Nos. 16-3307, 16-3504, 16-3512, 16-3513, 16-3514 (consolidated)

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

UNION PACIFIC RAILROAD COMPANY,
*Petitioner (No. 16-3307)*,

ASSOCIATION OF AMERICAN RAILROADS,
*Petitioner (No. 16-3504)*,

CSX TRANSPORTATION, INC.,
*Petitioner (No. 16-3512)*,

NORFOLK SOUTHERN RAILWAY COMPANY,
*Petitioner (No. 16-3513)*,

*and*

CANADIAN NATIONAL RAILWAY COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY,
GRAND TRUNK WESTERN RAILROAD COMPANY,
*Petitioners (No. 16-3514)*,

*v.*

SURFACE TRANSPORTATION BOARD,
UNITED STATES OF AMERICA,
*Respondents*.

On Petition For Review Of A Final Rule
Of The Surface Transportation Board

# PETITIONERS' JOINT OPENING BRIEF

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## INTRODUCTION

This is a case of agency overreach. An agency's rulemaking authority extends no further than what Congress has delegated. It should go without saying that when Congress has expressly given one agency the authority to issue a particular rule, a *different* agency cannot step in and issue the rule instead.

Yet that is exactly what happened here. Petitioners are freight railroads challenging a final rule of the Surface Transportation Board. The Board issued a rule defining "On-Time Performance" for Amtrak trains operating on the tracks of the freight railroads, even though Congress had delegated that rulemaking authority to the Federal Railroad Administration and Amtrak itself.

Moreover, in conducting this ultra vires rulemaking, the Board ignored a critical issue: the harm to freight traffic that will result from the Board's rule that an Amtrak train is not "on time" unless it arrives at, and departs from, all stations on its route within 15 minutes of the scheduled time. The Board further erred by basing its "All-Stations" approach on its unsupported speculation that Amtrak's schedules would readily be modified to conform to the new methodology.

The Court should allow 20 minutes of argument per side. This consolidated proceeding involves five petitioners—and a dozen interveners defending the Board's rule. This case is of great significance to the freight rail industry and oral argument will assist the Court in resolving the important questions presented.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners make the following disclosure:

**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.

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

**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.

**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.

**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.

**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.

**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.

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## STATEMENT OF JURISDICTION

This Court has jurisdiction to review the final rule of the Surface Transportation Board pursuant to 28 U.S.C. § 2321(a) and 28 U.S.C. §§ 2342-2344. Venue is proper under 28 U.S.C. § 2343 because petitioner Union Pacific Railroad Company maintains its principal place of business in Nebraska. The petitions filed by the other petitioners were transferred to this Court pursuant to 28 U.S.C. § 2112. No. 16-3504, Doc. No. 4443214. The five petitions included in this consolidated proceeding are timely because all were filed within 60 days of issuance of the final rule.

## STATEMENT OF THE ISSUES

**I.** 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.

— Passenger Rail Investment and Improvement Act § 207, codified at 49 U.S.C. § 24101 note.

— Passenger Rail Investment and Improvement Act § 213(a), codified at 49 U.S.C. § 24308(f).

— *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013).

— *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998).

**II.** Whether the rulemaking was arbitrary and capricious because the Surface Transportation Board—in enacting the strict requirement that an Amtrak train is not "on time" unless it departs from the initial station, and arrives at all other stations on its route, within 15 minutes of the scheduled times—completely ignored the rule's harmful impact on freight traffic, which must share the same tracks with the Amtrak trains.

— *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

— *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292 (8th Cir. 1985).

**III.** Whether the rulemaking was arbitrary and capricious because the Surface Transportation Board's decision to adopt an "All-Stations" approach rested on speculative assumptions that were contradicted by the evidence before the agency, and because the Board failed to address the serious operational consequences and other costs resulting from its approach.

— *Del. Dep't of Nat. Res. v. EPA*, 785 F.3d 1 (D.C. Cir. 2015).

— *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

## STATEMENT OF THE CASE

### 1. Amtrak and the Freight Railroads

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

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[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.

customers. *Ass'n Am. R.R. 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. JA130-31. 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.

All of these burdens are exacerbated by provisions authorizing or requiring that freight railroads be 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 Am. R.R. v. U.S. Dep't of Transp.*, 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 Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 672 (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. The Passenger Rail Investment and Improvement Act**

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 here 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.*[2]

**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

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[2] PRIIA § 207(d) provides that if Amtrak and the FRA fail to reach agreement on the content of the metrics and standards, or for whatever reason do not timely promulgate the metrics and standards, "any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."

> 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 . . . ." *Id.*[3]

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. FRA and Amtrak Issue Their On-Time Performance Rule.**

Exercising the rulemaking authority Congress granted them under PRIIA § 207, the FRA and Amtrak issued their proposed On-Time Performance rule in

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[3] PRIIA §§ 207 and 213(a) are reproduced in full in the addendum at the back of this brief.

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. The Freight Railroads' Constitutional Challenge to PRIIA § 207**

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 Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d at 668.

The Supreme 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 Am. R.R.*, 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 Am. R.R. v. U.S. Dep't of Transp.*, 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.

### 5. The Board Claims The Authority To Issue Its Own Rule Defining On-Time Performance.

On December 19, 2014, in the midst of the constitutional litigation, the 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-Time Performance for purposes of PRIIA § 213. *Id*. at 11.

Commissioner Begeman dissented. She argued that the Board should conduct a notice-and-comment rulemaking proceeding to consider, among other things, whether it even *had* the statutory authority to define On-Time Performance and, if so, how to define it. Decision, Docket No. NOR 42134, at 11-12 (Dec. 19, 2014). She underscored the importance of soliciting input from "*[a]ll* interested stakeholders"—including the freight railroads that host Amtrak trains—because the Board's On-Time Performance measure would "have a far-reaching impact on the entire industry." *Id*. at 12.

Canadian National moved the Board to reconsider its conclusion that it possessed statutory authority to define On-Time Performance. Petition for Reconsideration, 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. Motions 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 Petition for Rulemaking, Docket No. EP 726 (Jan. 15, 2015).

**6. The Board Issues Its Proposed Rule.**

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. The proposed rule mirrored the definition of On-Time Performance adopted in 1973 by the Interstate Commerce Commission, which similarly used a tiered structure with allowances of up to 30 minutes for longer trips. JA20 (citing former 49 C.F.R. § 1124.6).

The Board also invited comment on whether it should adopt an "All-Stations" approach rather than the "Endpoint" approach reflected in the proposed rule. JA21. Whereas an Endpoint approach measures On-Time Performance based on the train's arrival at its final destination, an All-Stations approach measures On-Time Performance based on the arrival and departure times at all intermediate stations in addition to the arrival time at the final destination.

**7. Numerous Commenters Urge The Board To Consider The Proposed Rule's Potential Impact On Freight Rail And Expand The Delay Tolerance.**

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. As Amtrak's own published reports document, many of its schedules have never consistently been achieved in the real world. *See* Amtrak Train Route On-Time Performance, http://www.amtrak.com/historical-on-time-performance (last visited Oct. 13, 2016). 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.

AAR's comments, for example, urged the Board to consider the impact its rule would have on freight traffic and to extend the 30-minute cap on delays for longer routes. It argued that the Board should "construe On-Time Performance in a way that recognizes that there are many other users of the network," including "freight carriers [and] the businesses and consumers that rely on freight service." JA132. AAR discussed the burdens already imposed on the freight railroads by their obligation to host Amtrak trains, emphasizing that rail freight tonnage and congestion have increased markedly over past decades and are expected to increase for decades to come. JA130-31. Noting that "capacity and freight volumes today

are significantly different from those that existed in 1973, the date the proposed standards were adopted," AAR urged the Board to relax the On-Time Performance requirements by maintaining the tiered structure but providing for greater maximum allowances (*i.e.,* more than 30 minutes) for routes exceeding 500 miles. JA131, 138.

Union Pacific urged the Board to reduce the harmful impact on freight traffic by "look[ing] to evidence of current transportation conditions" and providing for "a delay allowance of at least 10% of the scheduled travel time as published in Amtrak's public timetables, or at least 15 minutes per 100 route miles." JA47-48. Union Pacific also focused on the need to allow for more than 30 minutes of tolerance on the longer routes, explaining that "[t]he types of events that justify increasing the allowance as distances increase do not stop occurring once routes exceed 500 miles." JA52. Union Pacific argued that federal regulations define a passenger airplane flight as "chronically delayed" if it arrives more than 30 minutes late more than 50 percent of the time during a month, *see* 14 C.F.R. § 399.81(c)(2), and that it would make no sense to impose a *more* rigorous standard on trains than airplanes given that trains must confront many obstacles that planes do not. JA53-56.

CSX argued that the Board should remove the 30-minute cap for long distance routes, observing that using delay allowances from 1973 makes no sense

"in today's complex (and capacity-constrained) surface transportation environment." JA102; *see also* JA109-11 (explaining that the Board should take into account the rail network as it exists today, including dramatically higher freight volumes and increased density and congestion). CSX urged the Board to include more reasonable levels of tolerance for routes of all distances, pointing out that "[t]his approach better fits the realities of today's complex rail transport environment." JA114. CSX underscored the harmful impact of the Board's rule on freight traffic, reminded the Board of its obligation to ensure network fluidity for passenger and freight traffic alike, and argued that "[t]he Board should strike a . . . balance that ensures the efficient operation of our nation's railroads and considers the interests of host railroads and shippers alongside Amtrak and its passengers." JA107-08.

Norfolk Southern similarly took issue with the Board's proposal, explaining that the proposed "10-30 minute tolerances are only meaningful if the underlying train schedules themselves provide standards that are realistically capable of being consistently met." JA160. Norfolk Southern showed that "Amtrak's published schedules are flawed measures of the expected transit time of most services due to their formulaic creation (often years ago) and Amtrak's ongoing unwillingness to modify them to take into account changing real world conditions." *Id.* Accordingly, Norfolk Southern proposed that the Board abandon its reliance on

Amtrak's unrealistic schedules and instead allow for 30 minutes of tolerance based on "a realistically achievable transit time over that individual host railroad." JA179.

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 (emphasis added).

### 8. The Freight Railroads Identify The Many Problems With An "All-Stations" Approach To On-Time Performance.

After Amtrak and others urged the Board in their opening comments to adopt an "All-Stations" approach in lieu of the proposed "Endpoint" approach, the freight railroads filed reply comments explaining why an All-Stations approach would not be workable and how it would create serious operational problems.

The freight railroads pointed out that a fundamental problem with an All-Stations approach is that many Amtrak schedules are not designed for an All-Stations approach. *See* JA118, 240, 252-54, 269-72, 281-84. Amtrak schedules—like the schedules of all passenger trains—include what is known as "recovery time." Recovery time is time built into a schedule to account for contingencies (delays) that inevitably occur as a train progresses along its route. Thus, a route that might take 60 minutes under theoretical ideal conditions (*i.e.*, no other trains on the line and no unanticipated delays) is normally scheduled with modest additional recovery minutes in order to give it a practical chance of an on-time arrival in the ordinary case where the train encounters a few minutes of delay at various points along its route.

Many Amtrak schedules do not fit with an All-Stations approach because almost all their recovery time is inserted near the *end* of the route to maximize the opportunity for Amtrak trains that suffer unscheduled delays along the route to arrive at the final station stop on time. *See* JA252-53, 269-72, 281-82, 306-09.

Thus, for many Amtrak trains, the first few stations have little if any of the allocated recovery time; the remaining intermediate stations have approximately half of the allocated recovery time; and the endpoint station has the remaining half. JA252. For this reason, adopting an All-Stations approach would render even more artificial and unrealistic the present scheduled arrival and departure times at many early and intermediate stations.

The freight railroads observed that it was no answer to simply assume that Amtrak's schedules could readily be modified. When the FRA and Amtrak issued their own On-Time Performance rule in 2010, they used an All-Stations approach, acknowledging that the "introduction of [an] All-Stations [On-Time Performance] standard will involve a challenging process of readjustment, in which Amtrak, its railroad hosts, and (where applicable) State sponsors of service" would be required to make "operational and scheduling adjustments." *Metrics and Standards for Intercity Passenger Rail Service* 18 (May 12, 2010), http://1.usa.gov/1nYiXmw. Yet Amtrak's schedules were *not* modified in response. JA239, 253, 265, 282.

Moreover, the freight railroads explained, even if the schedules *were* modified to reflect an All-Stations approach, it would create serious operational difficulties. The problem is that reallocating recovery time to earlier in a schedule would result in more Amtrak trains arriving early at intermediate stations because the added recovery time would not be needed in some instances, whereupon the

Amtrak trains would be forced to idle on the tracks awaiting their scheduled departure time. *See* JA240-41, 254, 272, 281. Those idling trains will cause delays to other trains (whether passenger or freight), particularly at the numerous stations where Amtrak has not built a station track and its platform is located on the host railroad's main line. JA254.

**9. The Board Issues Its Final Rule.**

The Board issued its final rule on July 28, 2016. JA377. 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." JA378. 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." JA381. 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." JA389. Whereas the blanket 15-minute tolerance allows slightly more tolerance on the shortest routes (200 miles or less) than the Board had originally proposed, it allows *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.

In addition, at the behest of Amtrak and others, the Board jettisoned the Endpoint approach of the proposed rule, and switched to an All-Stations approach. JA381-82. The Board acknowledged the problem flagged by many commenters—

that Amtrak schedules were not designed for an All-Stations approach—but dismissed this concern by stating that it was "confident" that the schedules would be modified in the wake of the rulemaking. JA382. The Board offered no explanation for why it was "confident" this would occur, especially since the schedules were *not* modified after the FRA and Amtrak adopted an All-Stations approach in their 2010 rulemaking. Nor did the Board address the concern set forth at great length in the comments—that even if the parties responded as the Board speculated they would, an All-Stations approach would create serious operational difficulties because the revised schedules necessary to improve On-Time Performance would cause traffic jams on the network as Amtrak trains arriving early would be forced to idle at intermediate stations.

## SUMMARY OF ARGUMENT

This Court should vacate the Board's On-Time Performance rule because the Board lacked statutory authority to promulgate the rule, because the Board failed to consider the severe impact of its rule on freight traffic, and because the Board's adoption of an "All-Stations" approach was arbitrary and capricious.

**I.** 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).

The Board's rationale—that the judicial invalidation of PRIIA § 207 allows the Board to claim the invalidated rulemaking authority for itself—defies the separation of powers. An agency's authority to promulgate rules can only come from Congress. Because Congress did not give the Board the necessary authority when it enacted PRIIA in 2008—a point the Board concedes—the Board does not have the necessary authority today. None of the cases the Board cited to justify its actions holds that a judicial invalidation of rulemaking authority to one agency transfers that authority to a *different* agency. The Board's claim that its actions are "the only way for the Board to now fulfill its responsibilities," JA380, cannot substitute for the requisite congressional authorization. To the extent the judicial invalidation of PRIIA § 207 created a "gap" in the remedial scheme, it is the prerogative of Congress—not the Board or the courts—to address it.

**II.** The Board's failure to consider the harmful impact of its rule on freight traffic requires that its On-Time Performance rule be vacated. A rule must be set aside when the agency "'failed to consider . . . important aspect[s] of the problem.'" *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*

*Co*., 463 U.S. 29, 43 (1983)). Here, the freight railroads in their comments urged the Board to take into account how its rule would affect freight traffic, bearing in mind the current conditions on the twenty-first century rail network, including recent and projected increases in freight traffic, greater congestion on key corridors, and the burdens already imposed on the freight railroads by the obligation to host Amtrak trains. The freight railroads urged the Board, in order to minimize the harmful impact on freight traffic, to increase its proposed 30-minute cap on longer routes and generally adopt more liberal delay tolerances.

Despite all of these comments—and despite the explicit warning of the U.S. Department of Transportation that "it is important to keep the freight rail system fluid and efficient" and to bear in mind that "[f]reight rail customers also depend upon this network" (JA33)—the Board simply *ignored* the effect of its rule on the freight railroads and the many businesses and consumers that rely on freight rail. In fact, rather than *increase* the 30-minute cap on permissible delays, the Board *reduced* it to 15 minutes—no matter how long the route—without saying a word as to how its strict On-Time Performance measure might affect freight traffic, or so much as acknowledging that any of these concerns had been raised. The Board's total silence on a critical issue in this rulemaking requires that its On-Time Performance rule be vacated.

**III.** The Board's adoption of an "All-Stations" approach, in which On-Time Performance is assessed by the train's punctuality at every stop on its route, was arbitrary and capricious. The Board impermissibly based its rule on the speculative assumption that Amtrak's schedules—some of which the Board conceded are not designed for an All-Stations approach—would readily be modified to conform to the Board's new standard. Although the Board asserted it was "confident" that the parties would react in the way the Board predicted, JA382, it offered not a shred of evidence supporting its prediction. In fact, the evidence before the agency demonstrates precisely the opposite: when the FRA and Amtrak in 2010 adopted an All-Stations approach in their own On-Time Performance rule, the necessary modifications were never made. Recognizing a significant problem with a final rule but predicting that the regulated parties would find some way to solve it is the epitome of arbitrary reasoning.

The Board further erred in failing to acknowledge, let alone address, the operational problems that will result from an All-Stations approach. Commenters explained in great detail how, even if the Amtrak schedules were modified in the way the Board predicted, an All-Stations approach would lead to Amtrak trains routinely arriving early at stations and being forced to idle, blocking freight and commuter traffic while they awaited their departure time. The Board's refusal to address these concerns is yet another reason for vacatur.

## STANDARD OF REVIEW

Under the Administrative Procedure Act, a court must vacate a final rule when the agency has acted "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(c). In addition, a court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). Agency action is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## ARGUMENT

This Court should vacate the final rule because the Board had no authority to promulgate it, because the Board conspicuously failed to address its impact on freight traffic, and because the Board's adoption of an "All-Stations" approach was arbitrary and capricious.

### I. The Board Lacked Statutory Authority To Issue Its On-Time Performance Rule.

"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 other 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 rule must be vacated. As this Court has held, "[a]n agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set [such] regulations aside." *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998).

### 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 a host of 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. As to the On-Time Performance measure specifically, Congress provided that the Board's jurisdiction was triggered when On-Time Performance, as defined by the FRA and Amtrak under PRIIA § 207, falls below 80 percent for two consecutive calendar quarters.

The congressional design of PRIIA is clear. Congress separated the rulemaking function from the investigatory and enforcement function. 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 Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013). Although the Board has investigatory and enforcement power under PRIIA § 213, Congress gave the rulemaking power, including the power to define On-Time Performance, to the FRA and Amtrak—and confined the Board to a mere "consult[ing]" role in the rulemaking.

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. 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 Eleventh Circuit examined a very similar statute 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 does 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 (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." *National R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quotation omitted).

In sum, Congress gave the FRA and Amtrak—not the Board—the authority to promulgate an On-Time Performance measure for use in Section 213 proceedings. Where, as here, an agency has "promulgat[ed] . . . rules without valid statutory authority," the court is "required by Congress to set [those] regulations aside." *O'Keefe*, 132 F.3d at 1257.

### B. The Invalidation Of PRIIA § 207 Did Not Transfer The Authority To Define "On-Time Performance" To The Board.

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). The rationale offered by the Board in its final rule—that the judicial invalidation of

PRIIA § 207 authorized the Board to step in and promulgate an On-Time Performance measure—is flawed in many respects.

**1.** The Board does *not* claim that Congress vested it with authority to define On-Time Performance when Congress enacted PRIIA in 2008. Indeed, between the time of PRIIA's enactment and the judicial invalidation of PRIIA § 207, it was universally acknowledged that it was only through the metrics and standards issued by the FRA and Amtrak under PRIIA § 207 that "On-Time Performance" could be defined for purposes of a trigger for § 213 investigations. The Board itself stated in its public comments during the FRA and Amtrak's rulemaking that the § 207 metrics and standards, including the On-Time Performance measure, were "an essential step in order for the processes put in place by PRIIA to be effective." Comments of the STB (Mar. 27, 2009), https://www.regulations.gov/document?D=FRA-2009-0016-0014.

The Board now asserts that even though Congress did not delegate it the authority to define On-Time Performance when it enacted PRIIA in 2008, such authority arose subsequently, when the D.C. Circuit struck down Section 207 as unconstitutional. As the Board stated in its final rule, "the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill," because "[a]ny other result would gut the remedial scheme, a result that Congress clearly did not intend." JA381.

The Board's rationale is meritless because an agency's authority to promulgate rules must come from Congress. *See Bowen*, 488 U.S. at 208. If Congress, when it enacted PRIIA, did not delegate authority to define On-Time Performance to the Board, a subsequent judicial decision striking down the delegation to the FRA and Amtrak does not transfer the invalidated authority 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. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) ("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur."). Here, there can be no reasonable dispute as to the authority Congress delegated. It gave the FRA and Amtrak the authority to issue an On-Time Performance rule for purposes of PRIIA § 213. The D.C. Circuit's subsequent ruling cannot change that delegation.

The Board rested its claim of authority on two cases that are plainly distinguishable. *See* JA381 (citing *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004) and *Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336 (6th Cir. 2005)). Both cases involved a statute giving the Commissioner of Social Security the power to assign to certain coal companies the responsibility of paying benefits to

retired miners. *See* 26 U.S.C. § 9706(a) ("[T]he Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator . . . ."). After the Commissioner made the assignments in question, the Supreme Court invalidated a portion of the statute that had permitted assignments to companies that had long since left the business. The Commissioner then made reassignments, and the courts in *Pittston* and *Sidney Coal* simply upheld the reassignments as consistent with the statute. *See Pittston*, 368 F.3d at 404; *Sidney Coal*, 427 F.3d at 346.

These cases do not support the Board's actions here, because the Social Security Commissioner—unlike the Board—was acting pursuant to express authority delegated to her by Congress. The Board has never cited a case where an agency *without* express authority inherited a "gap-filling" power to issue a rule because Congress's grant of rulemaking authority to *different* agencies was invalidated.[4]

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[4] The Board cited two cases in a footnote, neither of which justifies its rulemaking. *See* JA381 n.4 (citing *ICC v. Am. Trucking Ass'ns*, 467 U.S. 354 (1984) and *W. Coal Traffic League v. STB*, 216 F.3d 1168 (D.C. Cir. 2000)). In *American Trucking*, the Court merely held that the Commission had the discretion to adopt a *remedy* as an "adjunct" to the express remedies identified in the statute. 467 U.S. at 365. And in *Western Coal*, the court held that the Board permissibly decided to place a 15-month "moratorium" upon the filing of

[Footnote continued on next page]

**2.** The Board stated that issuing its own On-Time Performance rule was "the only way for the Board to now fulfill its responsibilities" under Section 213, and that "[a]ny other result would gut the remedial scheme, a result that Congress clearly did not intend." JA380-81. In the Board's view, nature abhors a regulatory vacuum, so if the FRA and Amtrak are unable to issue the On-Time Performance rule as contemplated by Section 207, then the Board must be allowed to claim that power itself. The Board's expansive vision of regulatory power is misplaced.

The purported need for the Board to "fulfill its responsibilities" cannot substitute for the constitutional requirement of congressional authorization for the rulemaking. "Regardless of how serious the problem an administrative agency seeks to address . . ., it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (quotation omitted). Agencies 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). Indeed, if an agency could exercise rulemaking authority any

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railroad merger applications. 216 F.3d at 1170. Neither case justifies the ultra vires rulemaking that occurred here.

time the agency deemed it necessary to "fulfill its responsibilities," agencies could regulate in the absence of congressional authorization—and the Constitution's separation of powers would be rendered a nullity. *See O'Keefe*, 132 F.3d at 1257 ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers . . . .").

The Board's concern that the remedial scheme would be undercut if the power to define On-Time Performance went unexercised, JA381, 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 the Supreme 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."

Even if an agency were free to rewrite a statutory scheme to achieve what it divines Congress would have wanted, there are numerous indicators in the text of PRIIA that Congress did *not* want to give the Board the authority to define On-Time Performance for purposes of Section 213 investigations. First, Congress took pains to separate the rulemaking function from the investigatory and enforcement

functions, giving the former to the FRA and Amtrak, and the latter to the Board. *Martin v. OSHRC*, 499 U.S. 144, 151 (1991) (noting that while Congress sometimes combines "rulemaking, enforcement, and adjudicative powers . . . in a single administrative authority," at other times it opts to assign these responsibilities "to two different administrative authorities" in order to "achieve a greater separation of functions than exists within the traditional 'unitary' agency"). Second, rather than leave the Board's role undefined, Congress expressly *confined* the Board to a "consult[ing]" role in the rulemaking. Third, in PRIIA § 207(d), Congress addressed what would happen if the FRA and Amtrak were unable to issue an On-Time Performance rule themselves. It provided that even in that scenario, a Board-appointed *arbitrator* would issue the rule—not the Board itself.

An additional indicator of Congress' intent to withhold rulemaking authority from the Board is its decision to codify PRIIA § 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.[5] For this reason, the Board's invocation of its general

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[5] 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

[Footnote continued on next page]

rulemaking power in the "Authority" line for this rulemaking is inexplicable, JA389, and the Board offered no clue as to why it cited as the legal "Authority" for this rulemaking a statutory provision that plainly *does not authorize* this rulemaking.

In sum, it is the prerogative of Congress, not the Board, to determine whether and how to reassign rulemaking authority in the wake of the judicial invalidation of § 207. No precedent supports the Board's claim that a judicial invalidation of a statutory delegation of rulemaking authority to one agency allows a different agency, to which Congress did *not* delegate that authority, to step in and arrogate that power to itself. When a court holds that Congress made an impermissible choice of delegate, it is up to Congress whether and how to redirect the rulemaking authority. The Board's usurpation of that congressional prerogative exceeded its authority and violated the separation of powers.

### C. The Board Cannot Claim *Chevron* Deference.

The Board's assertion of authority to adopt rules implementing §§ 207 and 213 is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "A precondition to deference under *Chevron* is a congressional delegation of administrative authority," *Adams Fruit*

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U.S.C. §§ 10101-16106. PRIIA § 213, which is codified at 49 U.S.C. § 24308(f), falls outside both ranges.

*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 did *not* delegate authority to the Board to promulgate rules implementing PRIIA generally, or PRIIA §§ 207 or 213 in particular—let alone the authority to decide how PRIIA should be rewritten in the wake of the invalidation of PRIIA § 207. For that reason, any claim to deference would fail at the threshold, as the precondition to *Chevron* deference (*Chevron* step zero) is not satisfied.

The Board's interpretation of PRIIA would fail both steps of *Chevron* in any event. Applying the ordinary tools of statutory construction, the court must first determine whether Congress has directly addressed the question, because "[i]f the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842-43. Here, Congress spoke clearly by giving the FRA and Amtrak, not the Board, the authority to issue an On-Time Performance rule. And even if the statute could somehow be deemed ambiguous, the Board's assertion of rulemaking authority is not "based on a permissible construction of the statute," *id*. at 843, for the many reasons detailed above.

## II. The Board's Failure To Consider The Impact Of Its Rule On Freight Traffic Requires Vacatur.

This case presents a textbook example of arbitrary and capricious rulemaking. Even though the impact on freight traffic is undeniably "an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and even though numerous commenters urged the Board to consider the impact on freight in fashioning its On-Time Performance rule, the Board ignored those concerns and failed even to *acknowledge* the arguments of many commenters in issuing its final rule. That failure requires vacatur. *See Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295-96 (8th Cir. 1985) (rule invalid where agency "failed to consider important aspects of the problem"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("An agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious." (quotation omitted)).

Congress has directed the Board to discharge its duties with an eye to promoting efficient freight service throughout the United States. For example, the transportation policy of the United States emphasizes the need to minimize regulation and ensure a robust and fluid nationwide rail network. *See* 49 U.S.C. § 10101. Similarly, Congress has required that the rights of Amtrak and host carriers be established on "reasonable terms" that seek to avoid materially

"lessen[ing] the quality of freight transportation provided to shippers." 49 U.S.C. § 24308(a)-(c).

As the Board recently explained, it "is charged with advancing the national transportation policy goals enacted by Congress and promoting an efficient, competitive, safe and cost-effective freight rail network." STB, *FY 2015 Annual Report*, https://www.stb.gov/STB/docs/AnnualReports/Annual%20Report%202015.pdf. The Board accomplishes these goals by enabling freight railroads "to earn adequate revenues that foster reinvestment in their systems, attract outside capital, and provide reliable service." *Id*.

The effect of the Board's On-Time Performance rule on freight traffic should have been an obvious and important consideration in fashioning the rule. Indeed, in commencing the rulemaking, the Board specifically acknowledged that "the definition [of On-Time Performance] adopted by the Board could affect a significant portion of the railroad industry," JA14, and one Board Member had written separately to emphasize that the Board's rule would "have a far-reaching impact" on freight railroads and the "entire industry." Decision, Docket No. NOR 42134, at 12 (Dec. 19, 2014) (Begeman, dissenting).

The comments strongly reinforced this concern. As set forth above, *see* pp. 12-16 supra, many commenters urged the Board to consider the effect of its On-Time Performance rule on freight traffic. Commenters argued that the Board

needed to recognize the current conditions on the twenty-first century rail network, including a dramatic rise in freight traffic and projections for substantial further increase in the years ahead, greater congestion on key corridors, and the special difficulties posed by Amtrak trains, which consume a disproportionate share of the limited capacity or "train slots" available on a line. *See, e.g.*, JA52, 109-11, 130, 164-65. And many commenters urged the Board, in recognition of these realities and in order to avoid further burdening the freight carriers that host Amtrak trains, to increase the 30-minute cap on longer routes and generally adopt more liberal delay tolerances. *See, e.g.*, JA53-56, 114-16, 137-38, 178-83.

The Board did not discuss any of these concerns or so much as acknowledge that they had been presented. In fact, even though the Department of Transportation itself raised these very concerns in its comments—reminding the Board that "[f]reight rail customers also depend upon this network," and that "it is important to keep the freight rail system fluid and efficient" (JA33)—the Board ignored them as well. Instead, rather than increase the 30-minute cap on permissible delays, the Board *reduced* it to 15 minutes—no matter how long the route. *See* JA383. In doing so, the Board said not a word in response to the arguments raised by the freight railroads in their comments that *more* delay tolerance was needed given the potential impact on freight traffic.

Ironically, pursuant to its obligations under the Regulatory Flexibility Act, the Board did discuss whether its rule would have a significant impact on *smaller* freight railroads—railroads that, unlike the petitioners in this case, generally do not host Amtrak trains. *See* JA387 ("For almost all of its operations, Amtrak's host carriers are Class I rail carriers, which are not small businesses . . . ."). In that context, the Board suggested that because its On-Time Performance rule merely "clarifies an existing obligation," it would have no practical impact on host railroads. *Id*. That claim is misplaced. The rule puts substantial pressure on the freight railroads to alter their dispatching practices and modify schedules in order to avoid federal investigations and potential civil damage awards. *See Dep't of Transp. v. Ass'n Am. R.R.*, 135 S. Ct. 1225, 1236 (2015) (Alito, J., concurring) ("Because obedience to the [On-Time Performance rule] materially reduces the risk of liability, railroads face powerful incentives to obey."). Moreover, in claiming that its rule merely "clarifies" the freight railroads' existing obligation to host Amtrak trains, the Board overlooked the fact that its choice of On-Time Performance rule determines the *extent* of the burden. A strict 15-minute delay tolerance plainly imposes a far greater burden on host railroads than would, say, a more permissive 45-minute tolerance. In this way, the Board's rule "lend[s] definite regulatory force to an otherwise broad statutory mandate." *Id*. (quotation omitted).

Nor did the Board address the argument raised in the comments that it would be arbitrary and irrational to impose a more demanding On-Time Performance standard for Amtrak trains than exists for commercial passenger airplanes. *See* JA53-55. Federal regulations define a flight as "chronically delayed" if it arrives more than 30 minutes late more than 50 percent of the time during a month. *See* 14 C.F.R. § 399.81(c)(2). Moreover, trains must confront many obstacles that planes do not. For example, while planes have no speed limit once they reach 10,000 feet, *see* 14 C.F.R. § 91.117, trains must always adhere to speed limits and thus cannot go faster to make up for lost time. Trains must also navigate construction and maintenance, whereas planes encounter no similar obstacles once they are en route. Even though these arguments were discussed at length in the comments, the Board did not address them.

In sum, the Board was obligated to acknowledge and address "an important aspect of the problem," *State Farm*, 463 U.S. at 43, that had been raised by many commenters: how its On-Time Performance rule will affect the nation's freight traffic. The Board's failure to do so requires vacatur.

## III. The Board's Adoption Of An "All-Stations" Approach To On-Time Performance Was Arbitrary And Capricious.

The final rule must be vacated for an additional reason: the Board failed to engage in reasoned decisionmaking when it adopted an "All-Stations" approach to measuring On-Time Performance.

The Board's proposed rule recommended an "Endpoint" approach to measuring On-Time Performance, looking solely to the Amtrak train's arrival at its final destination. The Board explained that an Endpoint approach is "clear and relatively easy to apply," and "would simplify the record-keeping and production of evidence that may otherwise be necessary for Amtrak and the host carriers if on-time performance were defined using a number of additional factors, such as the amount of delay at intermediate stops." JA21.

The Board changed course in the final rule. At the behest of Amtrak and others, it jettisoned the Endpoint approach, and switched to an "All-Stations" approach in which On-Time Performance is assessed by the train's punctuality at every stop on its route. JA381-82. The Board reasoned that "an 'all-stations' definition will more appropriately reflect the principle that rail passengers destined for every station along a line, regardless of its size, should have the same expectation of punctuality." JA382.

In adopting the All-Stations approach, the Board committed two fundamental errors, either of which independently warrants vacatur. First, the Board conceded that some Amtrak schedules are not designed for an All-Stations approach—but summarily dismissed the concern by speculating, contrary to all the evidence in the record, that the parties would simply modify the schedules to conform to the new methodology. Second, even if the schedules *could* be modified

along the lines the Board envisions, the Board failed to address the serious operational problems that would result from an All-Stations approach.

### A. The Final Rule Rests On The Board's Unsupported Speculation That Amtrak's Schedules Will Readily Be Modified.

It was widely acknowledged in the comments that Amtrak schedules are generally not designed for an All-Stations approach. The freight railroads explained how recovery time is back-loaded, and that using Amtrak's schedules as a baseline for measuring On-Time Performance would result in unrealistic arrival and departure times for stations at the beginning or in the middle of longer routes. *See* JA252-53, 269-72, 281-82, 306-10. The freight railroads also pointed out that when the FRA and Amtrak issued their own On-Time Performance rule in 2010, they expressly acknowledged that "introduction of [an] All-Stations [On-Time Performance] standard will involve a challenging process of readjustment, in which Amtrak, its railroad hosts, and (where applicable) State sponsors of service" would be required to make "operational and scheduling adjustments." *Metrics and Standards for Intercity Passenger Rail Service* 18 (May 12, 2010), http://1.usa.gov/1nYiXmw. For these reasons—and because Amtrak's schedules are generally unrealistic and aspirational—the freight railroads urged the Board not to adopt an On-Time Performance rule that used Amtrak's schedules as a baseline. JA48-50, 104-07, 136, 146-48, 166-78.

Other commenters similarly noted the concerns surrounding Amtrak's schedules and urged the Board to obtain more information and examine the issue more closely before moving forward. In fact, the U.S. Department of Transportation specifically warned the Board not to proceed with its On-Time Performance rule until it had gathered additional information on Amtrak's schedules:

> DOT recognizes that the Board may raise additional questions about Amtrak's schedules. Given the importance of this proceeding, it is appropriate for the Board to delve further into these questions and to obtain more information . . . .

JA35 (emphasis added and citation omitted). Likewise, the Virginia Department of Rail and Public Transportation stated that the Board "should adopt a final rule *only* after the viability of Amtrak services schedules can be further assessed." JA156 (emphasis added).

In issuing the final rule, the Board itself acknowledged that some Amtrak schedules are not compatible with an All-Stations approach. The Board recognized that "a number of current passenger rail schedules insert a very large share of recovery time between the last stations on a route." JA382. It further recognized that, "[a]s the freight railroads point out, and as FRA and Amtrak themselves acknowledged in their final metrics and standards under PRIIA Section 207 (in which they deferred application of an all-stations test for [On-Time

Performance] for two years to allow for schedule adjustments), some schedules, particularly for long-distance trains, may need to be modified to more realistically distribute recovery time in light of an all-stations threshold." *Id*.

But then, the Board sidestepped the entire problem by declaring that "[w]e are confident . . . that following adoption of an all-stations approach to [On-Time Performance] in this rulemaking, rail operations planners from all affected parties will be able to devise appropriate, realistic, and up-to-date modifications to published schedules that are consistent both with all-stations [On-Time Performance] and with Congress' explicit intent in PRIIA to improve intercity passenger rail service." JA382.

This is not reasoned decisionmaking. An agency cannot base its rule on pure *speculation* as to how the regulated parties might react. *See Del. Dep't of Nat. Res. v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015) ("We will reverse when agency action is based on speculation . . . .") (quotation omitted). The Board offered not a word of explanation—let alone any evidentiary basis—for why it was "confident," JA382, that the parties would simply be able to negotiate *new* schedules that would conform to the Board's approach by redistributing recovery time throughout the route. The Board's rationale is the epitome of arbitrary reasoning: acknowledging

a significant problem with a final rule but predicting that the regulated parties would find some way to solve it.[6]

If anything, the evidence in the record when the Board issued its final rule demonstrates that Amtrak's schedules will *not* be modified as the Board predicts. It is undisputed that when the FRA and Amtrak in 2010 adopted an All-Stations approach in their own On-Time Performance rule, the necessary modifications were never made. *See* JA239, 253, 282. In fact, one commenter noted that Amtrak *refused* to add meaningful recovery time for intermediate stations during negotiations. *See* JA307. An agency cannot "offer[ ] an explanation for its decision that runs counter to the evidence before the agency," *State Farm*, 463 U.S. at 43, just as an agency has "no license to ignore the past when the past relates directly to the question at issue," *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006). Here, the Board ignored the most relevant evidence imaginable: the fact that the requisite schedule modifications *were not made* after

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6 The Board's statement that "considerations regarding the published schedules *may* enter into the investigation stage," JA382 (emphasis added), does not solve the problem. For one thing, it is conditional; the Board offered no assurance that a freight railroad will not be punished based on an outdated or unrealistic Amtrak schedule. For another, the Board's approach would still subject freight railroads to the expense, burden and reputational harm arising from a federal investigation before they could be exonerated.

the FRA and Amtrak did precisely what the Board did here—issue an On-Time Performance rule with an All-Stations approach.

Finally, the Board offered no explanation for why it chose to ignore the recommendations of the U.S. Department of Transportation and the Commonwealth of Virginia that it should gather more information, and issue a final rule only *after* examining the achievability of Amtrak's schedules. Remarkably, even though the Board acknowledged that "some commenters . . . argue that the Board should set standards for the development of route schedules or conduct further study of the schedules prior to adopting rules," JA383, the Board simply stated that it lacked authority to set standards—and utterly ignored the recommendations that it conduct further study of Amtrak schedules before adopting an On-Time Performance rule.

In sum, there is no evidence that the Amtrak schedules will be modified in the way the Board anticipated—and abundant evidence that they will *not* be. For that reason, the On-Time Performance rule must be set aside as resting on impermissible, unsupported speculation.

### B. The Board Ignored The Operational Problems And Related Costs That Will Arise From Its All-Stations Approach.

The Board's reasoning was deficient in another key respect: the Board simply refused to acknowledge, let alone address, the operational problems and other costs that will unavoidably result from an All-Stations approach. Courts

have "stressed that unless the agency answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned." *PPL Wallingford*, 419 F.3d at 1198 (quotation and brackets omitted).

In their comments, the freight railroads explained the many problems that would arise from an All-Stations approach. Among other things, Amtrak's schedules would have to be designed so that trains would routinely arrive early at intermediate stations, to offset the delays that inevitably arise in rail operations. But at most intermediate stations, Amtrak trains have no choice but to stop on the main line, as there is no station track or siding. Thus, "if a train arrives early, it sits on the main line until its scheduled departure, blocking freight traffic." *See* JA241; *see also* JA308-09 (on some runs, "this practice would require the train to hold at intermediate stations to 'kill time' before continuing its journey"); JA272 ("[I]ncluding too much recovery time on certain segments on some routes might result in Amtrak frequently arriving early to the following station, which would be undesirable from both a safety and operations perspective if that station is on mainline track."); JA281 n.2 ("If an Amtrak train arrives early at an intermediate station because of unused recovery time, it must idle there until its scheduled departure time, and the benefit of that unused recovery time is lost.").

Relatedly, the railroads explained that modifying schedules could impose significant costs by requiring increased capital spending on infrastructure in hopes

of achieving the modified arrival and departure times at each station along the route. *See* JA241. In fact, when the FRA and Amtrak issued their own On-Time Performance rule, they specifically recognized "the potential burden and operational impacts of [an All-Stations] standard." JA241 n.13 (quotation omitted). Yet the Board failed to acknowledge these costs as well.

In sum, the Board recognized the need to modify schedules to conform to an All-Stations approach, but inexplicably failed to address the concerns about the operational problems and other costs arising from such an approach *even if the parties did exactly what the Board speculated they would*. An agency is not required to agree with all the concerns raised by commenters—but it is not entitled to simply ignore them, as the Board did here.

## CONCLUSION

This Court should vacate the final rule.

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Dated: October 14, 2016

/s/ Thomas H. Dupree Jr.
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## CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Thomas H. Dupree Jr.
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