

No. 13-1080

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**In the Supreme Court of the United States**

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DEPARTMENT OF TRANSPORTATION, ET AL.,

*Petitioners,*

v.

ASSOCIATION OF AMERICAN RAILROADS,

*Respondent.*

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

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**BRIEF OF ASSOCIATION OF INDEPENDENT  
PASSENGER RAIL OPERATORS AS *AMICUS  
CURIAE* IN SUPPORT OF RESPONDENT**

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CHARLES M. WOODWORTH	RICHARD B. KATSKEE
<i>Mayer Brown LLP</i>	<i>Counsel of Record</i>
<i>71 South Wacker Drive</i>	CRAIG W. CANETTI
<i>Chicago, Illinois 60606</i>	<i>Mayer Brown LLP</i>
<i>(312) 782-0600</i>	<i>1999 K Street, NW</i>
	<i>Washington, DC 20006</i>
	<i>(202) 263-3000</i>
	<i>rkatskee@mayerbrown.com</i>

*Counsel for Amicus Curiae*

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## TABLE OF CONTENTS

	<b>Page</b>
Table of Authorities.....	ii
Interest of the <i>Amicus Curiae</i> .....	1
Introduction and Summary of Argument.....	2
Argument.....	6
Section 207 Of The PRIIA Impermissibly Confers On Amtrak Regulatory Authority Over Its Competitors In The Passenger-Rail Industry. ....	6
A. The Provision Of Passenger-Rail Service Is A Competitive Industry In Which Amtrak Is But One Competitor. ....	6
B. Section 207 Unconstitutionally Delegates To Amtrak Regulatory Authority Over Amtrak’s Direct Competitors In The Passenger-Rail Industry.....	10
1. Amtrak’s Section 207 standards expressly apply to all intercity passenger trains, not just to Amtrak’s trains.....	13
2. Amtrak’s Section 207 standards may trigger STB investigations and enforcement actions against Amtrak’s competitors. ....	15
3. Amtrak’s Section 207 standards govern the selection of operators to assume Amtrak’s existing intercity routes. ....	17
4. Grant applications under the PRIIA are subject to Amtrak’s Section 207 standards. ....	18
Conclusion .....	20

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936).....	<i>passim</i>
<i>Nat’l R.R. Passenger Corp. v. Atchison, Topeka &amp; Santa Fe Ry. Co.</i> , 470 U.S. 451 (1985) .....	6, 11
<i>Washington ex rel. Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928).....	3
<b>STATUTES AND REGULATIONS</b>	
Amtrak Improvement Act of 1973, Pub. L. No. 93–146, 87 Stat. 548 .....	6, 7
49 U.S.C. § 24308.....	7
Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105–134, 111 Stat. 2570 .....	7, 8
Passenger Rail Investment & Improvement Act of 2008, Pub. L. No. 110–432, Div. B, 122 Stat. 4848 .....	<i>passim</i>
PRIIA § 207, 49 U.S.C. § 24101.....	<i>passim</i>
PRIIA § 213, 49 U.S.C. § 24308.....	<i>passim</i>
PRIIA § 214, 49 U.S.C. § 24711.....	5, 9, 17, 18
PRIIA § 217, 49 U.S.C. § 24702.....	8
PRIIA § 301, 49 U.S.C. § 24402.....	5, 8, 18, 19
Rail Passenger Service Act of 1970, Pub. L. No. 91–518, 84 Stat. 1327.....	6
49 U.S.C. § 24301 .....	11

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
49 U.S.C. § 24701 .....	8
 <b>OTHER AUTHORITIES</b>	
Amtrak Reform Council, Background Information, <a href="http://tinyurl.com/k33mdr2">http://tinyurl.com/k33mdr2</a> .....	8
Amtrak Reform Council, <i>Report to Congress: An Action Plan For The Restructuring And Rationalization Of The National Intercity Rail Passenger System</i> (Feb. 7, 2002), available at <a href="http://tinyurl.luzssgd">http://tinyurl.luzssgd</a> .....	6
<i>Hoosier State Passenger-Rail Service Extended Through January</i> , Progressive Railroading, Aug. 21, 2014, <a href="http://tinyurl.com/n3aec71">http://tinyurl.com/n3aec71</a> .....	9
H.R. Rep. No. 91–1580 .....	11
<i>INDOT Receives Four Proposals For Hoosier State Passenger-Rail Service</i> , Progressive Railroading, May 6, 2014, <a href="http://tinyurl.com/ol22rddy">http://tinyurl.com/ol22rddy</a> .....	9
Mich. Dep’t of Transp., <i>State Long-Range Transportation Plan 2005-2030: Intercity Passenger Technical Report</i> (Nov. 8, 2006), available at <a href="http://tinyurl.com/mwkoveb">http://tinyurl.com/mwkoveb</a> .....	7
National R.R. Passenger Corp., <i>Freedom Of Information Act Handbook</i> (2008).....	11
Okla. Dep’t of Transp., <i>Oklahoma Statewide Freight And Passenger Rail Plan</i> (May 2012), <a href="http://tinyurl.com/mq42fg5">http://tinyurl.com/mq42fg5</a> .....	7

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
Press Release, Gov. Dannel P. Malloy, State of Connecticut, Gov. Malloy: State to Seek Providers for New Haven–Hartford–Springfield Passenger Rail Service (Apr. 2, 2014), <a href="http://tinyurl.com/mcl4q">http://tinyurl.com/mcl4q</a> .....	10
Tex. Dep’t of Transp., Rail Div., Request for Information for Intercity Passenger Transit Service Opportunities—Rail or Bus (due Aug. 18, 2014), <a href="http://tinyurl.com/jw3swmz">http://tinyurl.com/jw3swmz</a> .....	10
Wash. Dep’t of Transp., RFI-2014-0409, Cascades Intercity Passenger Rail Service Opportunities (Apr. 9, 2014), <a href="http://tinyurl.com/mcahm34">http://tinyurl.com/mcahm34</a> .....	9
Wash. Dep’t of Transp., RFI-2014-0409, Status Update: May 2014 (May 2014), <a href="http://tinyurl.com/klhyv3t">http://tinyurl.com/klhyv3t</a> .....	9, 10

**BRIEF OF ASSOCIATION OF INDEPENDENT  
PASSENGER RAIL OPERATORS AS *AMICUS  
CURIAE* IN SUPPORT OF RESPONDENT**

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**INTEREST OF THE *AMICUS CURIAE***

The Association of Independent Passenger Rail Operators is a trade association that promotes the expansion of passenger-rail service in the United States both by cultivating broad understanding of the ways that our nation's passenger-rail infrastructure benefits the public and by encouraging the development of a dynamic and competitive marketplace for passenger-rail services. AIPRO strives to foster a renaissance in rail travel by encouraging the adoption of commonsense federal legislation that will establish comprehensive federal standards for competition and excellence in rail operations while simultaneously providing the States with freedom to innovate in order to meet the unique needs of their citizens.<sup>1</sup>

AIPRO was formed in response to, and to further the objectives of, the federal statute at issue in this case—the Passenger Rail Investment & Improvement Act of 2008, Pub. L. No. 110–432, Div. B, 122 Stat. 4848, 4907. The PRIIA affords States the freedom to choose the passenger-rail carriers that serve them. It also created the first-ever federal program to support initiatives by the States to revitalize high-

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<sup>1</sup> *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

speed and intercity passenger-rail corridors, expand competition in passenger-rail service, and give States a greater role in policymaking about the passenger-rail options available to their citizens.

The independent railroads that are AIPRO's members are world-class innovators in passenger rail. Together, they carry 80 million passengers on more than 250,000 train trips in the United States and more than 1 billion passengers worldwide each year. Although AIPRO itself was formed just a few years ago to help achieve the PRIIA's vision of greatly enhanced competition in passenger-rail service in the United States, AIPRO's members have long competed directly with Amtrak for commuter-rail operations; and the PRIIA's framework for expanded competition is creating new opportunities for AIPRO's members to compete directly with Amtrak for intercity passenger-rail routes and operations as well. Accordingly, AIPRO's members have a strong interest in ensuring that federal regulatory authority over intercity passenger rail is exercised in a manner that is both fair and consistent with the United States Constitution.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

When Amtrak was first created, it effectively became the nation's sole provider of intercity passenger-rail service. At that time, the special powers and preferences that Congress granted to Amtrak did not disadvantage any other passenger-rail providers, because there were none. Today Amtrak is no longer a monopoly; the passenger-rail industry is now a highly competitive one. Yet Section 207 of the PRIIA confers on Amtrak the ability to regulate the entire industry.

It has long been settled that Congress may not delegate such regulatory authority to a private entity. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-311 (1936). Because regulation is “necessarily a governmental function,” not a “private activity,” a statute that “attempts to confer such power [on a private party] undertakes an intolerable and unconstitutional interference with personal liberty and private property.” *Id.* at 311. As the decision of the court of appeals explains, *Carter Coal* recognized that “delegations to private entities are particularly perilous” because those entities “are not bound by any official duty,’ but may instead act ‘for selfish reasons or arbitrarily.’” Pet. App. 19a (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928)).

The PRIIA violates this constitutional proscription against delegation of governmental authority by making Amtrak—a private, for-profit corporation—at least coequal with the Federal Railroad Administration in imposing “metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations” (PRIIA § 207(a), 49 U.S.C. § 24101 (note))—standards that the PRIIA incorporates into a host of regulations that other passenger and freight railroads must satisfy or else be subject to penalties for noncompliance. The statute thus empowers Amtrak to exercise governmental authority to advance its own interests, even at others’ expense.

For example, Amtrak’s trains operate almost entirely on tracks owned by freight railroads, and hence Amtrak “compete[s] with [the freight operators] for use of their scarce track.” Pet. App. 19a. The metrics and standards that Amtrak sets with the



FRA under Section 207 “define the circumstances” under which the Surface Transportation Board will investigate whether a freight railroad has met its “statutory obligation to accord preference to Amtrak’s trains” in using the freight railroads’ tracks. Pet. App. 11a. AIPRO agrees with the court of appeals and the respondent that Section 207 thus “grants Amtrak a distinct competitive advantage” over other railroads by allowing it to set the terms for giving its own trains priority to use tracks that Amtrak does not own, rather than making Amtrak build its own tracks, pay extra to have its trains put first in line on others’ tracks, or wait its turn and suffer the lost revenues that slower service and delays may cause. Pet. App. 19a.

But that is not all. Although “Amtrak may not compete with the freight railroads for customers” (Pet. App. 19a), it *does* compete head-to-head for customers and routes with private, independent passenger railroads, including AIPRO’s members. And Section 207 gives Amtrak a distinct, direct, and unfair advantage in that competition by making it the regulator for the entire industry, of which it is but one member. Congress’s conferral on Amtrak of the authority to regulate the affairs both of host railroads and of all other providers of intercity passenger-rail service is precisely what this Court has declared to be “legislative delegation in its most obnoxious form.” *Carter Coal*, 298 U.S. at 311.

The resulting harms to Amtrak’s competitors and to free and open competition are substantial. First of all, the PRIIA provides that the failure of any intercity passenger train to satisfy the Amtrak-crafted Section 207 performance standards may trigger an investigation by the STB “to determine whether and

to what extent” the underperformance is “due to causes that could reasonably be addressed by” the “intercity passenger rail operator[].” PRIIA § 213(a), 49 U.S.C. § 24308(f)(1). In other words, Amtrak’s setting of industry performance standards directly affects whether and when its competitors may be subjected to regulatory-enforcement actions by the STB. Beyond that, when rail carriers seek through a competitive-bidding process to win a contract for an intercity passenger route currently held by Amtrak, their bids must be “evaluat[ed] \* \* \* against the financial and performance metrics developed” by Amtrak under Section 207 (PRIIA § 214(a), 49 U.S.C. § 24711(a)(4)), and the winning bidder’s contract must then incorporate those standards (*id.* § 24711(a)(5)(A)). Additionally, when States apply for federal grants to improve infrastructure for intercity passenger service, their applications must be “measured against” the Section 207 standards. PRIIA § 301, 49 U.S.C. § 24402(c)(2)(A)(i). Thus, although States are supposed to be free to contract with Amtrak or another provider for passenger-rail service, their efforts to upgrade the tracks and stations for that service are conditioned by the regulatory requirements that Amtrak has set. The terms of any grants that they receive will therefore be geared to Amtrak’s needs and expectations, regardless of whether those are appropriate arrangements for other potential bidders, for the contracting States, or for the train-riding public.

As the D.C. Circuit explained, “[p]erverse incentives abound.” Pet. App. 20a. The point of the non-delegation principle is that governmental regulation should “look to the public good, not private gain.” Pet. App. 19a. But nothing in the PRIIA “restrains [Amtrak] from devising metrics and standards that

inure to its own financial benefit rather than the common good.” Pet. App. 20a. Accordingly, the court of appeals correctly held that it is an unconstitutional delegation of legislative authority. The judgment should be affirmed.

## ARGUMENT

### SECTION 207 OF THE PRIIA IMPERMISSIBLY CONFERS ON AMTRAK REGULATORY AUTHORITY OVER ITS COMPETITORS IN THE PASSENGER-RAIL INDUSTRY.

#### A. The Provision Of Passenger-Rail Service Is A Competitive Industry In Which Amtrak Is But One Competitor.

The Rail Passenger Service Act of 1970, Pub. L. No. 91–518, 84 Stat. 1327, had the effect of creating for Amtrak a monopoly over intercity passenger-rail service in the United States. See Amtrak Reform Council, *Report to Congress: An Action Plan For The Restructuring And Rationalization Of The National Intercity Rail Passenger System* 1 (Feb. 7, 2002) (describing Amtrak as “a monopoly operator”), available at <http://tinyurl.luzssgd>. The purpose of that Act was to “reinvigorate a national passenger rail system that had \* \* \* grown moribund and unprofitable” by authorizing private railroads to transfer to Amtrak their “common carrier obligation to offer intercity passenger service.” Pet. App. 3a. In exchange for being relieved of this obligation, the freight railroads agreed to permit Amtrak to use their tracks and other facilities for Amtrak’s intercity passenger service. Pet. App. 3a; see also *Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 454-455 (1985). Congress later mandated that Amtrak’s passenger trains would “be accorded preference over freight trains in the use of any given line

of track, junction, or crossing” in order to facilitate speedy passenger service using the freight railroads’ tracks. Amtrak Improvement Act of 1973, Pub. L. No. 93–146, § 10, 87 Stat. 548, 550; see 49 U.S.C. § 24308(c) (current enactment). Today, as a result, “roughly 97% of the track over which Amtrak runs its passenger service” is owned by private freight railroads. Pet. App. 4a.

In recent years, however, Congress has laid the foundation for reintroducing competition into the market for intercity passenger-rail service. In this new environment, States may contract with rail carriers and other service providers to operate and maintain intercity passenger trains and the railway infrastructure over which they run. See, e.g., Mich. Dep’t of Transp., *State Long-Range Transportation Plan 2005-2030: Intercity Passenger Technical Report* iii, 1 (Nov. 8, 2006) (“MDOT uses state and/or federal funds to contract with the carriers to provide route service that would not otherwise exist,” and “provides state and/or federal funds to enhance the intercity passenger infrastructure”), *available at* <http://tinyurl.com/mwkoveb>; Okla. Dep’t of Transp., *Oklahoma Statewide Freight And Passenger Rail Plan* 11-17 (May 2012) (“the operation of the *Heartland Flyer* is governed by an operating agreement between Amtrak and the States of Oklahoma and Texas” that “outline[s] the services to be provided, the responsibility for the provision of certain facilities and equipment, and the payments to be made by the parties”), *available at* <http://tinyurl.com/mq42fg5>.

The first important move toward this new competitive regime was Congress’s enactment of the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105–134, 111 Stat. 2570, which terminated

Amtrak’s monopoly over intercity service. See Amtrak Reform Council, Background Information, <http://tinyurl.com/k33mdr2> (last updated Apr. 30, 2002) (“[t]his Act (P.L. 105-134) provided that Amtrak \* \* \* would no longer \* \* \* hold a rail passenger monopoly”); 49 U.S.C. § 24701 (Historical And Statutory Notes) (explaining that the 1997 amendments repealed the former requirement that “a person may provide intercity rail passenger transportation over a route over which Amtrak provides scheduled intercity rail passenger transportation \* \* \* only with the consent of Amtrak”). Then, in 2008, Congress passed the PRIIA, which includes a number of provisions designed to foster competition in intercity passenger-rail service:

- Section 217 authorizes States to select “an entity other than Amtrak to provide services required for the operation of an intercity passenger train route \* \* \*.” PRIIA § 217, 49 U.S.C. § 24702 (note).
- Section 301(a) authorizes the Secretary of Transportation to “make grants \* \* \* to assist in financing the capital costs of facilities, infrastructure, and equipment necessary to provide or improve intercity passenger rail transportation.” PRIIA § 301(a), 49 U.S.C. § 24402(a)(1). A State that applies for a grant must either “select[] the proposed operator of its service competitively” or “provide written justification to the Secretary showing why the proposed operator is the best, taking into account price and other factors, and that use of the proposed operator will not unnecessarily increase the cost of the project.” PRIIA § 301(b), 49 U.S.C. § 24402(b)(3).

- Section 214 directs the Federal Railroad Administration to establish an Alternate Passenger Rail Service Pilot Program, under which “a rail carrier or rail carriers that own infrastructure over which Amtrak operates a[n] [intercity] passenger rail service route” may “petition the Administration to be considered as a passenger rail service provider over that route *in lieu of Amtrak* \* \* \*.” PRIA § 214(a), 49 U.S.C. § 24711(a)(1) (emphasis added).

The healthy competition that Congress cultivated has begun to take root. For example, an AIPRO member and three other railroads responded to a Request for Proposals from the Indiana Department of Transportation to operate the Hoosier State passenger-rail service between Indianapolis and Chicago, and the State has selected a new operator.<sup>2</sup> Washington and Oregon have issued a Request for Information regarding the Cascades Intercity Passenger Rail Service to determine a pathway to full competition and identify service providers.<sup>3</sup> Texas has issued a similar Request concerning the Heartland Flyer Service between Fort Worth and Oklaho-

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<sup>2</sup> See *INDOT Receives Four Proposals For Hoosier State Passenger-Rail Service*, Progressive Railroading, May 6, 2014, <http://tinyurl.com/ol22rdy>; *Hoosier State Passenger-Rail Service Extended Through January*, Progressive Railroading, Aug. 21, 2014, <http://tinyurl.com/n3aec7l>.

<sup>3</sup> See Wash. Dep’t of Transp., RFI-2014-0409, Cascades Intercity Passenger Rail Service Opportunities (Apr. 9, 2014), *available at* <http://tinyurl.com/mcahm34>; Wash. Dep’t of Transp., RFI-2014-0409, Status Update: May 2014 (May 2014), *available at* <http://tinyurl.com/klhyv3t>.

ma City.<sup>4</sup> And Connecticut has announced that it will launch a competition for additional passenger service between New Haven, Hartford, and Springfield.<sup>5</sup> AIPRO members have submitted or expect to submit information and bids on many of these. See, e.g., Wash. Dep’t of Transp., RFI-2014-0409, Status Update: May 2014 (May 2014) (AIPRO and AIPRO members First Transit, Inc., Herzog Transit Services, Inc., Keolis America, Inc., and Veolia Transportation responded to Request for Information), *available at* <http://tinyurl.com/klhyv37>.

Yet as we next explain, Section 207 undermines this expanding competition in the provision of intercity passenger-rail service by vesting one firm—Amtrak—with regulatory authority over matters affecting the entire industry. It thereby contravenes the nondelegation doctrine’s fundamental principle that federal regulation must “look to the public good, not private gain.” Pet. App. 19a.

**B. Section 207 Unconstitutionally Delegates To Amtrak Regulatory Authority Over Amtrak’s Direct Competitors In The Passenger-Rail Industry.**

As the D.C. Circuit explained below, this Court’s decision in *Carter Coal* “specifically condemned delegations made not ‘to an official or an official body,

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<sup>4</sup> See Tex. Dep’t of Transp., Rail Div., Request for Information for Intercity Passenger Transit Service Opportunities—Rail or Bus (due Aug. 18, 2014), *available at* <http://tinyurl.com/jw3swmz>.

<sup>5</sup> See Press Release, Gov. Dannel P. Malloy, State of Connecticut, Gov. Malloy: State to Seek Providers for New Haven–Hartford–Springfield Passenger Rail Service (Apr. 2, 2014), *available at* <http://tinyurl.com/mcl4qlg>.

presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.” Pet. App. 19a (quoting *Carter Coal*, 298 U.S. at 311). The Court stated unequivocally that “in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor.” *Carter Coal*, 298 U.S. at 311. But that is precisely what Section 207 does.

As an initial matter, there can be no serious doubt that Amtrak is a private entity. Congress, this Court, and Amtrak itself have all expressly acknowledged that Amtrak “is not a department, agency, or instrumentality of the United States Government.” 49 U.S.C. § 24301(a)(3); see also *Nat’l R.R. Passenger Corp.*, 470 U.S. at 454 (Amtrak “is not ‘an agency or establishment’ of the Government”) (quoting H.R. Rep. No. 91–1580, at 5); *Nat’l R.R. Passenger Corp., Freedom Of Information Act Handbook 1* (2008) (“The National Railroad Passenger Corporation, also known as Amtrak, is not a government agency or establishment [but] a private corporation operated for profit.”). Accordingly, the court of appeals correctly concluded that, “by designing Amtrak to operate as a private corporation—to seek profit on behalf of private interests—Congress has elected to deny itself the power to delegate it regulatory authority under § 207.” Pet. App. 23a.

Yet Section 207 does exactly that. It provides that “the Federal Railroad Administration and Amtrak shall jointly \* \* \* develop” performance metrics and standards applicable to intercity passenger-rail operations. PRIIA § 207(a), 49 U.S.C. § 24101 (note). By requiring the FRA and Amtrak to develop these standards “jointly,” Section 207 unconstitu-



tionally places Amtrak at least on par with the FRA as a regulator of intercity passenger-rail service—a status that no other service-provider shares. And the PRIIA goes even further: It requires the FRA either to accept the metrics and standards favored by Amtrak or to submit the determination of the standards “to an arbitrator the agency would have had no hand in picking.” Pet. App. 15a. As such, Section 207 effectively assigns to Amtrak or a private arbitrator the FRA’s regulatory power: Either the agency must accept Amtrak’s preferred standards or an arbitrator may impose those standards even over the agency’s strenuous objection. Pet. App. 10a (“Should the FRA prefer an alternative to Amtrak’s proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak’s permission.”).

As explained below, the PRIIA then incorporates Amtrak’s metrics and standards into a host of regulatory requirements that are binding on and enforceable against other railroads. The PRIIA thereby makes other railroads subject to regulatory action and regulatory penalties for noncompliance with Amtrak’s standards (or for contributing, even if only indirectly, to Amtrak’s own noncompliance with those standards). And it distorts both federal grant-making and the awarding of state contracts to bidder railroads by conditioning awards of federal funds on compliance with Amtrak’s standards. In short, the practical effect of the PRIIA is that a private party directly exercises federal regulatory authority over the industry in which it participates—precisely what this Court condemned in *Carter Coal*.

1. *Amtrak's Section 207 standards expressly apply to all intercity passenger trains, not just to Amtrak's trains.*

By its plain language, Section 207 empowers Amtrak to regulate its competitors directly. In pertinent part, that Section provides:

the [FRA] 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 \* \* \*.

PRIIA § 207(a), 49 U.S.C. § 24101 (note). In other words, Section 207 directs Amtrak and the FRA to devise performance standards for “intercity rail passenger train operations” generally, not just for Amtrak’s own operations. And because, as explained above, the PRIIA expressly contemplates that intercity passenger-rail service may be operated by entities other than Amtrak, albeit only under the terms set by Section 207, it follows that Amtrak, as coauthor of the Section 207 metrics and standards, is functioning as a regulator over its competitors—including over AIPRO’s members.

This scenario is particularly inequitable in light of Amtrak’s statutory preference over freight traffic on Amtrak’s host railroads. See 49 U.S.C. § 24308(c). Amtrak’s competitors must meet the same Section 207 performance requirements as Amtrak, but they

do not have the right that Amtrak does to put its trains ahead of other traffic on the tracks that everyone must use. Thus, Amtrak has a distinct competitive advantage in satisfying the performance standards that it crafted because the standards define the terms of the preference that other railroads must give to Amtrak.

Adding to the unfairness is the fact that, although Section 207 directs Amtrak and the FRA to consult with certain other stakeholders in developing the performance standards, the statute does not afford even this limited right to Amtrak's competitors in the provision of passenger-rail service before permitting Amtrak to impose regulations on them. See PRIIA § 207(a), 49 U.S.C. § 24101 (note) (listing stakeholders with consultation rights). Thus, when Amtrak and the FRA initially proposed the Section 207 metrics and standards in March 2009 (see J.A. 11), they solicited comments from the stakeholder groups specifically identified in the statute (see J.A. 75) but did not afford Amtrak's competitors in the passenger-rail industry any opportunity to comment—even though these competitor passenger railroads would be directly subject to the new regulatory standards.

In *Carter Coal*, this Court invalidated as an unconstitutional delegation of governmental authority a statute that conferred on a specified majority of coal producers and miners the power to set maximum labor hours and minimum wages that would be applicable to all industry participants. See 298 U.S. at 284, 310-11. Section 207 does precisely the same thing, but to an even greater degree: A single market participant regulates the entire industry, without

even the pretext of soliciting input from any of its direct competitors.

2. *Amtrak's Section 207 standards may trigger STB investigations and enforcement actions against Amtrak's competitors.*

Section 213 of the PRIIA provides for investigation and enforcement actions by the STB any time that “any intercity passenger train”—not solely those operated by Amtrak—fails to achieve 80 percent on-time performance or fails to meet the Section 207 service-quality standards for two consecutive quarters. PRIIA § 213(a), 49 U.S.C. § 24308(f)(1). In those circumstances, the STB “may” launch an investigation on its own initiative, and it “shall” do so upon receiving a complaint from “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.* The purpose of the STB investigation is “to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.” *Ibid.* (emphasis added). Thus, all intercity passenger-rail operators are subject to investigation and potential enforcement actions for failing to meet the standards that Amtrak, but no other operator, crafted; and it appears that any operator may be blamed and held accountable for *Amtrak's* failings as well.

Furthermore, Amtrak may itself choose to be the complaining party for its own failure to meet the performance standards in order to compel the STB to investigate either the freight railroads or other pas-

senger railroads that use the tracks. If Amtrak persuades the STB that its poor performance resulted from a host railroad’s failure to afford sufficient preference to Amtrak’s trains over other rail traffic, the STB is authorized to impose damages against the host railroad and to grant “such other relief to Amtrak as it determines to be reasonable and appropriate.” PRIIA § 213(a), 49 U.S.C. § 24308(f)(2).<sup>6</sup>

The STB may also order a freight railroad “to remit the damages awarded under this subsection to Amtrak or to an entity for which Amtrak operates intercity passenger rail service,” with the damages to “be used for capital or operating expenditures” on the affected route. PRIIA § 213(a), 49 U.S.C. § 24308(f)(4). There is no comparable damages remedy if a passenger railroad other than Amtrak fails to meet the mandatory on-time-performance standards that Amtrak has set, even if the STB determines that the failure is attributable either to a host railroad or to Amtrak’s exercise of its statutory preference, which may have the effect of shunting other

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<sup>6</sup> Notably, too, when the STB investigates poor performance by Amtrak, the governing Section 207 standards (which Amtrak crafted) specify that the principal evidence of the cause of delays is to be Conductor Delay Reports, which Amtrak’s own conductors prepare. See J.A. 44; J.A. 138 n.23. These reports are based solely on the conductors’ personal observations and do not include facts about which a conductor was unaware at the time—such as, for example, a government inspection of another railroad that slowed rail service for everyone. The reports thus often inaccurately assign blame for any delays. See J.A. 181. In short, Amtrak not only writes the governing performance standards and initiates regulatory investigations and enforcement actions applying those standards, but also prepares the evidence used to assign blame for failing to meet the standards that it has imposed.

operators' passenger trains aside in favor of Amtrak's. Thus, Amtrak not only sets the rules under which others must pay damages when Amtrak's own trains are late, but it then gets to use those damages to cover its ordinary expenses or to upgrade its service, giving itself even greater competitive advantages over the other passenger railroads with which it competes.

3. *Amtrak's Section 207 standards govern the selection of operators to assume Amtrak's existing intercity routes.*

Section 214 of the PRIIA establishes an "Alternative Passenger Rail Service Pilot Program," under which "a rail carrier \* \* \* that own[s] infrastructure over which Amtrak operates a passenger rail service route" may bid for a franchise to operate intercity passenger service over that route "in lieu of Amtrak." PRIIA § 214(a), 49 U.S.C. § 24711(a)(1). But the PRIIA subjects non-Amtrak service providers to the Section 207 standards at both ends of this bidding process.

On the front end, Section 214 "requires the [FRA] to select winning bidders by evaluating the bids against the financial and performance metrics developed under section 207." PRIIA § 214(a), 49 U.S.C. § 24711(a)(4). On the back end, Section 214 requires that any operating contracts must incorporate the Section 207 standards. PRIIA § 214(a), 49 U.S.C. § 24711(a)(5)(A) (contracts must include "the right and obligation to provide passenger rail service over that route subject to such performance standards as the Administration may require, consistent with the standards developed under section 207 of the [PRIIA]"); see also PRIIA § 214(c), 49 U.S.C. § 24711(c)(1)(B) (providing that a selected passenger

railroad’s contractual right to operate a franchised route is conditioned on its “compliance with the minimum standards established under section 207 of the [PRIIA] and such additional performance standards as the Administration may establish”).

The upshot is that Amtrak sets the criteria against which bids are evaluated in a competitive-bidding process in which Amtrak itself is a participant, and it sets the requirements that a successful bidder would have to meet under the contract that is ultimately awarded. Even if Amtrak does not intentionally seek to give itself an unfair advantage in the bidding process, therefore, the deck will inevitably be stacked in its favor because it developed the governing criteria and performance standards with an eye to its own business interests, capabilities, and needs, without affording similar consideration to how they may affect competition or competitors for the route or service.

*4. Grant applications under the PRIIA are subject to Amtrak’s Section 207 standards.*

The PRIIA also establishes a federal grant program to improve infrastructure that supports intercity passenger-rail service. See PRIIA § 301, 49 U.S.C. §§ 24401–24406. Although only States, state agencies, groups of States, or interstate compacts are eligible to apply for or receive these grants (see PRIIA § 301(a), 49 U.S.C. §§ 24401(1), 24402(a)(1)), passenger railroads may bid to design, build, and maintain the capital projects funded by the grants. Once again, however, the criteria for selecting projects to receive the grants incorporate Amtrak’s Section 207 metrics and standards.

Specifically, the Secretary of Transportation is required to select projects for grant awards based on criteria that include “the project’s levels of estimated ridership, increased on-time performance, reduced trip time, additional service frequency to meet anticipated or existing demand, or other significant service enhancements as measured against minimum standards developed under section 207 \* \* \*.” PRIIA § 301(a), 49 U.S.C. § 24402(c)(2)(A)(i). Accordingly, the Section 207 standards developed and imposed by Amtrak and the FRA govern any grant requests in which intercity passenger-rail operators might have an interest by virtue of contracts with state grant applicants or recipients. Thus, Amtrak effectively controls the terms on which federal grants are made; and having imposed the governing regulatory standards based on its assessment of its own business needs, it almost inevitably becomes the preferred contractual partner with States on the federally funded infrastructure projects that they wish to pursue.

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In *Carter Coal*, this Court held that a statutory scheme that “conferred upon the majority \* \* \* the power to regulate the affairs of an unwilling minority” was “legislative delegation in its most obnoxious form.” 298 U.S. at 311. The delegation of regulatory authority in Section 207 of the PRIIA is equally—if not more—“obnoxious,” because it empowers a single private entity to regulate the affairs of its entire industry and every participant in the market. Accordingly, Section 207’s “attempt[] to confer such power” is “an intolerable and unconstitutional interference with personal liberty and private property.” *Ibid.*



**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES M. WOODWORTH	RICHARD B. KATSKEE
<i>Mayer Brown LLP</i>	<i>Counsel of Record</i>
<i>71 South Wacker Drive</i>	CRAIG W. CANETTI
<i>Chicago, Illinois 60606</i>	<i>Mayer Brown LLP</i>
<i>(312) 782-0600</i>	<i>1999 K Street, NW</i>
	<i>Washington, DC 20006</i>
	<i>(202) 263-3000</i>
	<i>rkatskee@mayerbrown.com</i>

*Counsel for Amicus Curiae*

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