

1 IN THE SUPREME COURT OF THE UNITED STATES

3 DEPARTMENT OF :

5            Petitioners                                 :   No. 13-1080

7 ASSOCIATION OF AMERICAN :

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11 Monday, December 8, 2014

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13           The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United States  
15   at 11:08 a.m.

17 CURTIS E. GANNON, ESQ., Assistant to the Solicitor

19      behalf of Petitioners.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 13-1080, Department of  
5 Transportation v. Association of American Railroads.  
6 Mr. Gannon.

7 ORAL ARGUMENT OF CURTIS E. GANNON

8 ON BEHALF OF THE PETITIONERS

9 MR. GANNON: Mr. Chief Justice, and may it  
10 please the Court:

11 The court of appeals held that Section 207  
12 of PRIIA was unconstitutional because it believed that  
13 the statute constituted an actual delegation of  
14 regulatory authority to a private entity. And none of  
15 those three things is true about this statute.

16 First, under Lebron, Amtrak should not be  
17 considered a private corporation for nondelegation  
18 purposes. Second, the metrics and standards are not  
19 regulatory. The regulatory effect here comes from the  
20 longstanding statutory preference requirement, which was  
21 enacted by Congress, not Amtrak, and is enforced by an  
22 independent adjudicative agency, the Surface  
23 Transportation Board. And third --

24 JUSTICE KENNEDY: Go ahead, please.

25 MR. GANNON: And third, requiring Amtrak to

1 approve the metrics and standards before they went into  
2 effect is not a delegation outside the government under  
3 this Court's cases.

4 JUSTICE KENNEDY: I think the Lebron  
5 argument, Marsh v. Alabama, the company town case, no  
6 one says that it was a governmental agency. It was just  
7 exercising governmental-like powers which entitled the  
8 person to exercise free speech. That's all Lebron can  
9 stand for. You wouldn't say that Marsh v. Alabama, the  
10 company town, was a governmental agency after reading  
11 that opinion, would you?

12 MR. GANNON: No. I would say that after  
13 reading the opinion in Lebron, that the Court concluded  
14 that Amtrak is a governmental entity for things that  
15 Congress doesn't have control over.

16 JUSTICE KENNEDY: Well, you could say the  
17 same thing about Marsh v. Alabama.

18 MR. GANNON: Well, I think that the  
19 difference is that the Court recognized in Lebron that  
20 Amtrak is a government-created corporation that is under  
21 the government's control and that under the government's  
22 control both because of the management control that it  
23 has over it and because it created the purposes for  
24 which Amtrak exists and the things that it has to do.  
25 And then the Court there distinguished between whether Amtrak

1 is governmental for constitutional purposes that were  
2 beyond Congress's control, but acknowledged that  
3 Congress could control whether Amtrak was governmental  
4 for other purposes, other powers and privileges of  
5 government.

6 JUSTICE ALITO: If Amtrak is governmental  
7 for nondelegation purposes, is it also governmental for  
8 appointments clause purposes?

9 MR. GANNON: Well, I think that that follows  
10 from the -- the way the Court approached the question  
11 about the PCAOB and Free Enterprise Fund where Congress  
12 had also enacted a statute that said the PCAOB was not  
13 an agency or instrumentality of government, that no  
14 board members or employees were going to be considered  
15 officers or employees of the Federal government. The  
16 parties in that case, which included the United States,  
17 did not dispute that the appointments clause and  
18 separation of powers concerns that were at issue there  
19 were applicable to the PCAOB, notwithstanding those  
20 general statements by Congress. And we do think here --

21 CHIEF JUSTICE ROBERTS: I was just going to  
22 say your argument that Amtrak is governmental for  
23 purposes of -- that doesn't get you to the finish line,  
24 right? I mean, if you had a law that said the  
25 Department of Defense and the Department of State will

1 consult and jointly issue regulations and if they don't,  
2 this private individual resolved it for them, that would  
3 still present the same problems.

4 MR. GANNON: Well, I think,  
5 Mr. Chief Justice, you are referring to the arbitrator  
6 provision.

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. GANNON: Before we get to the arbitrator  
9 provision, I do think that -- that this would resolve  
10 the question. And ultimately, if this is not regulatory  
11 authority that cannot be conditioned --

12 JUSTICE SCALIA: Well, it wouldn't resolve  
13 the question. Only -- only perhaps for delegation  
14 purposes. But -- but it doesn't resolve the -- the  
15 other issue in the case, which is due process. That is  
16 to say, even if this is a governmental entity, there are  
17 some things that governmental entities can't do. And,  
18 indeed, I think that the case law in this area relies on  
19 the due process clause more than on the distinction  
20 simply between public and private entities.

21 MR. GANNON: Well, to be sure, the Carter  
22 Coal case talked about both nondelegation ideas and also  
23 due process issues. We -- we would be surprised if  
24 the Court wanted to decide the due process issue here  
25 since it wasn't decided by the court of appeals.

1 JUSTICE SCALIA: It was raised.

2 MR. GANNON: It certainty was raised.

3 JUSTICE SCALIA: And it's -- and it's argued  
4 here.

5 MR. GANNON: It -- it has been argued in the  
6 red brief here. And we do think that we're correct on  
7 the merits with respect to the due process issue and  
8 that -- for two principal reasons. One is that what is  
9 at stake here is not the equivalent of what was going on  
10 in the due process cases. This is not like the  
11 de-licensing of optometrists in the Gibson v. Berryhill  
12 case. It's not like the wage and hour requirements in  
13 Carter Coal, because -- because the analogy to those  
14 things here is the statutory preference requirement  
15 rather than the antecedent metrics and standards.

16 JUSTICE SCALIA: Yes. But the statutory  
17 preference requirement requires -- would require  
18 consideration of whatever is determined by this body,  
19 right?

20 MR. GANNON: The statutory preference  
21 requirement is independent of the metrics and standards  
22 and preexists them. That is what the Surface  
23 Transportation Board would be enforcing in a proceeding  
24 under Section 24308(f). The metrics and standards --

25 JUSTICE SCALIA: What must it consider?

1           MR. GANNON:           The metrics and standards play  
2   a triggering and gatekeeping role. The -- these  
3   provisions are reprinted in the government's brief on  
4   pages 15A and 16A of the appendix, that the -- the  
5   investigation by the Surface Transportation Board is  
6   triggered by their having been a failure by Amtrak to  
7   satisfy the metrics and standards. But I think that --  
8   that -- that is -- and if we're talking about the due  
9   process cases, that is not the prohibition that  
10  the Court has been concerned about. If you look at  
11  cases like Roberge, which talked about Cusack, it said  
12  that it's okay to have something that is presumptively  
13  bad banned by the legislature.

14           Here, the analogy to that is the statutory  
15  preference, and it's okay, then, to allow a private  
16  party to relax its application in certain circumstances.  
17  And we think that's the role that the metrics and  
18  standards play here, because Congress could have allowed  
19  Amtrak to ask for an STB investigation into violations  
20  of the statute any time it wanted to. And instead what  
21  they said is that it is only -- you are only going to  
22  get that investigation when you have failed to -- to  
23  perform at an adequate level such that we think there's  
24  been adequate injury. And then in that investigation,  
25  you are going to have to establish that the injury to



1     you was caused by the violation of the statute.

2             JUSTICE KENNEDY:             So in your -- in your  
3     view, the case would come out the same way if Amtrak  
4     could issue these metrics and standards entirely on its  
5     own, without consultation with the -- or cooperation  
6     with the government.     Same -- same case --

7             MR. GANNON:             One of the --

8             JUSTICE KENNEDY:             -- same result?

9             MR. GANNON:             One prong of our argument is,  
10    yes, that because this is not regulatory in that sense,  
11    this is more like the neighbors being able to veto the  
12    billboard in the neighborhood in Cusack, which the Court  
13    said was okay in Roberge, because the statutory  
14    preference is presumptively bad.     Violations of the  
15    statutory preference by the freight railroads were the  
16    thing that Congress wanted to be enforceable here, and  
17    the metrics and standards just cabin the circumstances  
18    in which Amtrak can seek that type of enforcement.

19            If I could return to the Chief Justice's  
20    question about the --

21            CHIEF JUSTICE ROBERTS:             You may.     You may.

22            JUSTICE SOTOMAYOR:             That doesn't stop -- do  
23    the metes and standards stop you from initiating or stop  
24    the agency from initiating a review, even if a carrier  
25    meets the metes and standard?

1           MR. GANNON:           Well, it's -- it's not the  
2   carrier.  It's not the host railroad that would meet the  
3   standards.

4           JUSTICE SOTOMAYOR:           No, it would be --

5           MR. GANNON:           It would be Amtrak's own  
6   performance.

7           But there is -- there is -- that would  
8   depend upon the reading of the beginning clause of  
9   (f)(1) which refers to if on-time performance fails to  
10   satisfy 80 percent for two consecutive quarters or the  
11   service quality isn't complied with for two quarters,  
12   then those are the circumstances in which an  
13   investigation could be requested and -- in which  
14   instance the STB would need to start the investigation  
15   or the STB could initiate the investigation.

16          And there is an open question about that  
17   first clause about whether the 80 percent on-time  
18   performance reference is something that has to be  
19   predicated upon the metrics and standards.  That's been  
20   briefed before the Surface Transportation Board in the  
21   proceeding brought against Canadian National, the  
22   complaint of which is reprinted -- a snippet from which  
23   is reprinted at the end of the joint appendix.  And so  
24   the question there would be whether on-time performance  
25   there depends upon a pre-PRIIA definition rather than

1 the ones that are included in the metrics and standards.

2 So there's a possibility that the agency  
3 could --

4 JUSTICE SOTOMAYOR: If we were -- if we were  
5 to rule that this is not a regulatory action, would that  
6 satisfy the entire case? We wouldn't have to go to the  
7 delegation issue or to whether it was public or private,  
8 et cetera.

9 MR. GANNON: I -- I think that that is  
10 right. And I think even in those circumstances, because  
11 it -- because if it's not regulatory, it's okay for  
12 private persons to have that power, and I think that  
13 would cover even the question of whether -- if -- if the  
14 arbitrator is assumed to be private. That is not what  
15 we think is the case.

16 And we also think that we don't have to win  
17 on that agreement either on -- on the question of --

18 JUSTICE SOTOMAYOR: On --

19 CHIEF JUSTICE ROBERTS: If the -- if the  
20 actions are not regulatory, why -- why did Amtrak's  
21 performance drop dramatically as soon as the Court  
22 issued its decision in this case?

23 MR. GANNON: Well, I think that's because of  
24 the -- that had decreased the threat of enforcement of  
25 the statutory preference. I do think that the -- it is

1 the statutory preference that is having the regulatory  
2 impact here. The freight railroads are not going to be  
3 held liable for Amtrak's failure to satisfy the metrics  
4 and standards. They're going to be held liable for  
5 failing to --

6 CHIEF JUSTICE ROBERTS: They're going to  
7 be -- Amtrak can then force a proceeding at which the  
8 freight carriers will have to defend, right?

9 MR. GANNON: That -- that is correct. And  
10 the same thing --

11 CHIEF JUSTICE ROBERTS: Well, that's a  
12 significant regulatory impact, to tell railroads I, a  
13 private party, get to start a governmental proceeding  
14 and you have to show up to defend it.

15 MR. GANNON: Yes. But that -- that  
16 happens --

17 CHIEF JUSTICE ROBERTS: And, by the way, if  
18 I don't -- it's triggered if I don't comply with  
19 standards that I get to set.

20 MR. GANNON: It's -- but we allow private  
21 parties to initiate governmental investigations and  
22 enforcement proceedings all the time, either before  
23 administrative agencies or courts, and we don't think  
24 that that is a delegation of legislative power --

25 JUSTICE KAGAN: Mr. Gannon --

1           MR. GANNON:           -- to the person who is  
2 beginning the investigation.

3           JUSTICE KAGAN:           Is the -- is the government  
4 able to award damages without the showing that there's  
5 been a violation of the metrics and standards?

6           MR. GANNON:           No. That is -- that is going  
7 to be a threshold determination. But as I said, that is  
8 a -- it's serving as a threshold gatekeeping function  
9 to -- of -- of limiting the circumstances in which the  
10 investigation can begin and when there will be damages.

11          JUSTICE KAGAN:           But I would think if that's  
12 the case, if the statutory preference does not get -- is  
13 a -- if a violation of the statutory preference doesn't  
14 get you all the way to damages, if there is essentially  
15 a second requirement which is a violation of the metrics  
16 and standards, I mean, in effect what the -- a statute  
17 does is it says there are two things you need to show, a  
18 violation of the preference and a violation of the  
19 metrics and standards, in order to get to damages. That  
20 seems -- if -- if that's the case, it seems kind of  
21 regulatory.

22          MR. GANNON:           Well, I -- I -- I understand  
23 the impulse, but I think that seems -- it -- it also  
24 seems like the ability of the neighbors to veto the  
25 billboards in Cusack because what Amtrak -- all Amtrak

1 has done is relax certain circumstances in which the  
2 freight railroads can be held liable for violating the  
3 statutory preference. A violation of the statutory  
4 preference is presumptively a bad thing.

5 And what has happened here is Congress has  
6 recognized that if it doesn't actually cause Amtrak to  
7 be -- to have sufficiently subpar performance, then we  
8 are not going to make a Federal case out of it and we're  
9 not going to let Amtrak do so. But -- and -- and there  
10 aren't going to be damages at the end of the day.

11 But I do think that the real-world reason of  
12 why the freight railroads had greater incentive to  
13 cooperate and Amtrak believes that it was their  
14 cooperation under the regime in which the metrics and  
15 standards were in effect, and there was still the  
16 possibility that there would be enforcement proceedings  
17 before the STB to determine whether the freight  
18 railroads had failed to comply with the statute --

19 JUSTICE ALITO: The statute says that the --

20 JUSTICE GINSBURG: Can we -- can we get back  
21 to the arbitrator? I think the Chief asked that  
22 question that -- and we passed it and assume it's  
23 regulatory.

24 MR. GANNON: Yes.

25 JUSTICE GINSBURG: The arbitrator, it's

1 argued, need not be a government officer. It could be a  
2 private officer. I have a question to ask about that  
3 provision.

4 Is it -- is this a one-time operation, that  
5 is, the setting these metrics and standards? In -- in  
6 fact, there was no arbitrator in this picture. Will  
7 there be a renewal of this, a repetition where there  
8 might be an arbitrator?

9 MR. GANNON: Well, I -- I don't think that  
10 the terms of 207(d) contemplate that the arbitrator will  
11 come into effect again. I think that because the  
12 beginning of it says that it -- it is only triggered if  
13 a development of the metrics and standard is not  
14 completed within the 180-day period required by  
15 subsection (a), which is the 180 days after PRIIA was  
16 enacted in 2008.

17 And so the arbitration provision was, I  
18 think, good for one time only. It was never invoked.

19 CHIEF JUSTICE ROBERTS: Well, but does that  
20 matter? I mean, the idea is that having the  
21 arbitrator -- arbitration provision there affected the  
22 issuance of the regulations.

23 MR. GANNON: Yes, I -- I understand that  
24 question, Mr. Chief Justice. I -- I think that's --  
25 it -- it mattered the first time around. To the extent

1 that there may be any amendments to the metrics and --

2 CHIEF JUSTICE ROBERTS: If --

3 MR. GANNON: -- standards in the future --

4 CHIEF JUSTICE ROBERTS: Right.

5 MR. GANNON: -- the arbitrator wouldn't be  
6 applicable. We do not think that the best reading of  
7 the arbitrator reference is that that would be a private  
8 person. We think that --

9 CHIEF JUSTICE ROBERTS: Well, I know -- if I  
10 could -- there's -- the issues are pretty intertwined  
11 here, so I know it's a difficult thing to keep track of  
12 for you. But if -- if -- and for us. But if we think  
13 that the regulations have a regulations -- not to load  
14 the question --

15 MR. GANNON: The metrics and standards have  
16 a regulatory affect.

17 CHIEF JUSTICE ROBERTS: Okay. Metrics and  
18 standards are regulations. And if we think there is  
19 nothing in the statute that requires -- well, I guess it  
20 doesn't -- doesn't -- doesn't really matter.

21 If that's the case, is the arbitrator an  
22 officer of the United States? In other words, if he is  
23 the one that ends up issuing what we will hypothetically  
24 conclude are regulations, I assume he has to be an  
25 officer of the United States.



1           MR. GANNON:           I -- I think that would  
2     constitute significant governmental authority under  
3     Buckley against Valeo, and that would be --

4           JUSTICE BREYER:       Well, you know, I'm quite  
5     interested in the government's view of this case, and I  
6     hope you will calm me down.

7           The reason that I find it interesting is  
8     because it seems to me there are hundreds, maybe  
9     thousands of organizations that set standards for the  
10    industry. And some of them operate under government  
11    memoranda or authority that ask them to do it, the most  
12    noted being ICANN which sets all the standards for the  
13    internet.

14          Now, it also seems to me very possible that  
15    a member of such an organization that fails to follow  
16    the standard could run afoul of other government rules  
17    or other agency rules or other laws, for example, by  
18    stalling the internet delivery of services and being  
19    delayed, and violating some FCC requirement. And since  
20    I know that there are about 2 or 300 international  
21    organizations that we belong to, to do such things, I  
22    just wonder what the implications would be if you lose  
23    this case. That is to say, if this Court held here that  
24    if a government, say, Congress, agency, Commerce  
25    Department, says to a group of private people set

1 standards, and then if they fail -- or if they do so and  
2 a member fails to meet a standard, it runs afoul of a  
3 different rule, such as a rule that you have to have a  
4 certain speed on the Internet or some such thing. Were  
5 we to hold that unconstitutional, I have a feeling --  
6 that this is what I want assurance on that I'm wrong -- that  
7 it would work havoc, possibly with the Internet,  
8 possibly with industry throughout the United States, I  
9 know not where, possibly in communications, possibly  
10 with the 200 or so organizations regulated by treaty.

11 Now, you've looked into this more than I  
12 and, therefore, I want you to calm me down and say no,  
13 this isn't a big-deal case. Don't worry about it.

14 MR. GANNON: I think it depends upon how  
15 broad the Court's ruling is. I think --

16 JUSTICE BREYER: No, no. The ruling is  
17 narrow. It just says the following. It says, these are  
18 standards which equal legislation and as a result of  
19 these standards being legislated by this, I think,  
20 Quango or something, or whatever, by -- by this  
21 particular entity, bad things happen to freight trains  
22 when they fail to meet the standards or something and  
23 they violate some other law and that's all  
24 unconstitutional.

25 MR. GANNON: And I frankly --

1 JUSTICE BREYER: Going back to Carter v.  
2 Carter Coal.

3 MR. GANNON: Yes.

4 JUSTICE BREYER: We could go back to  
5 Lochner.

6 MR. GANNON: I don't think that -- that  
7 Respondent is asking for a ruling of that nature. And I  
8 think that the question here would be because of the  
9 role that the metrics and standards play in the STB  
10 investigation. I think that would be the only way in  
11 which the Court would conclude that it is -- is  
12 tantamount to regulations. We don't believe that they  
13 have that effect. We don't think that other standards  
14 that are conditions for application of -- of the law out  
15 there in the world have necessarily the same effects  
16 under even Respondent's view of the case. But I -- and  
17 so I -- I think that the one you want to get  
18 reassurances from is actually Respondent, that the  
19 nature of their challenge is -- is narrower than that.  
20 But if I could return to the arbitrator --

21 CHIEF JUSTICE ROBERTS: Thanks.

22 I know it's a -- if he is an officer, is the  
23 government's issue a principal officer or an inferior  
24 officer?

25 MR. GANNON: I think that he would be an

1 inferior officer given the limited nature of the --

2 CHIEF JUSTICE ROBERTS: Okay. Then who --  
3 which principal officer supervises him?

4 MR. GANNON: It -- it would be the STB that  
5 appointed him.

6 CHIEF JUSTICE ROBERTS: But he's an  
7 arbitrator.

8 MR. GANNON: He's an arbitrator.

9 CHIEF JUSTICE ROBERTS: One of the parties  
10 to the arbitration.

11 MR. GANNON: I don't think the STB is a  
12 party to the arbitration. I think that the -- the two  
13 parties who have to issue the -- their metrics and  
14 standards are Amtrak and the Federal Railroad  
15 Administration. If they don't agree, then an  
16 arbitration -- the arbitrator would be resolving a  
17 dispute not -- the STB wouldn't be a party to that.

18 CHIEF JUSTICE ROBERTS: So if the STB  
19 doesn't like the arbitrator's decision, can the STB  
20 change it under the law?

21 MR. GANNON: I doubt it because it's  
22 supposed to be a binding arbitration. But we think that  
23 from the beginning, this is yet another reason to  
24 construe the arbitrator as being somebody who is  
25 governmental, probably somebody who is actually at the

1 STB.

2 JUSTICE SCALIA: I don't -- I don't see how  
3 you can say he's an inferior officer. He's supervised  
4 by nobody. That's what we have held to be the -- the  
5 touchstone of principal versus inferior.

6 MR. GANNON: He's appointed by the super --  
7 the Surface Transportation Board --

8 JUSTICE SCALIA: That's it. And supervised  
9 by nobody.

10 MR. GANNON: -- to perform a limited task.  
11 He could be removed by the STB.

12 JUSTICE SCALIA: A limited task is -- is not  
13 the touchstone. I mean, that's what we said in Morrison  
14 and we repudiated it in a later case, which said the  
15 touchstone of a -- of a principal officer is whether  
16 that person is not subject to control by somebody else.  
17 And I don't see how this person is subject to any  
18 control in -- in the task that he's assigned.

19 MR. GANNON: Well, in that sense, it's  
20 consistent with Morrison, and it is not consistent with  
21 what the Court said was sufficient to enter the question  
22 in Edmund, but did not say was necessary to answer the  
23 question in Edmund about there being review within the  
24 Executive Branch of the decisions being made by the  
25 Coast Guard judges there.

1 JUSTICE SCALIA: Let me -- let me talk about  
2 regulatory effect. As I understand it, once these --  
3 what do you call them?

4 MR. GANNON: The metrics and standards.

5 JUSTICE SCALIA: Metrics and standards.  
6 Once they were issued, wow, the -- the on-time record of  
7 Amtrak went way, way up. So they had a very immediate  
8 and clear effect on the behavior of -- of the parties.

9 Now, do you think that because the  
10 sentencing guidelines are now just advisory that we  
11 could have the sentencing guidelines issued by some  
12 private party that -- that is not appointed pursuant to  
13 the requirements of the Constitution? Because after  
14 all, they're just advisory. Now, the reality is, they  
15 have a significant effect on -- on the behavior of -- of  
16 lower courts. And I think it's the same thing here.  
17 There's a significant effect. I don't know --

18 MR. GANNON: I -- I don't think that this is  
19 the same as the sentencing guidelines, the effect that  
20 it has on the judges, because those are advice to the  
21 judges. Here, what the metrics and standards do is they  
22 satisfy conditions in the world when -- when the Federal  
23 statute is going to be applicable. It's in that sense,  
24 just like the Court contemplated in *JW Hampton* or indeed  
25 in cases like *Curran v. Wallace* and *Rock Royal*

1 Cooperative, where the policy was established by the  
2 Federal government, the Secretary of Agriculture wanted  
3 to put a price order in effect or to say that a  
4 particular tobacco market would be subject to a Federal  
5 inspection regime and that could not occur until --  
6 until there was approval from private entities.

7 JUSTICE SCALIA: Why did the record improve  
8 so -- so rapidly and so promptly?

9 MR. GANNON: Because for the first time in  
10 decades there was a meaningful threat that there would  
11 be an enforcement proceeding, not to enforce the metrics  
12 and standards, but to enforce the statutory preference  
13 requirement, which is not challenged here, which was not  
14 written by Amtrak, and which would be enforced by the  
15 Surface Transportation Board in an independent  
16 adjudication in which they would take evidence from both  
17 sides and determine what the real story was. There's --

18 JUSTICE SOTOMAYOR: Can -- can I go back to  
19 my question, okay? Can the STB on its own start an  
20 investigation?

21 MR. GANNON: I --

22 JUSTICE SOTOMAYOR: If -- if it gets --

23 MR. GANNON: That depends, Justice  
24 Sotomayor, on -- on the answer to as I said is an  
25 unresolved question about whether the 80 percent on-time

1 performance trigger at the beginning of 24308(f)(1)  
2 is -- is read as being confined to the on-time  
3 performance metrics and standards that were adopted  
4 under PRIIA or whether that can be a reference to a  
5 pre-PRIIA, on-time performance metric. And so for  
6 decades, Amtrak, pursuant to ICC -- originally pursuant  
7 to an ICC order used endpoint on-time performance  
8 metrics that looked very much like the ones that were  
9 ultimately adopted --

10 JUSTICE BREYER: So doesn't this show  
11 something? Actually, the sentencing guidelines are a  
12 pretty good example. You do have the Model Penal Code.  
13 We have law professors telling judges what to do all the  
14 time. We have judges who receive information in briefs.  
15 We had lots of guidelines promulgated by the states.  
16 There are all kinds of systems, and judges do use them,  
17 and some of them do have a practical effect and make a  
18 difference.

19 But once this Court starts down the road --  
20 and it would be starting, because I am aware of no  
21 precedent -- once we start down the road of saying  
22 Congress cannot tell even a private agency to go and  
23 make some standards, which we all know will be followed,  
24 once we start down that road there is no stopping place  
25 and, therefore, the measure has nothing to do with



1 separation of powers. It is exactly what Justices  
2 Cardozo, Hughes, Brandeis and Stone said in Carter Coal,  
3 the measure is the due process clause, and we're all off  
4 on something of a wild goose chase in this case. That's  
5 what is suggested to me by the sentencing guideline  
6 analogy.

7 JUSTICE SCALIA: Wow, I didn't mean that.

8 (Laughter.)

9 MR. GANNON: To the extent that Justice  
10 Scalia also doesn't see a nondelegation problem in  
11 Carter Coal, then I -- I take it that you are agreeing, but I  
12 think here that -- that the criminal sentencing context  
13 may present different issues. And I do think that the  
14 basic -- the basic reasons why the due process issue is  
15 not one where we would have a problem is both because of  
16 the -- what we think is the -- the fact that this is  
17 relaxing the regulatory effect of -- of the statutory  
18 preference. And secondly, because those cases about  
19 bias in the due process context involve the entity  
20 that's actually doing the adjudication. And here the  
21 analogy is that's the STB is acting as the Board of  
22 Optometrists in -- in the Gibson v. Berryhill.

23 JUSTICE KENNEDY: I think it was the  
24 Respondent's brief in which they gave the hypothetical.  
25 Suppose that the government together with auto

1 manufacturer A made standards, but then auto  
2 manufacturers B and C had to follow them. That seems  
3 wrong. Why is this different?

4 MR. GANNON: I take the point that that  
5 seems wrong. We don't think that this is the equivalent  
6 of regulating the automotive industry because Congress  
7 has put the regulation in place. That's the statutory  
8 preference requirement. This is something in which  
9 automobile manufacturer A would be, in advance, saying,  
10 I, automobile manufacturer --

11 JUSTICE KENNEDY: Suppose Congress put that  
12 in place? Suppose Congress said, and once this is  
13 promulgated, all manufacturers have to obey it.

14 MR. GANNON: I think that that would --  
15 without the federal agreement that we also have here,  
16 the federal railroad administration's contemporaneous  
17 agreement with the standards, that would present non  
18 delegation problems.

19 But, if I could reserve the remainder of my  
20 time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 Mr. Dupree.

23 ORAL ARGUMENT OF THOMAS H. DUPREE, JR.

24 ON BEHALF OF THE RESPONDENT

25 MR. DUPREE: Mr. Chief Justice and may it

1 please the Court:

2 The constitution does not permit Congress to  
3 create a corporation, deem it nongovernmental, and then  
4 launch it into the commercial sphere with a for-profit  
5 mandate and then vest it with regulatory authority over  
6 other companies in the same industry.

7 The text of the constitution places all  
8 legislative power in the Congress. Although this Court  
9 has approved grants of rulemaking authority to executive  
10 branch agencies or judicial branch agencies, it has  
11 never approved a grant of regulatory power to a private  
12 corporation.

13 JUSTICE GINSBERG: What do you do about --

14 JUSTICE SCALIA: That's the big problem  
15 here, regulatory authority. As far as I'm concerned,  
16 that's the big difficulty. Why is this an exercise of  
17 regulatory authority when all it does is enable an  
18 investigation?

19 MR. DUPREE: Well, Justice Scalia, I don't  
20 think it's quite correct to say all it does is enable an  
21 investigation. For one thing, there is the provision in  
22 Section 207 (c) that requires the freight railroads to  
23 amend their contracts with Amtrak to the extent  
24 practicable to incorporate the metrics and standards.  
25 So there is a direct regulatory command on the freight

1 railroad.

2 JUSTICE KAGAN: Well, but to the extent  
3 practicable, I mean, what does that mean?

4 MR. DUPREE: Well, unless it's a null set,  
5 Justice Kagan, it has to mean something. And I don't  
6 think the government has ever said that the freight  
7 railroads --

8 JUSTICE SOTOMAYOR: So instead you want a  
9 rule that lets the STB investigate even when you have  
10 one failure to accommodate?

11 MR. DUPREE: Well, I'm not sure that's the  
12 rule we want, Justice Sotomayor, but at least that would  
13 have the merit --

14 JUSTICE SOTOMAYOR: But you would prefer  
15 that?

16 MR. DUPREE: Well, it would at least have  
17 the merit of being constitutional. In other words, the  
18 problem here is not necessarily the scope of the  
19 investigatory power. It's the fact that Congress gave  
20 Amtrak the pen or co-authorship of the regulation.  
21 That's the constitutional vice here --

22 JUSTICE BREYER: Just like the Department of  
23 Commerce acting under authority from Congress gave ICANN  
24 the power to write standards for the internet.

25 MR. DUPREE: Well, and, Justice Breyer, let

1 me address your concern head on. Because we've been  
2 litigating this case against the government for several  
3 years now and to my knowledge no party involved -- the  
4 parties, the amici have foreseen the dire consequences  
5 that you honor posits --

6 JUSTICE BREYER: I'm not saying it's a dire  
7 consequence. By coincidence, I happen to be reading  
8 about the internet. I'm trying to learn about  
9 something.

10 MR. DUPREE: Well, Justice Breyer, I can  
11 make a few points in response. One is that in the ICANN  
12 case that's not a situation where you have a company  
13 trying to regulate other competitors in the market.  
14 That is one difference. Another difference is that a  
15 lot of these organizations tender their proposed  
16 standards to the agency for approval. So at the end of  
17 the day, it's the agency that has the final say in many  
18 cases. That's this model that Congress enacted.

19 And here, Congress plainly could have given  
20 Amtrak an advisory role, Section 207 (a) gives all sorts  
21 of entities and participants with a stake in these rules  
22 an advisory role. And there is absolutely no reason  
23 that Congress could not easily have drafted that statute  
24 to give Amtrak an advisory role.

25 JUSTICE GINSBURG: But if the government

1 agency, the FRA, it says, you know, what Amtrak  
2 proposes, the government's assent is essential to this  
3 scheme, right?

4 MR. DUPREE: That's correct, Justice Ginsburg. But  
5 I think the key point here is that Amtrak's assent is  
6 also essential. So, to be sure, the government could  
7 halt a regulation that Amtrak wanted to put in effect, but the  
8 constitutional advice here is that Amtrak has the same  
9 power. It could prevent the government from putting the  
10 government's preferred regulation in place. And that's  
11 giving too much power to a private entity to be able to  
12 dictate to the federal government what regulations will  
13 be issued --

14 JUSTICE BREYER: You don't have to answer  
15 this question, but have you thought through what this  
16 means -- what I think is called the Baal conference  
17 where you have groups of regulators and banks meeting  
18 together to determine what they are going to do about  
19 interest rates, money supplied, et cetera. You have  
20 not, is the answer, and I don't know enough about it, so  
21 skip it.

22 MR. DUPREE: Very good.

23 JUSTICE SOTOMAYOR: Well, but then, how do  
24 you -- do you say that we were just plain wrong when we  
25 let the tobacco industry and milk producers veto

1 regulations in our two prior cases Currin and Rock  
2 Royal?

3 MR. DUPREE: Yes, the difference in those  
4 cases, Justice Sotomayor, is that in those cases it was  
5 a federal government that drafted the regulation. And  
6 what happened at that point was that Congress gave the  
7 industry -- or in those cases a super majority of the  
8 industry the power to vote whether to subject themselves  
9 to the regulation. And the distinction there is between  
10 the government exercising the legislative authority and  
11 the private company determining when that  
12 authority becomes effective. That's --

13 JUSTICE SOTOMAYOR: That's -- that line is  
14 too thin for me. Because consent to me means it has to  
15 satisfy both parties. And that's no different than a  
16 veto. This is the STB saying, this satisfies us, this  
17 is what we would like to do. Amtrak is this -- are you  
18 willing to be regulated, just like the tobacco produce  
19 -- the tobacco industry and the milk producers.

20 MR. DUPREE: Well, for one thing my clients,  
21 the regulated parties, were not given a say in this. So  
22 to say Amtrak, is this what you want --

23 JUSTICE SOTOMAYOR: That's the due process.  
24 That's the due process.

25 MR. DUPREE: Fair enough. Then, with regard

1 to Your Honor's point --

2 JUSTICE SOTOMAYOR: And that's fair enough  
3 by the way. That's an issue that's fair enough. But --  
4 and subject to more talk. But I'm not quite sure why  
5 this becomes --

6 MR. DUPREE: With regard to Your Honor's  
7 earlier point about that being a thin line, I understand  
8 that but at the same time that is the line, the precise  
9 line that this Court explicitly drew both in Curran and  
10 in J.W. Hampton where it said that allowing this vote of  
11 the regulated parties, that doesn't amount to  
12 legislative action. Agreed it may be a fine line but it  
13 is the line that this Court has reverted to time and  
14 again.

15 JUSTICE SOTOMAYOR: I don't know what they  
16 meant because they were subjecting themselves to  
17 standards.

18 MR. DUPREE: Well, and I would simply go  
19 back to our point that we never had a vote in this  
20 process.

21 JUSTICE ALITO: What do you make of the  
22 provision to which you referred earlier that says that  
23 the metrics and standards shall be incorporated into the  
24 operating agreements to the greatest extent practicable  
25 or to the extent practicable. If a particular railroad



1     took the position that it will never agree to the  
2     incorporation of the metrics and standards into an  
3     operating agreement, is there anything that the federal  
4     government could do?

5             MR. DUPREE:             Well, Justice Alito, I think in  
6     that situation what would likely happen if Amtrak and  
7     the freight railroad could not reach agreement and  
8     therefore there was no agreement on the terms of the  
9     operating agreement, is that the Surface Transportation  
10    Board ultimately would be called upon to step in and  
11    essentially dictate terms or help the parties reach  
12    terms and proscribe the terms of the operating  
13    agreement. And I think in that situation -- again, it  
14    hasn't yet arisen but it would not surprise me in the  
15    slightest if Amtrak's argument at that point to the  
16    Surface Transportation Board was pointing to the  
17    language of 207 (c) and saying, this freight railroad is  
18    under a statutory mandate that it shall amend its  
19    agreements to the extent practicable. And nothing in  
20    the statute suggests that the determination as to  
21    practicability is something that falls within the  
22    exclusive jurisdiction of the freight railroads. The  
23    statutory language doesn't suggest that. If this Court  
24    were to hold that, I certainly wouldn't quarrel with it,  
25    but I'm not quite sure the statutory language gets you

1     there.

2             I think one fundamental flaw with the  
3     statute which we've not yet touched on, an additional  
4     flaw, is the problem of accountability. That, of  
5     course, is the concern that has animated this Court's  
6     non delegation and due process jurisprudence. And here  
7     you have a situation where Congress, the President and  
8     Amtrak itself have repeatedly declared to the public in  
9     explicit terms that Amtrak is not the government.

10            JUSTICE KAGAN:            Do you think that's  
11     dispositive? Because I've always thought that the  
12     labels that Congress decides to put on these things is  
13     not of particular relevance.

14            MR. DUPREE:            I'm not so sure I would go so  
15     far as to say it's dispositive, Justice Kagan. But I do  
16     think it's highly relevant. I think when this Court has  
17     spoken about transparency and accountability in the  
18     legislative process, what it's been talking about is the  
19     ability of the public to look at a regulation or a law  
20     and make a judgment as to where to assign blame. And  
21     when you have all parties involved assuring the public  
22     that Amtrak is not a government actor, I think the  
23     public is entitled to take the President and the  
24     Congress at their word and say that this is not the --

25            JUSTICE GINSBURG:        And not look at the

1 animal as it exists? Lebron said that the government  
2 exerts control over Amtrak as a policy maker. This --  
3 Amtrak, you will agree, is not like a private  
4 corporation. It's -- there's a great deal of federal  
5 involvement in Amtrak, right?

6 MR. DUPREE: I agree. I agree. But I think  
7 what resolves this case is the fact that Amtrak operates  
8 under a statutory mandate to conduct its affairs as  
9 though it were a non-governmental entity and a  
10 for-profit corporation. In fact, in the briefing --

11 JUSTICE KAGAN: Well, the post office is  
12 supposed to be a for-profit corporation, too, to the  
13 same extent, right?

14 MR. DUPREE: Well, yes, Justice Kagan, keep  
15 in mind the post office is expressly created as a  
16 federal entity, it's in our Constitution and in Federal  
17 statutory law it says the post office is an agency or an  
18 entity within the executive branch.

19 JUSTICE KAGAN: But then that all goes back  
20 to labels. I mean, I guess I'm just wondering what  
21 about Amtrak is not governmental other than the label.

22 MR. DUPREE: Well --

23 JUSTICE KAGAN: Subject to the policy  
24 control of Congress, which Congress exercises pretty  
25 much on a routine basis, it's entirely funded by

1 Congress, all the members of the board are appointed by  
2 the President with the advice and consent of the Senate,  
3 save the -- save one.

4 You know, I guess I'm just wondering other  
5 than this label, what suggests that this is not the  
6 government?

7 MR. DUPREE: Well, first, I would take issue  
8 with just the label. In other words, the organic  
9 statute of Amtrak in the US Code says it is not the  
10 government. So it may be a little more than just a  
11 label.

12 But taking Your Honor's point, I think what  
13 makes Amtrak not the government for nondelegation  
14 purposes is that Amtrak's officers and employees are not  
15 Federal employees, they don't take an oath of office and  
16 they are constrained by various financial incentives and  
17 statutory mandates to operate Amtrak not in the common  
18 good, not as a neutral, disinterested regulator would,  
19 but as a for-profit commercial actor.

20 That's actually the very point that Amtrak  
21 made to this Court in its Lebron brief where it said  
22 keep in mind, we are not neutral government regulators,  
23 we are hungry capitalists. That's how we run Amtrak.  
24 We have a --

25 JUSTICE KAGAN: Yes. We rejected that

1 argument.

2 MR. DUPREE: Well, it rejected the ultimate  
3 constitutional conclusion for purposes of the First  
4 Amendment claim, but I don't think this Court took issue  
5 with the fact that Amtrak's officers and directors have  
6 said from day one very publicly that we don't govern in  
7 any sense. We are not neutral, disinterested  
8 regulators. We are a for-profit business. And that's  
9 what makes this case different, Justice Kagan.

10 JUSTICE SCALIA: So for -- I mean, for that  
11 purpose, what difference does it make whether it's a  
12 governmental entity or not, so long as it is operating  
13 on a for-profit basis and is giving -- is given the last  
14 word on some regulatory matters that disadvantage its  
15 competitors, there's a violation of due process. I -- I  
16 don't see how it makes any difference whether you call  
17 it governmental or not.

18 MR. DUPREE: Justice Scalia, I certainly  
19 agree a hundred percent with you on the due process  
20 point. I think that whether it is government or  
21 nongovernmental may play a role if this Court were to  
22 approach this case through the lens of nondelegation,  
23 but as far as due process goes, Your Honor is exactly  
24 correct. No matter what we call Amtrak, the question  
25 ultimately at the end of the day is whether this

1 Federally-chartered corporation with all of the various  
2 financial incentives, statutory mandates and commands,  
3 can exercise regulatory power over other commercial  
4 actors in the marketplace.

5 JUSTICE GINSBURG: The due process question  
6 wasn't -- the due process question wasn't aired below at  
7 all; isn't that so?

8 MR. DUPREE: It was aired below, Justice  
9 Ginsburg. We have fully briefed due process at every  
10 stage of this case, as has the government. The district  
11 court resolved it on the merits and the D.C. Circuit  
12 didn't need to reach it because it resolved it on  
13 nondelegation grounds, but it did drop a footnote and  
14 said, nondelegation and due process are so closely  
15 intertwined in this context and, frankly, we're not  
16 sure, as Justice Scalia suggested, whether ultimately it  
17 would make a difference. So that's why I took the  
18 nondelegation route. But there's no question that due  
19 process is fully briefed, fully teed up for this Court's  
20 review.

21 JUSTICE GINSBURG: And not decided by the  
22 D.C. Circuit.

23 MR. DUPREE: I beg your pardon?

24 JUSTICE GINSBURG: And not decided --

25 MR. DUPREE: That's correct.

1 JUSTICE GINSBURG: -- because the D.C.  
2 Circuit went on a delegation.

3 MR. DUPREE: That's correct. But as I said,  
4 they said in the footnote, Footnote 3 toward the  
5 beginning of the opinion, that they didn't see much of a  
6 difference in this context because Carter Coal speaks  
7 both to nondelegation and due process and it did an  
8 analysis under Carter Coal.

9 So regardless if this Court thinks that  
10 Carter Coal is more properly characterized as  
11 nondelegation of due process, the merits of that  
12 question are squarely before this Court.

13 JUSTICE SOTOMAYOR: So are you attacking the  
14 statute that says that competitors have to accommodate  
15 Amtrak? Is that what you're saying is the due process  
16 violation?

17 MR. DUPREE: It's not, Justice Sotomayor.  
18 The statute that we're attacking is Section 207 of  
19 PRIIA.

20 JUSTICE SOTOMAYOR: But the -- but the  
21 investigation is only going to determine whether you  
22 violated the statute's failure to accommodate Amtrak.

23 MR. DUPREE: I don't think that's quite  
24 right, Your Honor. In other words, the -- a necessary  
25 predicate for liability is not just violation of the

1 preference statute, but also a violation of the metrics  
2 and standards. The government needs to prove both. It  
3 needs to prove violation of the metrics and standards  
4 and violation of the preference requirement.

5 JUSTICE BREYER: Can the government -- what  
6 is the due process violation? That is to say, if the  
7 Department of Energy under delegated authority says that  
8 the makers of the bulbs that are energy efficient must  
9 use, and they may choose any one of the five methods  
10 that produces green light or white light or whatever it  
11 is, and they are -- they are to choose the method, and  
12 that's just it. Now, that puts at a disadvantage those  
13 competitors who do not use energy-efficient bulbs. Is  
14 that a violation of due process?

15 MR. DUPREE: Well, if I'm understanding Your  
16 Honor's hypothetical, it doesn't sound like it because  
17 you have a situation where it's the government that's  
18 prescribing the regulations.

19 JUSTICE BREYER: No. It gives them  
20 considerable leeway as to make subsidiary decisions. I  
21 was trying to make it realistic. They make subsidiary  
22 decisions as to how they go about fulfilling the basic  
23 energy efficiency mandate.

24 MR. DUPREE: Right. It -- it -- the way  
25 Your Honor described that --



1 JUSTICE BREYER: Well, I just described it  
2 now.

3 MR. DUPREE: Right.

4 JUSTICE BREYER: They have broad authority,  
5 but they have to meet certain energy-efficient mandates  
6 and they can prescribe standards and so forth that will  
7 allow them to do it. Does that violate due process  
8 because it hurts the manufacturers of ordinary energy  
9 bulbs?

10 MR. DUPREE: If -- when you say "prescribe  
11 standards," it would pose a problem if the standards  
12 they're prescribing apply to others in the industry. If  
13 the way Your Honor posited it originally, it sounded as  
14 though Congress was essentially giving --

15 JUSTICE BREYER: It applies. They don't  
16 have to meet it. What happens is it gives them an  
17 advantage the way they choose over non-energy efficient  
18 bulbs.

19 MR. DUPREE: That doesn't sound like a due  
20 process violation.

21 JUSTICE BREYER: Then what is your violation  
22 here? I'm trying to figure out what your violation --

23 MR. DUPREE: The violation here is that  
24 Congress has given Amtrak the pen.

25 JUSTICE BREYER: The what?

1           MR. DUPREE:           The pen. To write the Federal  
2 regulations.

3           JUSTICE SCALIA:        You have to posit that the  
4 energy department manufactures bulbs.

5           MR. DUPREE:           No.

6           JUSTICE SCALIA:        And that it keeps the  
7 profit from the bulbs on its own. It doesn't have to go  
8 deposit it in the treasury. So the -- so the -- it is a  
9 profit-making entity and it prescribes standards, as  
10 Justice Breyer suggested, that harms other people. That  
11 would be a parallel to this.

12          MR. DUPREE:           Well -- and if that's the  
13 situation where the government is both acting in the  
14 marketplace as a commercial actor and as a regulator of  
15 the industry, that's a problem.

16          But what makes this case, I think, so  
17 difficult is that being a commercial for-profit actor is  
18 fundamentally incompatible with the notion of being a  
19 disinterested government regulator. That's because the  
20 essence of a --

21          JUSTICE BREYER:        That's what I was -- I'm  
22 trying to get at -- I started with the statement, I  
23 think, that due process -- your argument -- it didn't  
24 matter whether you called them private or public; am I  
25 right?

1 MR. DUPREE: That's right.

2 JUSTICE BREYER: Okay. Now, let's imagine  
3 they're just a company, not the Department of Energy.  
4 The Department of Energy has a broad energy efficient  
5 standard. It delegates to the people who make that kind  
6 of bulb all kinds of minor interstitial standards to  
7 make. They make them. They hurt the energy bulbs, the  
8 ordinary energy bulbs. Is that a violation of due  
9 process? If so, why? If not, how is yours different?

10 MR. DUPREE: Well, that -- I think that  
11 might be a violation of due process because in that  
12 situation what happens is that the Department of Energy  
13 is giving authority to private corporations to set  
14 rules, standards that govern the conduct of other  
15 private corporations.

16 JUSTICE BREYER: It will hurt the other  
17 private organizations.

18 MR. DUPREE: Right.

19 JUSTICE BREYER: My reaction was the way you  
20 deal with that normally is the statute would be  
21 interpreted not to give them the authority to write  
22 anticompetitive regulations and you'd attack it under  
23 the antitrust laws. There may be other ways to do it.  
24 I've never heard of an example where the due process  
25 problem really was a constitutional problem under due

1 process.

2 Now -- now, maybe there's some cases I've  
3 overlooked. The only one coming close, it seemed to me,  
4 is Carter v. Carter Coal, which I always put in the same  
5 box as Lochner. Now -- now, are we supposed to  
6 resurrect that? Is there other authority for that  
7 proposition? What is it?

8 MR. DUPREE: Well, Justice Breyer, I do  
9 believe that this Court on multiple occasions subsequent  
10 to the Lochner era has reaffirmed the core holding of  
11 Carter Coal about delegations to private parties are  
12 forbidden. This Court said that in Mistretta. A number  
13 of justices have said in separate opinions that that  
14 holding remains --

15 JUSTICE BREYER: But your due process, I  
16 want some authority for your due process point on the  
17 private agencies.

18 MR. DUPREE: Well, our -- the foundational  
19 case we have for due process in this context is Carter  
20 Coal. Absolutely. But again, I simply take issue with  
21 Your Honor's suggestion that it's a remnant of the  
22 Lochner era. I think it retains its vitality today as  
23 many subsequent opinions of this Court have recognized.

24 Let me address Mr. Gannon's point very  
25 briefly, if I may, on the notion that it was somehow the

1 preference requirement that was driving the dramatic  
2 change in Amtrak's performance. The preference  
3 requirement was enacted in the early 1970s. So Mr.  
4 Gannon is unable to explain why this magical change  
5 didn't occur until the metrics and standards came into  
6 effect.

7 JUSTICE SCALIA: Well, he said the metrics  
8 and standards for the first time made it realistic that  
9 there would be enforcement of that requirement.

10 MR. DUPREE: Well, first, I would say if  
11 that's true, that, to me, strikes me as a pretty plain  
12 regulatory effect in that the metrics and standards are  
13 on the books and the freight railroads know that they  
14 now need to comply or they're going to face enforcement  
15 actions. The government --

16 JUSTICE SCALIA: No. I think -- I think you  
17 can allow a private party to bring an enforcement  
18 action.

19 MR. DUPREE: You can allow a private  
20 party --

21 JUSTICE SCALIA: I mean, even if they just  
22 said an enforcement action shall be commenced if Amtrak  
23 requests it. I think that would be perfectly  
24 constitutional.

25 MR. DUPREE: I agree, Justice Scalia, but at

1 the same time the problem here is that Congress has  
2 given Amtrak the power to define the terms and to draft  
3 the regulations in which it may bring an enforcement  
4 action. If --

5 JUSTICE KAGAN: Mr. Dupree, I mean, one way  
6 to look at this on the delegation question, not on the  
7 due process question but on the delegation question, is  
8 that there is government all over this at every step,  
9 that there is all kinds of supervision of Amtrak itself,  
10 no matter what Amtrak does that; but with respect to the  
11 metrics and standards, particularly, that there is no  
12 way Amtrak is actually going to be able to get anything  
13 unless the FRA comes aboard, and that furthermore, that  
14 even those metrics and standards are useless unless the  
15 Surface Transportation Board decides to enforce the  
16 preference requirement.

17 So there is, like, no place at which a  
18 private actor can do something itself in this scheme, it  
19 would seem to me.

20 MR. DUPREE: Well, I -- I take the point  
21 that the FRA is involved in the development of the  
22 standards, but I don't think it follows from -- from  
23 that premise to say that Congress can give a private  
24 company and the Federal government joint ownership of  
25 the pen in drafting the regulations. That's the

1     problem.

2             And with regard to the issue of government  
3     control over Amtrak, the government conceded in the D.C.  
4     Circuit that it did not control Amtrak on a day-to-day  
5     basis and that includes, for present purposes, the  
6     rulemaking at issue. In fact, Congress certainly did  
7     not view the Federal government as controlling Amtrak in  
8     the rulemaking, because if it did, it would not have  
9     inserted the arbitration provision.

10            Congress clearly understood that in the  
11     context of this rulemaking, the Federal government did  
12     not control Amtrak. That is why the arbitration  
13     provision is in there.

14            Unless there are further questions, we'll  
15     ask that the judgment below be affirmed.

16            CHIEF JUSTICE ROBERTS:            Thank you, counsel.

17            Mr. Gannon, you have four minutes remaining.

18            REBUTTAL ARGUMENT OF CURTIS E. GANNON

19            ON BEHALF OF PETITIONERS

20            MR. GANNON:                    Thank you, Mr. Chief Justice.

21            Mr. Dupree stressed the question of  
22     accountability, and I think as Justice Kagan was just  
23     pointing out that there is plenty of accountability here  
24     for the Federal government. The Federal government's  
25     fingerprints are all over not just Amtrak but also the

1 metrics and standards because the FRA had to approve  
2 them.

3 On the Amtrak side here, the metrics and  
4 standards were approved by Amtrak's president who is  
5 somebody who is appointed by the eight presidential  
6 appointees and serves at their pleasure. And so the  
7 notion that this is just somebody down in the bowels  
8 of -- of a corporation's day-to-day operations that the  
9 Federal government had no connection with, I think, is  
10 misguided.

11 JUSTICE SCALIA: Would you talk about the  
12 contract provision?

13 MR. GANNON: Yes, we think that --

14 JUSTICE SCALIA: You should have raised that  
15 in your -- I should have raised it in your principal.

16 MR. GANNON: We think that the contract's  
17 provisions are -- the statutory provision there in 207  
18 does require the contracts to be incorporated to the  
19 extent practicable. We have actually said in our brief  
20 that we think that that is something that is largely due  
21 to negotiation between the parties. There are certain  
22 aspects of the metrics and standards that it would not  
23 make sense to incorporate in the contracts, and what the  
24 statute --

25 JUSTICE SCALIA: But if they can't come to



1 an agreement, who decides what the contract --

2 MR. GANNON: As Mr. Dupree said, that the --  
3 then the dispute goes before the surface transportation  
4 board, this is in 24308 --

5 JUSTICE SCALIA: And the STB --

6 MR. GANNON: Will determine what are, quote,  
7 "reasonable terms and conditions."

8 JUSTICE SCALIA: Which would include --  
9 which would include the requirement that, to the extent  
10 practicable, the standards set forth by Amtrak be  
11 followed.

12 MR. GANNON: But we -- we don't think that  
13 that requires they be -- they are not things that would  
14 be binding on the freight railroads. The statute  
15 provides that there needs to be an incentive payment.  
16 For instance, the statute provides that there needs to  
17 be an incentive payment in the contracts. But it  
18 doesn't mean that that -- that the incentive payment now  
19 has to correspond precisely to what the metrics and  
20 standards are. That is something that's subject to  
21 negotiation between the parties, and --

22 JUSTICE SCALIA: Well, as -- as your friend  
23 said, to the extent practicable, unless the whole thing  
24 is nugatory, certainly does not wash out the whole  
25 provision.

1 MR. GANNON: Well, I think that --

2 JUSTICE SCALIA: It must have some bite.

3 What bite does it have?

4 MR. GANNON: I think it was to encourage the  
5 parties to ensure that they are now collecting data in  
6 systematic ways, that they can nationalize things,  
7 that -- that they now measure things in the same  
8 fashion, they use minutes instead of seconds or  
9 whatever, and also that there are some parts of the  
10 metrics and standards that wouldn't make sense to go in  
11 the contracts at all, things that have to do with  
12 customer service surveys about -- satisfaction surveys  
13 about the cleanliness of the cars. And so -- and  
14 ultimately even the canon of constitutional avoidance  
15 could be used to prevent that from doing the work that  
16 would -- that would make it regulatory in this context  
17 if that were to make it a problem here.

18 I think that it's also the case that  
19 Mr. Dupree is talking about Amtrak as a competitor of  
20 the freight railroads, and we think that that's the  
21 wrong analogy, that Amtrak is effectively like a  
22 customer of a common carrier that is entitled to get  
23 services from the railroads at a particular rate. And  
24 that's the way it's always been. And under Respondent's  
25 approach, there would be both nondelegation problems and

1 due process problems, apparently, with the type of thing  
2 that occurred in Boston against Maine, where this Court  
3 held that Amtrak was able to initiate a condemnation  
4 proceeding for rail property before the ICC, and its  
5 determination that it needed that particular property  
6 had a strong presumption that it was going to be true  
7 and governing in that proceeding. This Court held that  
8 that was not an impermissible delegation of eminent  
9 domain authority, because the ICC made the ultimate  
10 determination there, notwithstanding the fact that  
11 Amtrak had to trigger the proceeding and Amtrak's  
12 decision to do so created a statutory presumption that  
13 there would be need.

14 I think that Mr. Dupree also is concerned  
15 about the need for Amtrak's consent here. This goes  
16 back to the very first argument that we have in our  
17 brief that under cases like Currin and Rock Royal  
18 Cooperative, the fact that the government needed to  
19 secure the consent of Amtrak is not something that makes  
20 that a delegation outside the government. Even though  
21 they had the pen along the way, the veto power is what  
22 is most important, and we think it's especially easy to  
23 get there in the context of an entity like Amtrak which  
24 is, at worst, for us quasi-private rather than entirely  
25 private.

1           And we think if you take that into account  
2   here, also the limited effect that the metrics and  
3   standards have, that this is not a non-delegation  
4   problem for any of the three problems the court of  
5   appeals believed.

6           CHIEF JUSTICE ROBERTS:           Thank you, counsel.

7           The case is submitted.

8           (Whereupon, at 11:59 a.m., the case in the  
9   above-entitled matter was submitted.)

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