulings that "bind[ ]" the STB, *see* PRIIA § 207(d), establishes that it is the *arbitrator* that directs the *STB*, not vice versa.

CONCLUSION

This Court should deny rehearing.

Respectfully submitted,

/s/ Thomas H. Dupree Jr.

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Dated: July 15, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

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CORPORATE DISCLOSURE STATEMENT

Appellant states as follows:

1. The Association of American Railroads is a trade association. Its members are railroads that are affected by the statute challenged in this case and by the regulations promulgated pursuant to that statute.

2. The Association of American Railroads has no parent company and is a nonstock corporation.

/s/ Thomas H. Dupree, Jr.