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 CO. *(No. 16-3307)*; ASSOCIATION OF AMERICAN RAILROADS *(No. 16-3504)*; CSX TRANSPORTATION, INC. *(No. 16-3512)*; NORFOLK SOUTHERN RAILWAY CO. *(No. 16-3513)*; *and* CANADIAN NATIONAL RAILWAY CO.; ILLINOIS CENTRAL RAILROAD CO.; *and* GRAND TRUNK WESTERN RAILROAD CO. *(No. 16-3514)*,
Petitioners,

v.

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

On Petition for Review of a Final Rule of the Surface Transportation Board

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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Dated: October 21, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus curiae* states as follows:

The Chamber of Commerce of the United States of America has no parent company. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community.

The Chamber has a strong interest in this important case. Many of the Chamber's members are companies subject to regulation by the Surface Transportation Board ("Board") who are adversely affected by the Board's final rule. In addition, the Chamber has long been concerned about agencies that exceed their congressionally granted authority and the economic impacts of rulemaking.

SUMMARY OF ARGUMENT

The Surface Transportation Board concedes that prior to April 2016, it had no authority to issue its On-Time Performance Rule ("Rule"). Section 207 of the

[1] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

Passenger Rail Investment and Improvement Act of 2008 ("PRIIA") vests that authority exclusively in the Federal Railroad Administration ("FRA") and Amtrak. That statute has not changed—Congress has not amended or repealed section 207. What changed was that in April 2016, the D.C. Circuit held that section 207 was unconstitutional because it allows Amtrak, a self-interested entity, to regulate its competitors. *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 821 F.3d 19 (D.C. Cir. 2016) ("*AAR*"). Now that the FRA and Amtrak can no longer define on-time performance, the Board asserts that it can swoop in and fill the regulatory void. But subtracting the unconstitutional portion from a statute that did not originally give such authority to the Board cannot somehow create new authority for the Board.

The Board mistakenly assumes that a judicial decision holding a statute unconstitutional wipes the statute off the books, as if Congress never enacted it in the first place. But even when a court declares a statute unconstitutional and thus unenforceable, the statute may continue to be relevant for purposes of statutory interpretation. Here, even though the D.C. Circuit declared section 207 unconstitutional, the enactment of that provision still demonstrates that Congress never authorized *the Board* to define on-time performance.

Moreover, the Board's position would create regulatory confusion, and its Rule will inflict substantial harm not only on freight railroads, but on their direct

and indirect customers across the country. For all these reasons, the Court should grant the petitions for review and vacate the Rule.

ARGUMENT

The Board's On-Time Performance Rule must be vacated because it exceeds the scope of the Board's statutory authority. The Administrative Procedure Act requires this Court to vacate an agency regulation that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C); *see also id.* § 558 ("[A] substantive rule … [may not be] issued except within jurisdiction delegated to the agency and as authorized by law."). Even without the APA, the Constitution would impose the same requirement. *See United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers.").

This Court should vacate the Rule. First, the PRIIA vested the authority to define on-time performance in the FRA and Amtrak, not the Board. Second, the D.C. Circuit's decision in *AAR* did not change the meaning of the PRIIA or bestow any new authority on the Board. Third, the Board's view of the law is unworkable and would harm countless businesses and the national economy.

I. The Statute Unambiguously Denies the Board the Authority to Define On-Time Performance.

The PRIIA, as it was enacted in 2008, does not give the Board the authority to define on-time performance. Section 207 vests this authority exclusively in "the Federal Railroad Administration and Amtrak." PRIIA § 207(a), 49 U.S.C. § 24101 note. The only authority that the PRIIA gives the Board is "consult[ing]" with the FRA and Amtrak, *id.*, "appoint[ing] an arbitrator" if the FRA and Amtrak have disputes, *id.* § 207(d), and conducting "investigation[s]" and "awarding damages" for violations of the standards that the FRA and Amtrak develop, *id.* § 213(a), 49 U.S.C. § 24308(f). This statutory structure is an unambiguous limitation of the Board's authority to the aforementioned areas. *See Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084-85 (11th Cir. 2013) (granting a preliminary injunction against a rule where an analogous immigration statute allocating authority among different agencies did not vest an agency with authority to promulgate legislative rules); *Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) ("It would be anomalous for Congress to have so painstakingly described the [agency's] limited authority … but to have given [it], just by implication, [much broader] authority ….").[2]

[2] Although agencies are entitled to *Chevron* deference where they interpret the scope of their statutory jurisdiction, that deference does not apply where, as here, the statute is unambiguous. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868

Moreover, any interpretation of the PRIIA that allowed the Board to define on-time performance is disfavored because courts are unwilling to presume that Congress delegates binding interpretative authority to more than one agency. *See Martin v. OSHRC*, 499 U.S. 144, 153-54 (1991) ("Because [the agency's interpretation] would make *two* administrative actors ultimately responsible for implementing the Act's policy objectives, we conclude that Congress did not expect the [agency] to possess authoritative interpretive powers."). "Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court," courts "presume" that "Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." *Gonzales*, 546 U.S. at 266. Here, that actor was the FRA. The PRIIA instructs the FRA to promulgate standards for on-time performance jointly with Amtrak. *See Martin*, 499 U.S. at 152. Indeed, if *both* the Board and the FRA had the power to define on-time performance, then *neither* agency would receive deference from the courts. *See Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) ("When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference.").

(2013). As explained, the PRIIA unambiguously vests the authority to define on-time performance with the FRA and Amtrak, not the Board.

The Board does not disagree. During the rulemaking, it offered no interpretation of section 207(a) and made no attempt to explain how the PRIIA, as enacted, gives it the authority to define on-time performance.[3] Instead, the Board argued that it somehow *acquired* this authority in April 2016, when the D.C. Circuit issued its decision in *AAR*. Because *AAR* invalidated section 207, the Board reasoned, the PRIIA now implicitly gives it the authority to define on-time performance. 81 Fed. Reg. 51,343, 51,345 (Aug. 4, 2016). This implicit delegation supposedly comes from the Board's power to conduct investigations under section 213(a). *Id*. But this argument not only disregrards Congress's delegation of authority in section 207, it misunderstands the effect of the D.C. Circuit's decision.

II. A Judicial Decision Declaring Part of a Statute Unconstitutional Does Not Create Authority that the Original Statute Withheld.

The premise underlying the Board's position—that a court decision declaring a statute unconstitutional wipes the statute off the books, as if Congress had never enacted it—is fatally flawed. The D.C. Circuit's decision in *AAR* does not mean that section 213 should be interpreted as if section 207 was never enacted. To the contrary, although section 207 has been declared unconstitutional,

[3] The Board cannot offer such an interpretation for the first time on appeal. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015) ("[The] *Chenery* principle applies to *Chevron* statutory analysis.").

it remains the expression of Congress's intent to delegate authority over on-time performance standards to the FRA and Amtrak, rather than the Board.

When a court declares a statute unconstitutional, it refuses to honor the statute to the extent that it conflicts with the higher authority of the Constitution. *See Marbury v. Madison*, 5 U.S. 137, 177-78 (1803). But courts do not repeal unconstitutional statutes or remove them from the Statutes at Large or the United States Code; only Congress can do that. *See Status of D.C. Minimum Wage Law*, 39 Op. Att'y Gen. 22, 22-23 (1937) ("The decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books."); Oliver P. Field, *The Effect of an Unconstitutional Statute* 10 (1935) ("A declaration of unconstitutionality does not operate as a repeal of a statute. All courts agree upon this."). A law that has been declared unconstitutional is not void *ab initio*.[4]

Thus, even when a statute has been declared unconstitutional, courts will consult it to determine the meaning of the surrounding statutes that are still in

[4] The Supreme Court has long "receded" from the view that an unconstitutional statute "'is … inoperative as though it had never been passed.'" *Lemon v. Kurtzman*, 411 U.S. 192, 198 (1973) (quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)). Instead, "[t]he actual existence of a statute [that has been declared unconstitutional] is an operative fact and may have consequences which cannot justly be ignored." *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 & n.3 (1940).

force. *See, e.g.*, *Janko v. Gates*, 741 F.3d 136, 142 n.4 (D.C. Cir. 2014). This makes sense. The question here is what the statute meant *at the time it was enacted*. *See Massachusetts v. EPA*, 549 U.S. 497, 529-30 & n.27 (2007) (rejecting the relevance of "postenactment congressional actions" because they do not reveal the intent of the *enacting* Congress); *Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) ("We seek … indicia of congressional intent at the time the statute was enacted."). When Congress enacts a statute that includes both a constitutional provision and an unconstitutional one, both provisions initially "enjoy[] a presumption of validity." *United States v. Baucum*, 80 F.3d 539, 540 (D.C. Cir. 1996). And because the provisions were enacted together, the unconstitutional ones influence the meaning of the constitutional ones, even after a court strikes them down. *See Janko*, 741 F.3d at 142 n.4.

The question whether Congress delegated the authority to define on-time performance to the Board is thus a straightforward question of statutory interpretation. When the PRIIA was enacted in 2008, it unambiguously vested the authority to define on-time performance in the FRA and Amtrak, not the Board. The Board could not have argued in 2008 that its power to conduct investigations under section 213(a) was an "implied" grant of authority to define on-time performance; section 207 refutes that interpretation because it expressly delegates that authority to the FRA and Amtrak. And if section 213(a) was not an implied

delegation to the Board in 2008, it cannot be one now. *See Ngiraingas*, 495 U.S. at 187. The fact that the D.C. Circuit declared section 207 unconstitutional does not mean that this Court should now interpret section 213(a) in a vacuum. Section 207 continues to illuminate the meaning of the PRIIA, even after *AAR*. *See Janko*, 741 F.3d at 142 n.4. Unless and until Congress declares otherwise, the Board lacks the authority to define on-time performance.[5]

The two out-of-circuit decisions that the Board cited—*Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), and *Sidney Coal Co. v. SSA*, 427 F.3d 336 (6th Cir. 2005)—are not to the contrary. Both decisions involved a provision of the Coal Act that instructed the Commissioner of the Social Security Administration to assign coal companies to retired coal miners to ensure that they received benefits. The Commissioner had three mutually exclusive options for assigning the retirees to the companies. *See* 26 U.S.C. § 9706(a). In *Eastern Enterprises v. Apfel*, the Supreme Court had held that the third option was partially unconstitutional because

[5] This conclusion is not affected by the principle that judicial decisions interpreting the Constitution are generally retroactive. *Contra Texas v. United States*, 497 F.3d 491, 515 (5th Cir. 2007) (Dennis, J., dissenting). It is true that when the Supreme Court declares a statute unconstitutional, it means that the statute was always unconstitutional. *See Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment). But this has nothing to do with congressional intent. The subsequent determination that a statute is unconstitutional does not mean that Congress did not intend to pass it. Because congressional intent is what matters when discerning whether a statute delegates authority to an agency, *see Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000), the retroactivity of constitutional decisions is not relevant here.

it allowed the Commissioner to assign retirees to companies that had never signed a collective bargaining agreement. 524 U.S. 498 (1998).

After the Supreme Court decided *Eastern Enterprises*, the Commissioner reassigned retirees under the third option from companies that had not signed a collective bargaining agreement to companies that had. *Pittston*, 368 F.3d at 392-93. A few companies complained that this violated the Coal Act, but the Fourth and Sixth Circuits disagreed. *Id.* at 405; *Sidney Coal*, 427 F.3d at 346. The Commissioner had a duty "to comport with the terms of the statute *as well as the Constitution*." *Pittston*, 368 F.3d at 403 (emphasis added). Because the Constitution trumps a statute, "the Commissioner *should never have assigned* retirees to [companies that did not sign a collective bargaining agreement] *in the first place*." *Id.* And when the Commissioner responded to *Eastern Enterprises*, she stayed within the bounds of her delegated authority. The Coal Act covers only companies that were "in business" in 1993, 26 U.S.C. § 9706(a), so the Commissioner took "the small step of construing the class of out-of-business operators to include Eastern-like companies who were constitutionally disqualified." *Pittston*, 368 F.3d at 403 n.3. After the Commissioner made this permissible interpretation, she could apply the third option in the Coal Act "to the letter." *Id.* at 404.

This case is nothing like *Pittston* or *Sidney Coal*. Unlike the Commissioner in the wake of *Eastern Enterprises*, the Board does not face a conflict in the wake of *AAR* between its duty to follow the Constitution and its duty to follow the PRIIA. The constitutional problem identified in *AAR* is specific to Amtrak; to comply with it, the Board needs to do nothing. Also unlike the Commissioner, the Board has not responded to *AAR* by staying within its delegated authority. Before and after *Eastern Enterprises*, the Commissioner had the authority to assign coal companies to retirees. The Board, by contrast, concedes that it lacked the authority to define on-time performance before the D.C. Circuit decided *AAR*. Likewise, the Commissioner's interpretation of the statute was permissible before and after *Eastern Enterprises*. The Board's interpretation of the PRIIA, however, is untenable. In short, *Pittston* and *Sidney Coal* stand for the proposition that an agency confronted with a judicial decision declaring part of a statute unconstitutional must respond in a way that "is (1) faithful to the authority Congress *originally* delegated to the agency and (2) does not contradict the plain language of the statute." *Texas v. United States*, 497 F.3d at 505 n.13 (op. of Jones, C.J.) (emphasis added). The Board's Rule does neither.

III. The Board's Position Is Unworkable and Would Hurt American Businesses.

The Board asks this Court to hold that when a judicial decision invalidates a delegation to one agency on constitutional grounds, then other agencies can swoop

in and fill the regulatory vacuum. Such a holding would be unworkable, fraught with uncertainty, and harmful to American businesses. It cannot and should not be the law.

First, the Board's position would be unworkable in practice. The Board contends that, if a court decision disqualifies the agency with express authority to administer a statutory provision, then another agency inherits the "implied" authority to assume the mantle. This is not only doctrinally wrong, but it would be unworkable in the many instances where Congress charges *numerous* agencies with administering different parts of a statute. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1134 (2012) ("Congress often … divides authority among multiple agencies, giving each responsibility for part of a larger whole. Instances of overlap and fragmentation are not rare or isolated. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation …."). If one of these statutes is declared unconstitutional in part, which agency fills in? All of them? Some of them? What if they disagree? The potential for confusion, inter-agency turf wars, and inconsistent regulations is obvious. Such turmoil would be a serious burden on businesses, which must work with regulators and comply with their demands.

The Board's view also deviates from "*Chevron*'s concept of the administrative state"—*i.e.*, agencies that are "expert," and "politically accountable," and merely "fill[ing] statutory interstices." *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1051 (5th Cir. 1998) (citing *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 844-45, 865-66 (1984)). The Board's position would have agencies that Congress did not choose, regulating areas that Congress did not intend, based on court decisions that Congress did not anticipate.

This case is a prime example. The Board has seized the authority to define on-time performance, despite the much more limited role that Congress assigned to it. The resulting power grab is significant. The definition of on-time performance has dramatic effects on the freight trains that share track space with Amtrak. Freight traffic, in turn, is vitally important to the Chamber's members and the greater economy. Freight railroads ship nearly two billion tons each year—or half a trillion dollars' worth of goods. *See* U.S. Dep't of Transp., *Freight Facts and Figures 2013*, at 3-4 tbls. 2-1, 2-2 (Jan. 2014). "America's freight railroads sustain 1.2 million jobs, including 180,000 high-paying jobs in the freight rail industry itself." *Perspectives from Users of the Nation's Freight System: Hearing Before the Panel on 21st-Century Freight Transp. of the H. Comm. on Transp. & Infrastructure*, 113th Cong. 68 (2013) (statement of Edward R. Hamberger); *see also* AAR, *2016 State of the Industry Report 2* at 3, https://goo.gl/jOe35V

("[F]reight railroads have a ripple effect that result[s] in nine jobs for every one freight rail job…."). The smooth operation of freight traffic has "numerous public benefits including reductions in road congestion, highway fatalities, fuel consumption and greenhouse gasses, logistics costs, and public infrastructure maintenance costs," FRA, *The Freight Rail Network*, Freight Rail Today, https://www.fra.dot.gov/Page/P0362; and it saves consumers billions of dollars every year, *see* AAR, *The Economic Impact of America's Freight Railroads* at 2 (Aug. 2016), https://goo.gl/rRqV45. This is an enormous amount of authority to wield for an agency that Congress did not select for the role.

Moreover, as the petitioners explain, the Board developed its definition of on-time performance without even considering the impact on freight traffic. *See* Petrs' Br. at 38-42. This type of arbitrary and capricious rulemaking indicates that Congress had good reason not to delegate authority over on-time performance standards to the Board.

CONCLUSION

For the foregoing reasons, the Chamber respectfully asks this Court to grant the petitions for review and to vacate the Rule.

Respectfully submitted,

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Dated: October 21, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 3,355 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Eighth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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