No. 17-699

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

KATHRYN D. KIRMAYER
DANIEL SAPHIRE
TIMOTHY J. STRAFFORD
ASSOCIATION OF AMERICAN RAILROADS
425 Third Street SW
Suite 1000
Washington, DC 20024
(202) 639-2100

THOMAS H. DUPREE JR.
Counsel of Record
MICHAEL K. MURPHY
DAVID A. SCHNITZER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Respondents Union Pacific Railroad Co., et al.

QUESTION PRESENTED

Whether the Surface Transportation Board lacked statutory authority to issue its On-Time Performance rule, where Congress expressly delegated the authority to issue the rule to the Federal Railroad Administration and Amtrak, and confined the Board to a "consult[ing]" role, 49 U.S.C. § 24101 note.

RULE 29.6 STATEMENT

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation, a publicly traded company. No publicly traded corporation is known to own 10% of the stock of Union Pacific Corporation.

Respondent Association of American Railroads is a trade association. It brought this action on behalf of its freight railroad members that are affected by the regulation challenged in this case. Association of American Railroads has no parent company and is a nonstock corporation.

Respondent CSX Transportation, Inc. is wholly owned by CSX Corporation, a publicly held corporation. There are no other publicly held corporations that own 10% or more of the stock of CSX Transportation, Inc.

Respondent Norfolk Southern Railway Company is not a publicly held corporation or other publicly held entity. Norfolk Southern Railway Co. is a wholly owned subsidiary of Norfolk Southern Corporation, which is a publicly held corporation.

Respondent Canadian National Railway Company is a publicly held corporation. Canadian National has no parent company, and no publicly held company has a 10% or greater ownership interest in Canadian National Railway Company.

Respondent Illinois Central Railroad Company is a wholly owned subsidiary of Illinois Central Corporation, which is in turn a wholly owned subsidiary of CN Financial Services VIII LLC, which is in turn a wholly owned subsidiary of Grand Trunk Corporation, which is in turn a wholly owned subsidiary of North American Railways, Inc., which is

in turn a wholly owned subsidiary of Canadian National Railway Company. Canadian National Railway Company is the only publicly held corporation that holds a 10% or greater ownership interest in Illinois Central Railroad Company.

Respondent Grand Trunk Western Railroad Company is a wholly owned subsidiary of Grand Trunk Corporation, which is in turn a wholly owned subsidiary of North American Railways, Inc., which is in turn a wholly owned subsidiary of Canadian National Railway Company. Canadian National Railway Company is the only publicly held corporation that holds a 10% or greater ownership interest in Grand Trunk Western Railroad Company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Rule

Regulations

Other Authorities

BRIEF IN OPPOSITION

Respondents Union Pacific Railroad Company, Association of American Railroads, CSX Transportation, Inc., Norfolk Southern Railway Company, Canadian National Railway Company, Illinois Central Railroad Company, and Grand Trunk Western Railroad Company respectfully submit this brief in opposition to the petition for a writ of certiorari filed by National Railroad Passenger Corporation ("Amtrak").

STATEMENT

This case involves the Eighth Circuit's invalidation of a Surface Transportation Board rulemaking on the basis that the Board exceeded its statutory authority under the Passenger Rail Investment and Improvement Act ("PRIIA"). The Board itself has not filed a petition for certiorari, the Solicitor General apparently having determined that this case does not warrant this Court's review.

The Eighth Circuit's decision does not create a circuit split and does not conflict with any decision from this Court. Amtrak does not seriously contend otherwise, and its petition should be denied for three main reasons.

First, Amtrak asks this Court to decide a "Question Presented" that is not actually presented by this case. Amtrak posits the question whether the Board correctly held that it has "independent" statutory authority under a so-called two-trigger theory to issue an On-Time Performance rule. Pet. i. But that was not the theory the Board itself gave when it issued its rule, and it is a "foundational principle of administrative law that a court may uphold agency action *only* on the grounds that the

agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (emphasis added). Thus, deciding Amtrak's "Question Presented" would make no difference to the outcome of its case because the Board's rule cannot be upheld under a theory supplied by Amtrak but not by the Board itself.

Second, the decision below does not create or even implicate any circuit conflicts, and it was plainly correct on the merits. The Board exceeded its statutory authority when it issued its On-Time Performance rule. In PRIIA § 207, Congress gave the FRA and Amtrak—not the Board—the power to define On-Time Performance for purposes of proceedings under PRIIA § 213, and confined the Board to a "consult[ing]" role. When Congress has expressly delegated authority to a particular agency to issue a rule, a different agency lacks the power to issue that rule. *See Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013).

Third, Amtrak errs in claiming this case raises issues of "vital national importance" to the transportation infrastructure (Pet. 15, capitalization altered)—a claim that is undermined by the United States' determination that the issues are *not* sufficiently important to warrant defending the Board's rule through a cert petition.

For these reasons, the petition for a writ of certiorari should be denied.

1. In 1970, Congress established the National Railroad Passenger Corporation, better known as Amtrak, to provide intercity passenger rail service. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454 (1985). 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 21,300 miles of track over which Amtrak operates is owned by the freight railroads. *See Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 410 (1992) ("Most of Amtrak's passenger trains run over existing track systems owned and used by freight railroads.").[1]

The freight railroads are required by federal law to allow Amtrak trains to operate on their tracks. *See* 49 U.S.C. § 24308. Because the tracks used by Amtrak trains are also used by the freight railroads to move freight traffic, the obligation to host Amtrak trains imposes significant burdens on the freight railroads and impedes the host railroads' ability to move freight and serve their customers. *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 23 & n.1 (D.C. Cir. 2016). The presence of passenger trains reduces the number and frequency of freight trains that can run on a network. Eighth Circuit Joint Appendix ("JA") 130-31. Because passenger trains operate at higher speeds than freight trains, passenger trains consume a disproportionate share of the capacity or "train slots" available on a line, resulting in delays to freight trains. *Id.* And the requirement that freight railroads give "preference" to Amtrak trains over freight trains, *see* 49 U.S.C. § 24308(c), further constrains the discretion of freight railroad dispatchers to maximize fluidity and capacity on the line.

These effects are heightened by provisions authorizing or requiring that freight railroads be

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

subjected to federal investigations—and potential civil damage awards—if Amtrak trains do not achieve certain on-time performance results. That is because coercing or compelling the freight railroads to improve Amtrak's on-time performance necessarily comes at the expense of freight traffic, which must be delayed, rescheduled, or rerouted in order to avoid interference with Amtrak trains. Thus, while on-time performance standards nominally measure the performance of Amtrak trains, they have a direct impact on the ability of freight trains to move on the network and serve customers in a timely, efficient and reliable manner. *See generally Ass'n of Am. R.Rs*, 821 F.3d at 23 n.1 ("Amtrak and freight railroads . . . compete for scarce resources (i.e. train track) essential to the operation of both kinds of rail service."); *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp*., 721 F.3d 666, 672 n.21 (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."), *vacated on other grounds*, 135 S. Ct. 1225 (2015).

2. Congress enacted the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. *See* Pub. L. No. 110-432, div. B, 122 Stat. 4848, 4907 (codified generally in Title 49). At issue in this case are two provisions of PRIIA: Section 207(a), which delegates authority to the FRA and Amtrak to define "On-Time Performance" for Amtrak trains; and Section 213(a), which authorizes the Surface Transportation Board to conduct investigations, and potentially impose penalties against the host freight railroads, in situations where the On-Time Performance measure—or other standards established by the FRA and Amtrak under Section 207(a)—are not met.

Section 207(a) of PRIIA provides that "the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including . . . on-time performance . . . ." PRIIA § 207(a), codified at 49 U.S.C. § 24101 note. The section further provides that "[s]uch metrics, at a minimum, shall include . . . measures of on-time performance . . . ." *Id*.

Section 213(a) of PRIIA authorizes the Board to open investigations in situations where the On-Time Performance measure, or other standards established by the FRA and Amtrak under Section 207, are not met. Section 213(a) provides:

> If the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board . . . may initiate an investigation, or upon the filing of a complaint by Amtrak . . . [or] a host freight railroad over which Amtrak operates . . . the Board shall initiate such an investigation, to determine whether

> and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by [the host railroad or Amtrak].

PRIIA § 213(a), codified at 49 U.S.C. § 24308(f).

Section 213(a) further provides that "[i]f the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required under [49 U.S.C. § 24308(c)], the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate . . . ." PRIIA § 213(a).

In sum, as the Board's Chairman publicly explained, PRIIA "gives the Board the power to investigate, in certain circumstances, failures by Amtrak to meet on time performance standards. Those standards will be established by Amtrak and the Federal Railroad Administration, in consultation with the Board and others." Opening Remarks of Chairman Nottingham, STB Hearing on PRIIA at 5 (Feb. 11, 2009).

3. Exercising the rulemaking authority Congress granted them under PRIIA § 207, the FRA and Amtrak issued their proposed On-Time Performance rule in 2009. In the notice published in the *Federal Register*, the FRA and Amtrak invited the Surface Transportation Board (and other entities) to submit comments on their proposed rule. *See* 74 Fed. Reg. 10,983 (Mar. 13, 2009).

The FRA and Amtrak jointly issued their final rule in 2010. *See* 75 Fed. Reg. 26,839 (May 12, 2010).

The final rule described On-Time Performance as a "congressionally-mandated" standard, and provided that Amtrak's On-Time Performance for each of its routes be assessed by reference to three metrics, each of which must be met for On-Time Performance to be deemed satisfactory. *See* http://1.usa.gov/1nYiXmw, at 26-27.

4. Soon after the FRA and Amtrak issued their final On-Time Performance rule, the Association of American Railroads ("AAR") filed a lawsuit in federal district court in Washington, D.C., challenging PRIIA § 207 as unconstitutional. AAR argued, among other things, that Section 207 authorized Amtrak to exercise rulemaking power even though Congress provided by statute 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). The D.C. Circuit agreed, and struck down the provision as "an unlawful delegation of regulatory power to a private entity." *Ass'n of Am. R.Rs.*, 721 F.3d at 668.

This Court vacated and remanded for further proceedings. It held that the D.C. Circuit's decision rested on the incorrect "premise" that Amtrak is a private entity for purposes of AAR's challenge. *See Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1228 (2015). The Court emphasized that "[a]lthough Amtrak's actions here were governmental, 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." *Id.* (citation omitted).

On remand, the D.C. Circuit again struck down Section 207, invalidating the FRA and Amtrak's On-Time Performance rule. The court held that Section 207 "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor [i.e., Amtrak] to regulate its competitors and violates the Appointments Clause for delegating regulatory power to an improperly appointed arbitrator." *Ass'n of Am. R.Rs.*, 821 F.3d at 23 (footnote omitted).

The full D.C. Circuit denied the Government's rehearing petition on September 9, 2016. Thus, the FRA and Amtrak's On-Time Performance rule is currently invalid.[2]

5. On December 19, 2014, in the midst of the constitutional litigation, the Surface Transportation Board announced that it would issue its own definition of On-Time Performance. The Board made this announcement in the context of a PRIIA § 213 proceeding brought by Amtrak against Canadian National. In denying Canadian National's motion to dismiss that proceeding on the ground that the Board lacked authority to define On-Time Performance, the Board stated that "the invalidity of Section 207 does not preclude the Board from construing the term 'on-time performance' and initiating an investigation under Section 213." Decision, Docket No. NOR 42134, at 10 (Dec. 19, 2014). The Board asked the parties to brief the question of how the Board should define On-

[2] After it lost in the D.C. Circuit, the Government returned to the district court and asked the court to reinstate Section 207's grant of rulemaking power to Amtrak and the FRA under a "severability" theory. The district court rejected that argument and the Government is now appealing its ruling in D.C. Cir. No. 17-5123.

Time Performance for purposes of PRIIA § 213. *Id*. at 11.

Canadian National moved the Board to reconsider its conclusion that it possessed statutory authority to define On-Time Performance. Pet. for Recon., Docket No. NOR 42134 (Jan. 7, 2015). At the same time, CSX Transportation and Norfolk Southern moved to dismiss a separate PRIIA § 213 complaint that Amtrak had lodged against them. They similarly argued that the Board lacked statutory authority to define On-Time Performance. Mots. to Dismiss, Docket No. NOR 42141 (Jan. 7, 2015).

While the motions filed by Canadian National, CSX Transportation and Norfolk Southern were pending, AAR filed a conditional petition for rulemaking. AAR asked the Board to commence a notice-and-comment rulemaking—but *only* in the event that the Board denied the pending motions and held that it had statutory authority to define On-Time Performance. AAR argued that, in its view, the Board did *not* have statutory authority to define On-Time Performance because Congress had delegated that authority to the Federal Railroad Administration and Amtrak—not the Board. Conditional Pet. for Rulemaking, Docket No. EP 726 (Jan. 15, 2015). However, AAR explained, *if* the Board disagreed and intended to create its own On-Time Performance standard, it should do so through notice-and-comment rulemaking rather than adjudication.

The Board decided to proceed through notice-and-comment rulemaking and commenced the instant proceeding on May 15, 2015. JA11. It issued its proposed On-Time Performance rule on December 28, 2015. JA16. The proposed rule provided that: "A train is to be 'on time' if it arrives at its final terminus

no more than five minutes after its scheduled arrival time per 100 miles of operation, or 30 minutes after its scheduled arrival time, whichever is less." JA24.

An overriding concern—repeated in detail throughout the comments—was the potential impact the Board's proposed rule would have on the freight railroads, the many businesses that depend on freight rail for the timely delivery of products or commodities, and the millions of consumers who would be harmed by diminished freight rail capacity. Commenters urged the Board to mitigate any impact on freight traffic by increasing the delay tolerance beyond the 5-minutes-per-100-miles standard with a 30-minute cap. They noted "the widely known fact that most Amtrak schedules are unrealistic, aspirational in nature, and divorced from current real world conditions." JA268.

Holding the freight railroads to a strict delay tolerance based on these unrealistic schedules would harm freight traffic by pressuring freight railroads into degrading their freight service, and unfairly subject freight railroads to federal investigations at Amtrak's request. *See, e.g.*, JA47-48, 52-56, 102, 107-11, 130-32, 160, 179.

In addition to the freight railroads, the United States Department of Transportation filed comments urging the Board to take into account the impact of its On-Time Performance rule on freight traffic. It stated:

> [The Department of Transportation] recognizes that the issues raised in this proceeding have effects beyond the passenger rail network itself, and it is important to keep the freight rail system fluid and efficient. Freight rail

> customers also depend upon this network, and as DOT has explained in other proceedings before the Board, service disruptions in the freight system can have cascading effects upon the rail network as a whole, including passenger rail. In certain instances, such disruptions can also adversely affect safety, as railroads and shippers seek to make up for delays or overcome other obstacles, like extreme weather.

JA33. North Carolina's Department of Transportation echoed the same concern, warning the Board not to overlook the impact on freight traffic, and emphasizing that "both freight and passenger rail operations must maintain a competitive level of reliability to be commercially feasible." JA190.

The Board issued its final rule on July 28, 2016. Pet. App. 19a. It asserted that the D.C. Circuit's invalidation of PRIIA § 207 gave the Board the authority to issue an On-Time Performance rule. The Board acknowledged that PRIIA § 207 "charged Amtrak and the Federal Railroad Administration"—not the Board—"with 'jointly' developing new, or improving existing, metrics and standards for measuring the performance of intercity passenger rail operations, including on-time performance and train delays incurred on host railroads." Pet. App. 21a. The Board reasoned, however, that "the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill by virtue of its authority to adjudicate complaints brought by Amtrak against host freight railroads for violations of Amtrak's statutory preference and to award damages where a preference violation is found." Pet. App. 27a. The

Board insisted that "[a]ny other result would gut the remedial scheme, a result that Congress clearly did not intend." *Id*.

The Board then announced that it was modifying its proposed On-Time Performance measure by abandoning its tiered approach with the 30-minute cap, and replacing it with a blanket 15-minute tolerance regardless of the length of the route. The final rule thus provided that: "An intercity passenger train's arrival at, or departure from, a given station is on time if it occurs no later than 15 minutes after its scheduled time." Pet. App. 40a. Whereas the blanket 15-minute tolerance allowed slightly more tolerance on the shortest routes (200 miles or less) than the Board had originally proposed, it allowed less tolerance on middle and longer routes of 300 miles or more.

Although the freight railroads had argued in their comments that even 30 minutes of tolerance was not enough on the longer routes given the modern freight rail network and the congestion that exists on many routes, the Board did not examine or address how its On-Time Performance rule might affect freight traffic. In fact, the Board did not even acknowledge that AAR, every freight railroad that filed comments, and the United States Department of Transportation had all urged the Board to consider in its rulemaking the importance of maintaining a fluid freight rail network.

6. Respondents challenged the Board's rule in the Eighth Circuit, arguing that the Board lacked statutory authority to issue its On-Time Performance

rule. Amtrak intervened. The court agreed with respondents and invalidated the rule.[3]

The court held that "the Board's interpretation [of PRIIA] contradicts the Act's plain language." Pet. App. 5a. The court began by noting that "[t]he Final Rule expressly bases its authority on the need to fill the vacuum created by the invalidation of the on-time performance rule announced by the FRA and Amtrak under § 207." Pet. App. 11a. It then held this rationale unpersuasive, explaining that "Congress' express delegation to the FRA and Amtrak in § 207(a) overcomes any implied situational authority claimed by the Board under § 213(a)." Pet. App. 12a (citing *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013)). "In sum," the court concluded, "the gap-filling rationale does not allow one agency to assume the authority expressly delegated to another." *Id*.

The court noted that, in defending the rule in court, the Board "has moved away from the gap-filling rationale it asserted when adopting the Final Rule," and urged the court to sustain the rule on its "independent trigger" theory—that the text of Section 213(a) gave the Board independent authority to issue its On-Time Performance rule. Pet. App. 13a. Although the court recognized that it "may uphold the Final Rule only on the basis given when it was adopted," it would nonetheless "give the Board the

[3] Respondents also challenged the rule as arbitrary and capricious because the Board failed to consider the rule's harmful impact on freight traffic, and because the Board's decision to use an "All Stations" approach was misguided. The Eighth Circuit did not reach these challenges because it held that the Board lacked authority to issue the rule at all.

benefit of the doubt and consider its textual argument on the merits." *Id*. at 13a-14a.

The court examined the Board's "independent trigger" theory and found it meritless, concluding that "[t]he Board's interpretation fades in light of [the statute's] full text and context." Pet. App. 16a. First, the court noted that "a term is presumed to have the same meaning throughout the same statute," and "[t]he only place in the PRIIA where on-time performance is described and given an explicit source is § 207(a), which instructs the FRA and Amtrak to 'develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including . . . on-time performance.'" Pet. App. 16a-17a. Second, the court explained, "Congress likely did not give the FRA/Amtrak and the Board separate authority to develop two potentially conflicting on-time performance rules." *Id*. at 17a. For this reason too, "on-time performance in § 213(a) means on-time performance as developed by the FRA and Amtrak under § 207(a)." *Id*. at 18a.

Neither the United States nor Amtrak sought rehearing.

REASONS FOR DENYING THE PETITION

Certiorari is unwarranted because Amtrak's purported "question presented" is not presented and has no bearing on the outcome of this case; because the decision below is correct and does not conflict with decisions of this or any other court; and because this case does not raise issues of "vital national importance"—as underscored by the United States' decision not to seek further review.

I. Amtrak's "Question Presented" Is Not Actually Presented And Resolving It Will Make No Difference To The Outcome.

Amtrak asks this Court to decide a question that is not presented by this case. Amtrak's "Question Presented" asserts that "[i]n promulgating a regulation interpreting 'on-time performance' . . ., the Board held, based on the plain text of the statute, that Section 213 creates two independent triggers." Pet. i. Amtrak then states that "[t]he question presented here is: whether the Board correctly held that it has independent statutory authority to define 'on-time performance' for purposes of the first trigger in PRIIA Section 213." *Id*.

The obvious problem with this "Question Presented" is that the Board "[i]n promulgating [the] regulation interpreting 'on-time performance'" did *not* hold that that it had "independent statutory authority" to define On-Time Performance based on "two independent triggers." To the contrary, the Board asserted that it had authority to define On-Time Performance based on the D.C. Circuit's invalidation of Section 207. As the Eighth Circuit correctly recognized, "[t]he Final Rule expressly bases its authority on the need to fill the vacuum created by the invalidation of the on-time performance rule announced by the FRA and Amtrak under § 207." Pet. App. 11a; *see, e.g*., Pet. App. 27a ("the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill"); *id*. at 26a n.7 (asserting the implicit "authority to fill the definitional gap exposed by the invalidation of a statutory provision").

This Court has declared it a "foundational principle of administrative law that a court may

uphold agency action *only* on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (emphasis added). Thus, even if this Court were to decide the "Question Presented" in Amtrak's favor, it would make no difference to the outcome of this case because the Board's rule cannot be upheld on a theory the Board itself did not articulate when it issued the rule.

Amtrak's attempt to lure this Court into deciding a question that is not actually presented is evident when Amtrak repeatedly cites to "App." in purporting to describe the Board's reasoning in issuing the rule. *See* Pet. 21 (citing App. 53a, 56a), Pet. 25 (citing App. 53a), Pet. 26 (citing App. 54a-55a, 55a n.40, 55a), Pet. 27 (citing App. 56a, 53a). What Amtrak is citing throughout its petition is *not* the On-Time Performance rule or its preamble. Rather, Amtrak is citing a 2014 Board order from a proceeding known as "Illini/Saluki." That order is not the final rule under review.

Although Amtrak contends that the Board's On-Time Performance rulemaking "expressly incorporated" the *Illini/Saluki* order, Pet. 21, that is not correct. The final rule merely cites the order a single time—and for a different point. *See* Pet. App. 25a (stating that in *Illini/Saluki*, "the Board concluded that the unconstitutionality of Section 207 of PRIIA does not prevent the Board from initiating investigations of on-time performance problems under section 24308(c)"). Amtrak errs in claiming that by including a single bare reference to a prior order—and by citing it for a limited and distinct proposition—the Board "expressly incorporated" that prior order, and all of its reasoning, in its entirety.

The Eighth Circuit recognized that the Board issued its rule based on the "gap-filling" rationale, but in the spirit of giving the Board "the benefit of the doubt," it also considered (and rejected) the "independent trigger" rationale. Pet. App. 13a-18a. But the Eighth Circuit's willingness to consider the argument does not change the fact that even if the argument had merit, it cannot affect the outcome of this case because under *Michigan v. EPA*, the Board's rule cannot be upheld on a theory the Board itself did not articulate.

II. The Eighth Circuit's Decision Is Correct And Does Not Conflict With Decisions Of This Or Any Other Court.

Amtrak makes no real effort to establish a conflict. It does not argue that the decision below creates a circuit split. And whereas Amtrak asserts in a section header that the Eighth Circuit's decision "conflicts with this Court's precedent," Pet. 20 (capitalization altered), the discussion that follows fails to identify any conflicts with specific cases.

The main thrust of Amtrak's argument is simply that review is warranted because the Eighth Circuit reached an incorrect result. But this Court does not typically grant review to correct erroneous applications of settled law, *see* S. Ct. Rule 10—and the Eighth Circuit's decision is correct in any event.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The Board, like all federal agencies, "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081

(D.C. Cir. 2001). For that reason, the Board "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Here, because Congress did not confer upon the Board the power to issue its On-Time Performance rule, the Eighth Circuit correctly vacated the rule as exceeding the agency's statutory authority.

A. Congress Granted The FRA And Amtrak, Not The Board, The Authority To Define "On-Time Performance" For Purposes Of Section 213 Proceedings.

The plain language of PRIIA shows that Congress did not delegate to the Board the statutory authority to define "On-Time Performance" for purposes of proceedings under PRIIA § 213.

In PRIIA § 207, Congress expressly gave "the Federal Railroad Administration and Amtrak"—in "consultation" with the Board and other actors—the authority to promulgate "measures of on-time performance." Then, in PRIIA § 213, Congress provided that the Board may (and in some cases must) begin an investigation when that On-Time Performance measure, or other metrics and standards issued pursuant to PRIIA § 207, are not satisfied.

The congressional design of PRIIA is clear. As the D.C. Circuit explained, Section 207 "provides the means for devising the metrics and standards, [while Section] 213 is the enforcement mechanism." *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013). Congress, as it often does, deliberately assigned the rulemaking power and the investigatory and enforcement power "to two *different* administrative authorities" in order to "achieve a greater separation of functions than exists within the

traditional 'unitary' agency." *Martin v. OSHRC*, 499 U.S. 144, 151 (1991). Congress wanted the FRA and Amtrak to define what constituted satisfactory On-Time Performance for Amtrak trains, and then allow the Board to conduct investigations when that standard was not met.

When Congress has expressly delegated authority to a particular agency to issue a rule, a different agency lacks the power to issue that rule. The express grant of rulemaking authority to the FRA and Amtrak precludes a finding that Congress made an implied grant of authority to the Board to issue the same rule. Indeed, finding both an express delegation to the FRA and Amtrak and an implied delegation to the Board would ascribe to Congress a taste for the absurd. Congress could not possibly have desired the creation of two potentially conflicting On-Time Performance standards, an outcome that would place host railroads in the untenable position of operating under conflicting regulations. Because courts do not presume that Congress acts irrationally, there is no basis for claiming that hidden within PRIIA § 213 is an implied delegation of authority to the Board to define On-Time Performance.

The Eighth Circuit's approach is consistent with the Eleventh Circuit's decision in *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013). In that case, Congress granted the Department of Homeland Security the authority to issue rules implementing the H-2B visa program for temporary foreign workers and confined the Department of Labor ("DOL") to a consulting role. *Id.* at 1084. When DOL nonetheless issued rules implementing the program—claiming, just as the Board did here, an implied authority to engage in

rulemaking on the theory that its rulemaking power "may be inferred from the statutory scheme"—the court held that "DOL has exercised a rulemaking authority that it does not possess." *Id*. at 1083-85 (quotation omitted). The court explained:

> DOL [ ] argues that the 'text, structure and object' of the [federal immigration statute] evidence a congressional intent that DOL should exercise rulemaking authority over the H-2B program. This would be a more appealing argument if Congress had not expressly delegated that authority to a different agency. Even if it were not axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegated to it by Congress, we would be hard-pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency.

Id. at 1084-85 (citation omitted). Here, because Congress gave the FRA and Amtrak the power to define On-Time Performance for purposes of Section 213 investigations, it follows that Congress did *not* give that power to the Board. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quotation omitted).

Finally, the Eighth Circuit correctly held that the Board was not entitled to *Chevron* deference. Pet. App. 14a. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority," *Adams Fruit Co. v. Barrett*, 494 U.S. 638,

649 (1990), and "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013). As shown above, Congress gave the rulemaking power to the FRA and Amtrak, not the Board.

B. The "Independent Trigger" Rationale Is Meritless.

As shown above, deciding Amtrak's "Question Presented"—whether Section 213 contains an "independent trigger" for On-Time Performance—would have no bearing on the outcome of this case because the Board did not provide this rationale when it issued the rule. *See Michigan v. EPA*, 135 S. Ct. at 2710. But it fails on the merits in any event. Sections 207 and 213 were enacted together and must be read together. The "On-Time Performance" standard applied by the Board in Section 213 is the "On-Time Performance" standard issued by the FRA and Amtrak under Section 207.

Whereas Section 213 contains two separate investigatory triggers, Congress gave the FRA and Amtrak rulemaking authority as to *both* triggers—On-Time Performance as well as service quality. The statutory text and structure make this clear:

> PRIIA § 207(a): "The Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board [and others], develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including . . . **on-time performance**

> . . . . Such metrics, at a minimum, shall include . . . measures of **on-time performance** . . . ."
>
> PRIIA § 213(a): "If the **on-time performance** of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters, or the service quality of intercity passenger train operations for which minimum standards are established under section 207 of [PRIIA] fails to meet those standards for 2 consecutive calendar quarters, the Surface Transportation Board . . . may [or upon the request of Amtrak or others, shall] initiate an investigation . . . ."

PRIIA § 207, codified at 49 U.S.C. § 24101 note; PRIIA § 213, codified at 49 U.S.C. § 24308(f)(1) (emphases added).

Congress expressed the triggers for investigation as it did not because it wanted On-Time Performance defined by different agencies; rather, Congress expressed them separately because it set forth a more specific compliance level for an On-Time Performance standard (80 percent or better compliance) than for the other metrics and standards to be established under Section 207 (compliance generally).

Amtrak's argument—that Congress expressly directed the FRA and Amtrak to issue an "On-Time Performance" standard in Section 207, and at the same time silently authorized the Board to issue and apply a competing "On-Time Performance" standard in Section 213—is not plausible. Courts "presume that the same term has the same meaning when it occurs here and there in a single statute." *Envtl. Def.*

v. Duke Energy Corp., 549 U.S. 561, 574 (2007). Amtrak's argument defies this basic rule of statutory construction by viewing Section 213 in isolation, rather than by reading it in conjunction with the simultaneously-enacted Section 207. When the two provisions are read together, as they must be, there can be no serious dispute that by using the same term in two neighboring provisions that are expressly linked and designed to work together, Congress intended that "same term [to have] the same meaning." *Envtl. Def.*, 549 U.S. at 574.

In hopes of bolstering its strained reading, Amtrak notes that in Section 213, Congress used the words "on-time performance" for the first trigger, and "minimum standards . . . established under section 207" for the second trigger, asking this Court to infer that the first trigger must refer to something other than the On-Time Performance standard issued under Section 207. Pet 22-23. There is a simpler explanation. Congress had just expressly directed the FRA and Amtrak to issue an "On-Time Performance" standard, so it did not need to "clarify" that it was referring to the "On-Time Performance" standard issued under Section 207. However, as to the second trigger, Congress did not know all of the "service quality" standards the FRA and Amtrak would develop using their authority under Section 207. Although Congress specified many of the standards, it directed the FRA and Amtrak to go beyond the specified list. *See* PRIIA § 207(a) (authorizing issuance of standards "including" the ones specified, and expressly directing issuance of standards governing "other" unspecified services). Thus, because it was impossible when drafting the statute for Congress to identify by name every standard the FRA and Amtrak might decide in the future to

develop, Congress had no choice but to describe this indeterminate group by reference to the authorizing statute.

Amtrak errs in contending, Pet. 25, that Congress must have intended to give the Board rulemaking power because it codified PRIIA § 213 in a section of the Code detailing the Board's enforcement authority. In truth, Congress codified Section 213 in a section of the U.S. Code that falls *outside* the Board's general rulemaking power. Congress provided in 49 U.S.C. § 1321 that "[t]he Board may prescribe regulations in carrying out this chapter and subtitle IV"—but PRIIA § 213 *is not located* within the relevant chapter or subtitle IV.[4] For this reason, the Board's invocation of its general rulemaking power in the "Authority" line for this rulemaking is inexplicable. *See* Pet. App. 40a. One of the enduring mysteries of this case is why the Board cited as the legal "Authority" for this rulemaking a statutory provision that plainly does not authorize this rulemaking.

Amtrak argues that the Board's rulemaking is consistent with Congress' intent that the Board have the authority to begin investigating on-time performance complaints immediately. Pet. 24-25. But there is no language in the statute suggesting that Congress wanted the Board to commence "immediate" investigations before the FRA and Amtrak issued an On-Time Performance rule. As the Board itself acknowledged in its comments on the FRA and Amtrak's draft rule, "[o]nce the metrics and

[4] The chapter referred to in the statute is Chapter 13 of Title 49, subtitle II, encompassing 49 U.S.C. §§ 1301-1326. Likewise, subtitle IV encompasses 49 U.S.C. §§ 10101-16106. PRIIA § 213, which is codified within subtitle V, at 49 U.S.C. § 24308(f), falls outside both ranges.

standards are finalized, PRIIA gives STB new responsibilities with respect to the performance and service quality of Amtrak trains." Comments of the STB (Mar. 27, 2009) (emphasis added). And whereas Amtrak notes that Congress tried to prevent undue delay by providing for binding arbitration if the FRA and Amtrak had not issued an On-Time Performance rule within 180 days, *see* Pet. 24 (citing PRIIA § 207(d)), that provision actually undercuts Amtrak's argument. The mechanism Congress chose for avoiding undue delay in getting the statutory scheme up and running was to have an arbitrator resolve any impasse; it was not for the Board to go ahead and issue an On-Time Performance rule itself.

III. This Is Not A Case Of Exceptional Importance.

Because the Eighth Circuit's decision does not conflict with decisions from this or any other court, Amtrak argues strenuously that the decision below "implicates questions of vital national importance that warrant this Court's review." Pet. 15 (capitalization altered). That claim is not accurate. The Board and the Solicitor General declined to file a cert petition on behalf of the United States. Their silence speaks powerfully. It demonstrates that the decision below does *not* raise questions of "vital national importance."

Amtrak is wrong in claiming that the Eighth Circuit's invalidation of the On-Time Performance rule "frustrates Congress's objectives" in enacting PRIIA. Pet. 15. Even assuming that Congress had the objective of improving Amtrak's on-time performance, that does not give a court the right to ignore the *means* that Congress established for achieving that objective. Courts and agencies alike

are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994). Here, Congress expressly delegated rulemaking authority to the FRA and Amtrak, and confined the Board to a "consult[ing]" role. PRIIA § 207(a). Those specific means cannot be overridden by general appeals to congressional objectives.

In an attempt to create the impression that the United States agrees with its position, Amtrak excerpts statements from the Government's briefs in *a different case*. *See* Pet. 15-16 (quoting briefs filed in No. 13-1080, *Dep't. of Transp. v. Ass'n of Am. R.Rs.).* That case concerned the D.C. Circuit's striking down PRIIA Section 207 as unconstitutional. This case, in contrast, concerns the Eighth Circuit's determination that the Board lacked statutory authority to issue an On-Time Performance rule. If the United States believed the concerns it raised in No. 13-1080 applied equally to this case, it would have filed its own cert petition, but it did not. For that reason, Amtrak's complaint that the Eighth Circuit "overruled the authoritative interpretation of the statute given by the agency Congress charged with enforcing Section 213" rings hollow. Pet. 16. That agency is not asking this Court to review the Eighth Circuit's decision.

Amtrak's concern that the remedial scheme would be undercut if the power to define On-Time Performance went unexercised, Pet. 16, overlooks that in our system of separated powers, it is Congress that determines who shall exercise that power. The Board may not rewrite PRIIA to conform to what it speculates Congress "would have wanted" had it

known its delegation to the FRA and Amtrak would be invalidated. As this Court explained in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996), neither a court nor an agency is "free to rewrite the statutory scheme in order to approximate what [it] think[s] Congress might have wanted had it known that [enacting the statute] was beyond its authority. If that effort is to be made, it should be made by Congress."

In discussing the history of Amtrak and the events giving rise to PRIIA, Amtrak erroneously asserts that freight railroads were disregarding their obligation to afford preference to Amtrak trains. Pet. 6-7. In reality, there are many factors that can affect Amtrak's performance, and no determination has been made that there have been any preference violations. Instances of Amtrak's poor on-time performance are attributable to, among other things, schedules that are in many cases outdated and unrealistic, as well as events outside the control of the parties, such as bad weather and grade-crossing accidents.

Next, Amtrak insists that "the practical consequences to the Nation's transportation infrastructure" that will "inevitably result" are "monumental." Pet. 17. This is hyperbole. For one thing, there has not been an operative On-Time Performance standard in most of the years since PRIIA's enactment—and the nation's transportation infrastructure has survived. Moreover, the Attorney General retains the authority to enforce Amtrak's rights under the Rail Passenger Service Act in federal court. *See* 49 U.S.C. § 24103. If the Eighth Circuit's decision truly portended dire consequences for the transportation infrastructure, surely the United

States would have sought this Court's review. In any event, nothing prevents Congress from filling what Amtrak contends is a regulatory gap.

Finally, Amtrak argues that the Eighth Circuit's decision "in effect . . . expands the constitutional invalidation" of PRIIA § 207. Pet. 18. But as Amtrak ruefully concedes, *id*. at 19, "the Eighth Circuit's decision here rested on *statutory* grounds." The Eighth Circuit simply did not address or decide any constitutional questions, so certiorari is unwarranted on that basis.

IV. There Is No Reason To Hold Amtrak's Petition.

In closing, Amtrak makes a half-hearted request that this Court hold its petition pending the D.C. Circuit's ruling in No. 17-5123. But Amtrak identifies no plausible reason why this Court should do so—and there is none.

Regardless of how the D.C. Circuit resolves the Government's "severability" argument in that case, the Board lacks the statutory authority to issue an On-Time Performance rule. If the D.C. Circuit adheres to its prior determination that Section 207's grant of rulemaking authority to Amtrak and the FRA is unconstitutional, that would not have the effect of transferring the invalidated authority to the Board. An agency's authority to promulgate rules must come from Congress. *Bowen*, 488 U.S. at 208. If Congress, when it enacted PRIIA, did not give the Board the authority to define On-Time Performance, a subsequent judicial decision striking down the delegation to the FRA and Amtrak does not somehow redirect that delegation to the Board. Delegation is a matter of legislative intent, not judicial interpretation. The relevant question—what

authority Congress delegated in 2008 when it enacted PRIIA—is not something that can be changed by subsequent developments.

The absence of any good reason to hold this petition is reflected in Amtrak's inability to provide any coherent explanation as to how the D.C. Circuit's decision would affect this Court's review of the Eighth Circuit's ruling. *See* Pet. 33 (vaguely stating only that "[t]his Court might choose to address the question presented here . . . with the benefit of the D.C. Circuit's resolution of Section 207's status"). Accordingly, the proper disposition is for this Court to deny rather than hold Amtrak's petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KATHRYN D. KIRMAYER
DANIEL SAPHIRE
TIMOTHY J. STRAFFORD
ASSOCIATION OF AMERICAN RAILROADS
425 Third Street SW
Suite 1000
Washington, DC 20024
(202) 639-2100

THOMAS H. DUPREE JR.
Counsel of Record
MICHAEL K. MURPHY
DAVID A. SCHNITZER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Respondents Union Pacific Railroad Co., et al.