ORAL ARGUMENT NOT YET SCHEDULED

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 Remand from the Supreme Court of the United States

BRIEF OF ASSOCIATION OF INDEPENDENT PASSENGER RAIL OPERATORS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici: All parties, intervenors, and amici appearing before the district court, this Court, or the United States Supreme Court are listed in the Brief for Appellant.

B. Rulings Under Review: References to the rulings at issue appear in the Brief for Appellant.

C. Related Cases: References to related cases appear in the Brief for Appellant.

CORPORATE DISCLOSURE STATEMENT

The Association of Independent Passenger Rail Operators is a trade association that promotes the expansion of passenger-rail service in the United States. AIPRO has no parent company and no publicly held company has a 10% or greater ownership interest in AIPRO.

CERTIFICATE REGARDING SEPARATE BRIEFING

In accordance with Circuit Rule 29(d), counsel for AIPRO certify that a separate *amicus* brief for AIPRO is necessary because AIPRO's members stand in the unique position of being head-to-head competitors with Amtrak in the provision of passenger-rail service. AIPRO thus represents interests and speaks to legal and practical considerations that are at the core of this dispute but are not represented by any party or any other *amicus curiae*. AIPRO filed an *amicus* brief in the Supreme Court in this case.

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GLOSSARY

AIPRO Association of Independent Passenger Rail Operators

PRIIA Passenger Rail Investment and Improvement Act of 2008

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellant.

IDENTITY AND 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.[1]

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. 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-speed and intercity passenger-

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[1] *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 have consented to the filing of this brief.

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 due-process mandates of 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 railroads, because there were none. Today, Amtrak is no longer a monopoly; the passenger-rail industry is now highly competitive. Yet Section 207 of the PRIIA confers on Amtrak the ability to regulate that entire industry.

It has long been settled that Congress may not empower one market participant to exercise regulatory authority over its competitors: The Supreme Court held in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), that conferring on "one person . . . 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. Section 207 of the PRIIA violates this constitutional proscription by making Amtrak—a for-profit corporate participant in the intercity passenger-rail market—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. Section 207 thus empowers Amtrak to exercise governmental authority to advance its own interests, even at its competitors' expense.

Although "Amtrak may not compete with the freight railroads for customers" (*Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 675 (D.C. Cir. 2013), *vacated and remanded*, 135 S. Ct. 1225 (2015)), it *does* compete head-to-head for customers and routes with private, independent passenger railroads, including AIPRO's members. Section 207 gives Amtrak a distinct, direct, and unfair advantage in that competition by making it the regulator for the entire passenger-rail industry. 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 the Supreme Court has declared to be "an intolerable and unconstitutional interference with personal liberty and private property." *Carter Coal*, 298 U.S. at 311.

The harms to other passenger railroads and to the train-riding public from this due-process violation 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 Surface Transportation Board "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 federal regulatory-enforcement actions.

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 other passenger railroads*, the States' 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 the States receive will therefore be geared to Amtrak's needs and expectations—regardless of whether those arrangements are appropriate for other potential bidders, for the contracting States, or for the train-riding public.

As this Court previously observed, "[p]erverse incentives abound." *Ass'n of Am. R.Rs.*, 721 F.3d at 676. The principle underlying the due-process prohibition against an industry participant's regulation of its

competitors is identical to the principle underlying the constitutional prohibition against delegations of regulatory authority to private entities—namely, that governmental regulation should "look to the public good, not private gain." *Id.* at 675. Nothing in the PRIIA "restrains [Amtrak] from devising metrics and standards that inure to its own financial benefit rather than the common good." *Id.* at 676. Accordingly, this Court should hold that Section 207 of the PRIIA is irreconcilable with the requirements of the Due Process Clause.

ARGUMENT

SECTION 207 OF THE PRIIA VIOLATES THE DUE PROCESS CLAUSE BY IMPERMISSIBLY CONFERRING 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://www.publicpurpose.com/arc-execsum.pdf. The purpose of that Act was to "reinvigorate a national passenger rail system that had . . . grown moribund and unprofitable" (*Ass'n of Am. R.Rs.*, 721 F.3d at 668) by

authorizing private railroads to transfer to Amtrak their "common carrier obligation to offer intercity passenger service" (*id.* at 669). 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. *Id.* at 668; *see also Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 454-55 (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).[2]

Although Amtrak was thus afforded exclusive rights to operate intercity passenger-rail service and has received special regulatory power and privileges under this statutory scheme, that has not been true for commuter-rail services. Commuter rail provides daily, high-volume passenger transportation in metropolitan and suburban areas. *See* H.R. Comm. on Transp. and Infrastructure, 112th Cong., *Amtrak Commuter Rail Service: The High Cost Of Amtrak's Operations* ("Amtrak Report") 7

[2] Today, as a result, "roughly 97% of the track over which Amtrak runs its passenger service" is owned by private freight railroads. *Ass'n of Am. R.Rs.*, 721 F.3d at 669.

(2012), *available at* http://tinyurl.com/nlmezr4. Across the United States, public agencies with elected or appointed boards oversee the provision of these commuter services. Originally, the agencies either operated the rail service themselves or contracted with Amtrak to do so. Thus, although Amtrak "was designed to serve long-distance passenger needs," it also conducted commuter-rail operations in California, Washington, Connecticut, Maryland, Virginia, and Florida. *Id.* But in recent years, commuter-rail ridership has increased substantially, and "with rising demand for service, . . . commuter rail agencies [began] looking to competitive contracting for commuter rail operations as a way to provide the highest level of service at the lowest costs." *Id.* at 4 (identifying 10% increase in ridership between 2005 and 2010 alone, and reporting that, "[i]n 2010, the Nation's commuter rail transportation system provided nearly 460 million passenger trips").

As a result of both the increased need for high-quality, low-cost service, and the level playing field for competitors (because Amtrak's special regulatory powers, privileges, and preferences for intercity rail service do not apply to commuter rail), vibrant competition for the provisions of commuter services has arisen over the past two decades. In this fair competitive environment, AIPRO's members have been highly successful in obtaining contracts to provide commuter-rail services;

Amtrak has not. Indeed, Amtrak has "fail[ed] to secure a single commuter rail operations contract over the past ten years" (*see* Amtrak Report at 5, 11), and it has been replaced as the service provider on a number of commuter routes (*see id.* at 5-6). For example:

- In 2007, Florida Tri-Rail evaluated bids from Amtrak and Veolia (an AIPRO member that now operates under the name of Transdev) using criteria of price, technical approach, operating plans, and qualifications, and selected Veolia to operate the commuter service from Miami to Ft. Lauderdale. *See id.* at 5, 14. Amtrak's bid scored lower than Veolia's in every area, while Amtrak's overall bid price was 67% higher. *See id.*

- In 2009, Amtrak lost its contract with Virginia Rail Express to Keolis (another AIPRO member). Keolis's price for operating the service was $24 million less than Amtrak's. *See id.* at 5-6, 15.

- After almost 20 years of having Amtrak operate its commuter service in California, in 2010 Caltrain awarded the operations to Herzog (yet another AIPRO member). Herzog bid $11 million less than Amtrak, and it scored much higher on technical qualifications. *See id.* at 6, 16.

In light of the great successes that fair competition has produced for providing better commuter-rail service to more riders at a lower cost, Congress has in recent years laid the foundations to reintroduce competition into the market for intercity passenger-rail service as well. 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"); *see also* 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." PRIIA § 214(a), 49 U.S.C. § 24711(a)(1).

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.[3] The State selected Iowa Pacific Holdings to "provide the train equipment, train maintenance, on-board services and marketing," while Amtrak "would serve as the primary operator, working with host railroads, providing train and engine crews, and managing reservation[s] and ticketing."[4] In April 2014, Washington and Oregon issued a Request for Information regarding the Cascades Intercity Passenger Rail Service to determine a pathway to full competition and identify service providers.[5] Texas issued a similar Request concerning the Heartland Flyer Service between Fort Worth and Oklahoma City.[6] And Connecticut has issued a Request for Qualifications "seeking to engage a qualified and experienced contractor to provide the services required for train operations and station and parking management for CTDOT's new CTrail Hartford Line

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[3] *See* Ind. Dep't of Transp., *Hoosier State Passenger Rail*, *available at* http://www.in.gov/indot/3200.htm.

[4] *Id.*

[5] *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.

[6] *See* Tex. Dep't of Transp., Rail Div., *Request for Information for Intercity Passenger Transit Service Opportunities—Rail or Bus*, *available at* http://tinyurl.com/jw3swmz.

passenger rail service between New Haven, Connecticut and Springfield, Massachusetts."[7] AIPRO's 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/klhyv3t.

Recent bipartisan legislation approved by the Commerce Committee of the United States Senate underscores the considered judgment of Congress in enacting the PRIIA that the public interest is best served by fostering this new competition in the intercity passenger-rail market and allowing the burgeoning competition in that market to flourish. On June 25 of this year, the Commerce Committee voted to approve the Railroad Reform, Enhancement, and Efficiency Act, S. 1626, 114th Congress (2015). *See* Press Release, U.S. Senate Comm. on Commerce, Science, & Transp., *Committee Approves Wicker/Booker Railroad Reforms* (June 25, 2015) (describing "'bipartisan consensus on the way forward for safer and more reliable passenger rail service'") (quoting committee chair) (emphasis

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[7] *See* Conn. Dep't of Transp., *Request for Qualifications No. 14DOT7004, Request for Qualifications for a Service Provider for CTrail Hartford Line Passenger Rail Service* (due Feb. 1, 2016), *available at* http://tinyurl.com/ouzx55f.

omitted), *available at* http://tinyurl.com/nasd42h. According to the Committee, the bill aims to establish "A Sustainable Course for Passenger Rail" by "[l]everaging competition" in the industry and "[r]equir[ing] the Department of Transportation (DOT) to solicit and facilitate competition from carriers other than Amtrak to improve service and reduce subsidy costs." *Id.*

The bill contains several specific measures aimed at encouraging competition in intercity passenger service. For example:

- It would establish a streamlined pilot program for promoting alternatives to Amtrak for long-distance service. Under that program, up to three pilot projects could be undertaken in which another passenger railroad would replace Amtrak as the service provider for an intercity route and would receive an operating subsidy up to 90% of what Amtrak receives for the route. *See* S. 1626, 114th Congress tit. I (2015).

- It would clarify that the States may promote competition for passenger-rail service without limitation. *See id.* § 205.

- It would establish a new program under which passenger railroads could receive three-year operating-assistance grants on a competitive basis "for the purposes of initiating, restoring, or enhancing intercity rail passenger service." *See id.* § 301.

- It would solicit sweeping "Performance Based Proposals" from passenger railroads to replace Amtrak on major routes, including the busy and highly profitable Northeast Corridor. *See id.* §§ 308–309.

In short, the bill would further encourage competition among railroads for the provision of intercity passenger-rail service, consistent with Congress's previous enactments and the legislative findings underpinning them that competition in the passenger-rail industry promotes safer, more reliable, and less expensive service to the public.

As we next explain, these important congressional objectives of promoting and expanding competition in the provision of intercity passenger-rail service cannot be achieved when, as here, one player in the market is empowered to impose standards that govern the conduct of its competitors. Competition is almost inevitably stifled—and the requirements of due process are straightforwardly violated—when one competitor gets to write the rules for the competition, as Amtrak does under Section 207 of the PRIIA. Due process and fundamental fairness require that this inequitable scheme be dismantled.

B. Section 207 Affords To Amtrak Substantial And Unfair Competitive Advantages Over Other Passenger Railroads.

In *Carter Coal* the Supreme Court held that conferring regulatory power on "persons whose interests may be and often are adverse to the interests of others in the same business" violates the constitutional guarantee of due process. 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." *Id*. This Court has likewise explained that "the Constitution's guarantee of due process" is "[p]artly echo[ed]" in the principle 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.'" *Ass'n of Am. R.Rs.*, 721 F.3d at 675 (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928)). Because regulation is "necessarily a governmental function" executed by a "presumptively disinterested" actor, a statute that "attempts to confer such power" on a participant in a private industry "undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter Coal*, 298 U.S. at 311. Yet that is precisely what the PRIIA does.

Section 207 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 Federal Railroad Administration and Amtrak to develop these standards "jointly," Section 207 unconstitutionally places Amtrak at least on a par with the agency as a

regulator of intercity passenger-rail service—a status that no other railroad shares.[8]

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 subjects the other railroads 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 the PRIIA 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 Section 207 is that one market participant in the passenger-rail industry directly exercises federal regulatory authority over its competitors—

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[8] The PRIIA goes even further: It requires the Federal Railroad Administration 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." *Ass'n of Am. R.Rs.*, 721 F.3d at 674. As such, Section 207 effectively assigns to Amtrak or a private arbitrator the federal government's regulatory power: Either the Federal Railroad Administration must accept Amtrak's preferred standards or an arbitrator may impose those standards even over the agency's strenuous objection. *Id.* at 671 ("Should the [agency] prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission.").

causing the very due-process violation that the Supreme Court condemned in *Carter Coal*.

In all of these ways, the unconstitutional delegation of regulatory power to Amtrak effected by Section 207 is already harming Amtrak's direct competitors in the vibrant and growing competitive environment of the passenger-rail market, thus also injuring the public—which would otherwise enjoy the benefits of safer, higher-quality, more efficient, and less costly rail service if Amtrak were not permitted to distort the market by regulating its competitors. These harms will only increase as competition expands in keeping with congressional intent. That is because, no matter how well AIPRO's members and other passenger railroads may do in offering safer and better service at lower prices, Amtrak remains empowered by Section 207 to stack the deck against them by setting performance standards for the entire industry that are geared to Amtrak's own needs—and then triggering regulatory enforcement of those standards to its own benefit and other railroads' detriment.[9]

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[9] The danger that Amtrak may abuse its regulatory authority over intercity rail service to promote its own commercial interests at the expense of the competition that Congress has sought to encourage (and the public welfare that this competition advances) is reflected in Amtrak's conduct as a competitor for commuter-rail contracts. After losing the Florida Tri-Rail contract to Veolia, Amtrak unsuccessfully sued Veolia in federal court, alleging that Veolia had "wrongfully recruited and enticed

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 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 . . . .

PRIIA § 207(a), 49 U.S.C. § 24101 (note). In other words, Section 207 directs Amtrak and the agency 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

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members of Amtrak's staff to terminate their employment with Amtrak and take positions with Veolia if Veolia won the contract." Amtrak Report at 17. When Amtrak lost the Virginia Rail Express contract to Keolis, "Amtrak's union allegedly told its workers they would be fired by Amtrak and blacklisted if they took a job with Keolis," and "Amtrak refused to allow VRE engineers to ride with Amtrak crews to learn the route." *Id.* at 18. According to the staff report of the House Transportation and Infrastructure Committee, "Amtrak engaged in anti-competitive behavior that can only be described as an attempt to stifle competition among the burgeoning private operator market for passenger rail." *Id.* at 17. By contrast, as the trade association for the passenger railroads that have taken over several commuter operations from Amtrak, *amicus* is aware that initial uncertainty following some post-competition transfers from Amtrak to independent operators has quickly given way in all cases to solid and positive working relationships between the operators, the rail operating unions, and the host railroads that own the track.

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 AIPRO's members.

This arrangement is particularly noxious 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 enjoy Amtrak's preference over other carriers on the tracks that everyone must use. Thus, Amtrak has a distinct competitive advantage in satisfying the performance standards that it crafted because those standards define the terms of the preference that host railroads must give to Amtrak and to no other passenger railroad that may wish to compete with Amtrak for routes, lines, or passengers.

Adding to the harm is the fact that, although Section 207 directs Amtrak and the Federal Railroad Administration 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 agency initially proposed the Section 207 metrics and standards in March 2009 (*see* J.A. 23), they solicited comments from the stakeholder groups specifically identified in the statute (*see* J.A. 57) but did not afford AIPRO, its members, or any other passenger railroads the opportunity to comment—even though these competitor railroads would be directly subject to the new regulatory standards.

In *Carter Coal*, the Supreme Court invalidated on due-process grounds 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, 310-12. Section 207 does precisely the same thing for passenger railroads, but to a 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 federal investigations and enforcement actions against Amtrak's competitors.

Section 213 of the PRIIA provides for investigation and enforcement actions by the Surface Transportation Board 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 Board "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." *Id.* The purpose of the Board's 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*." *Id.* (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 passenger railroad, has crafted; and it appears that any operator, including another passenger railroad that competes with Amtrak, 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 Surface Transportation Board to investigate either the freight railroads or other passenger railroads that use the tracks. If Amtrak persuades the Board that its poor performance resulted from a host

railroad's failure to afford sufficient preference to Amtrak's trains over other rail traffic, the Board 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).

Notably, too, when the Board 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. 37, 86 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 along the line for everyone. The reports thus often inaccurately assign blame for any delays. *See* J.A. 257-58. 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.

Finally, the Surface Transportation Board may resolve an enforcement action by ordering 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 Board determines that the operator's failure is wholly attributable either to a host railroad or to Amtrak's exercise of its statutory preference, which may have the effect of shunting other railroads' passenger trains aside in favor of Amtrak's. Thus, not only does Amtrak set the rules under which others must pay damages when Amtrak's own trains are late, but it, and it alone, then gets to use those damages to cover its ordinary, day-to-day expenses or to upgrade its service. In other words, Amtrak has the power to initiate enforcement actions that may result in orders that compel its competitors to pay damages to Amtrak for Amtrak's own deficient performance, which Amtrak may then use as it sees fit to compound its artificial and self-created advantages over all other passenger railroads. If that isn't an unfair competitive advantage resulting from a due-process violation, then nothing is.

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). The pending bipartisan Railroad Reform, Enhancement, and Efficiency Act would create substantial additional opportunities for competitive bidding for intercity service. 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 [Federal Railroad] Administration 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 [Federal Railroad] Administration may require, consistent with the standards developed under section 207"); *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 bidder; 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 those standards 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, and 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 Federal Railroad Administration 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.

* * *

In *Carter Coal*, the Supreme Court held that a statute that "conferred upon the majority" of industry participants "the power to regulate the affairs of an unwilling minority" was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311. The grant of regulatory authority in Section 207 of the

PRIIA is an even more "obnoxious" encroachment on the due-process rights of passenger-rail operators (*id.*) because it empowers one railroad to regulate the affairs of the entire passenger-rail industry and every member of that industry. Accordingly, Section 207's "attempt[] to confer such power" on Amtrak is "an intolerable and unconstitutional interference with personal liberty and private property." *Id.*

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,099 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Richard B. Katskee*

Dated: July 6, 2015

CERTIFICATE OF SERVICE

I certify that on July 6, 2015, the foregoing *Brief of Association of Independent Passenger Rail Operators as* Amicus Curiae *in Support of Appellant and Reversal* was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*