[ORAL ARGUMENT NOT SCHEDULED]

Nos. 16-1352; 16-1355

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,
Petitioner,
CAPITOL CORRIDOR JOINT POWERS AUTHORITY
Petitioner,

v.

FEDERAL RAILROAD ADMINISTRATION and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Review from the Federal Railroad Administration

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Final Brief for Respondents

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Petitioners are the Capitol Corridor Joint Powers Authority and the North Carolina Department of Transportation, state agencies of California and North Carolina, respectively. The Respondents are the Federal Railroad Administration and the United States of America. The Association of American Railroads has participated as amicus on behalf of the petitioners.

B. Rulings Under Review. The ruling under review is a letter issued by FRA entitled "Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations" on August 11, 2016. No formal citation exists for the letter, but it is available in the appendix at JA1–3.

C. Related Cases. This case has not previously been before this Court or any other court. The document under review makes reference to, but does not interpret, a regulation that had not yet been published in the Federal Register at the time the guidance was circulated. System Safety Program, 81 Fed. Reg. 53,849 (Aug. 12, 2016). That rule has been stayed until May 22, 2017. System Safety Program, 82 Fed. Reg. 14,476 (Mar. 21, 2017).

/s/ Jennifer Utrecht
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GLOSSARY

FRA	Federal Railroad Administration
DOT	Department of Transportation
APA	Administrative Procedure Act

INTRODUCTION

Petitioners challenge a guidance letter that the Federal Railroad Administration ("FRA") sent to state sponsors of intercity passenger railroads as part of FRA's ongoing effort to collaborate with these state sponsors and assist them in understanding their role in the federal railroad safety scheme.[1] In the challenged letter, FRA reiterated a longstanding, common-sense agency policy: every intercity passenger railroad must comply with the federal rail safety laws and regulations ("federal rail safety requirements"), and the entities engaged in providing that railroad service—both the state sponsors and the contractors they hire—are responsible for achieving that compliance.

One way to ensure that these requirements are met, the guidance explained, is for the State to contract for its railroad route to be part of the National Railroad Passenger Corporation's ("Amtrak's") integrated national rail system. Amtrak has, since 1971, been the near-exclusive provider of all intercity passenger rail services. It maintains, by law, a broad national system of passenger railroad routes, several corridors of which are funded by States and local governments. The trains Amtrak operates and maintains run across this broad system, and Amtrak ensures the entire national system—including the state-funded corridors—complies with the federal rail

[1] The term "state sponsor" or "State" is used throughout this brief, as it is in the challenged guidance, to refer to any State, local, or regional authority that plans and provides funding for a passenger railroad.

safety requirements. By fully contracting with Amtrak, therefore, States receive a "turnkey" contractor: one that will operate and maintain the railroad service, as well as handle a variety of otherwise required tasks, such as preparing and submitting required safety-related plans and serving as the primary contact for receiving necessary FRA notifications and correspondence.

States may also contract outside of Amtrak. In such cases, the guidance advises, States can no longer rely solely on Amtrak's extensive regulatory experience, and some other entity—be it a replacement "turnkey" contractor, several subcontractors, or the State itself—needs to take on those regulatory burdens. The guidance informs States that, in those instances, FRA would work closely with them to help ensure there were no gaps in their railroads' regulatory compliance in Amtrak's absence.

This restatement of FRA's policies and practices does not create any new legal obligations, rights, or consequences. It merely informs States how they can meet their existing obligations under the federal rail safety requirements. It is therefore a nonfinal, unreviewable advice letter not subject to this Court's jurisdiction or to notice and comment requirements.

STATEMENT OF JURISDICTION

Petitioners North Carolina Department of Transportation ("North Carolina DOT") and Capitol Corridor Joint Powers Association ("Capitol Corridor") seek review of an August 11, 2016 guidance letter, issued by FRA to state sponsors of

intercity passenger railroads. Petitioners invoke this Court's jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(7), which grants the courts of appeals exclusive jurisdiction over actions seeking judicial review of all "final agency actions" applicable to railroad safety, 49 U.S.C. § 20114(c). As explained below, however, the letter is not a "final agency action" or order that is reviewable under section 2342(7).

STATEMENT OF THE ISSUES

The questions presented are:

1. Whether FRA's August 11 guidance letter constitutes a reviewable final agency action.
2. If so, whether the guidance letter is a legislative rule that must be promulgated through notice-and-comment rulemaking.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in petitioners' separately bound statutory addendum.

STATEMENT OF THE CASE

A. The Regulatory Authority of the Federal Railroad Administration

Congress created the Federal Railroad Administration in order to "carry out all railroad safety laws of the United States." 49 U.S.C. § 103. As a delegate of the Secretary of Transportation, FRA exercises jurisdiction over "every area of railroad safety," and has the authority to "prescribe regulations and issue orders" that bind all

railroad carriers. 49 U.S.C. § 20103(a). For the purpose of the federal railroad safety laws, a railroad is defined broadly as "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways," with the exception of "rapid transit operations" in urban areas that are not connected to the "general railroad system of transportation." 49 U.S.C. § 20102(2)(A), (B); *see* 49 C.F.R. pt. 209, app. A (explaining that, as relevant here, all intercity passenger operations are considered "part of the general railroad system"). A "railroad carrier" is defined as "a person providing railroad transportation." 49 U.S.C. § 20102(3).

Throughout U.S. history, States and other public authorities have owned or funded railroads. *See, e.g., Georgia v. Trustees of Cincinnati S. Ry.,* 248 U.S. 26, 26–27 (1918). Courts have repeatedly recognized that state-owned railroads, like their private counterparts, are subject to the federal scheme of railroad regulations. *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 203 (1991) (holding that "the entire federal scheme of railroad regulation applies to state-owned railroads"); *United States v. California*, 297 U.S. 175 (1936), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).[2] FRA has therefore consistently exercised its

[2] Although the statutes at issue in the above-referenced cases applied to "common carriers by railroad," not "railroad carriers," that is a distinction without difference. FRA's jurisdiction over entities providing railroad transportation has only expanded since the decision in *United States v. California*, 297 U.S. 175. And the term "railroad carrier" was created in 1994 as part of Congress's recodification of Title 49 to "distinguish between railroad transportation and the entity providing railroad transportation." H. Rep. No. 103-180, at 79 (1993). That recodification, however,

jurisdiction over public authorities that act in a private capacity by providing rail service. *See, e.g.*, Passenger Equipment Safety Standards; Front End Strength of Cab Cars and Multiple-Unit Locomotives (Final Rule), 75 Fed. Reg. 1180, 1211–12 (Jan. 8, 2010) (explaining that public authorities that provide passenger or freight rail service have the same powers and obligations for the purpose of rail safety as similarly-situated private actors).

A number of FRA safety regulations apply to passenger railroads, *see* 49 C.F.R. pts. 200–299, including regulations designed to ensure the safety and maintenance of equipment, infrastructure, and operations. These regulations also require safety programs and plans to be developed for the railroad to proactively avoid safety accidents and incidents. *See, e.g.*, 49 C.F.R. § 238.103(e) (requiring the development and adoption of written procedures for the inspection, testing, and maintenance of all fire safety systems on passenger trains); *id.* § 238.107 (requiring the development of an overall inspection, testing, and maintenance plan for passenger equipment); *id.* § 238.109 (requiring the development and adoption of a training, qualification, and designation program for employees and contractors performing required inspection, tests, or maintenance on passenger equipment); *id.* § 239.201 (requiring submission and FRA approval of a passenger train emergency preparedness plan); *see also* JA4–12 (setting forth regulatory requirements that apply to passenger railroads).

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was intended "restate [the preexisting law] in comprehensive form, without substantive change." *Id.*, at 1.

The development and coordination of these safety-related plans can be quite complex. Multiple entities are often involved in providing a particular passenger rail service. A governmental authority might, for example, fund (or "sponsor") the rail service, while hiring a primary contractor to assume responsibility for overseeing the day-to-day operation of the service. Meanwhile, a subcontractor may maintain the passenger equipment, another entity might maintain the track, and a third may operate the equipment.

FRA's regulations do not exempt any of these parties, including the governmental authority, all of which are involved in "providing railroad transportation," *see* 49 U.S.C. § 20102(3), from the requirements of its safety regulations. In 2000, for instance, FRA rejected a request to amend a passenger railroad safety regulation prohibiting a railroad from certain conduct by eliminating potential liability for railroads who allow defective passenger equipment to be hauled over their line, but who do not have contractual responsibility to inspect or maintain that equipment. *See* Passenger Equipment Safety Standards, 65 Fed. Reg. 41,284, 41,291 (July 3, 2000).

FRA explained that the provision was consistent with "longstanding Federal law," and recognized that all of the participants in a passenger train operation are responsible for maintaining safety. The agency explained, using the common but not exclusive example of a commuter passenger railroad, that "a local governmental authority may fund and organize the commuter rail operation, and own the passenger

equipment; a freight railroad may host the operation by providing the trackage over which the passenger trains operate and dispatching the trains; Amtrak may provide the crews to operate the trains; and another entity may inspect, test, and maintain the equipment." 65 Fed. Reg. at 41,291. All of these participants have safety-related responsibilities, and can therefore be held liable for potential defects on the railroad. Further, because the contractors "are all performing services for, or on behalf of, the governmental authority funding and organizing the operation," FRA explained that "the governmental authority holds ultimate responsibility for the condition of the passenger equipment and compliance with these passenger equipment safety standards." *Id.*

B. Intercity Passenger Railroads and the Passenger Rail Investment and Improvement Act.

1. Intercity passenger railroads have a unique history. In 1970, Congress created Amtrak, a private, for-profit corporation, to revitalize the failing U.S. railroad industry and provide all intercity rail passenger service over a unified national system. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327. The Rail Passenger Service Act authorized Amtrak to relieve private railroads of their previous obligation to operate unprofitable passenger transportation in exchange for Amtrak's preferential use of the freight railroad's tracks, facilities, and services at incremental cost levels. *Id.* § 305. Until its amendment in 1997, the Act provided Amtrak a monopoly over intercity rail passenger transportation for any route over which

Amtrak provided scheduled service pursuant to a contract with a freight railroad. 49 U.S.C. § 24701 (1994), amended by Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 101(a)(1), 111 Stat. 2570, 2572.

The Railroad Passenger Service Act further required Amtrak to provide additional intercity passenger services beyond the basic system at the request of State or local governments, subject to certain funding agreements. Rail Passenger Service Act of 1970, § 403(b), (c) (originally requiring States to pay Amtrak for a reasonable portion of any loss associated with the service); Amtrak Reform and Accountability Act of 1997, Pub. L. 105-134, § 105 (repealing 403(c) and allowing Amtrak to contract with States directly for these services).

These additional Amtrak-operated corridors, sometimes called "403(b) services" after the section of the Act which created them, have a number of advantages for state sponsors over constructing additional track or contracting with another rail operator. First, partnership with Amtrak allows state-sponsored routes to take advantage of Amtrak's preferential operating rights on existing railroad tracks. In addition, because Amtrak operates and maintains the trains across its entire system, not simply in isolated corridors, FRA considers 403(b) services to be fully connected to and integrated within Amtrak's broader national system. *See* 49 U.S.C. § 24102(6) ("'National Network' includes long-distance routes and State-supported routes."). Accordingly, all required federal programs, plans, and regular submissions—such as accident reporting under 49 C.F.R. Part 225—are submitted under Amtrak's name

and reporting code. By partnering with Amtrak, therefore, state sponsors receive a "turnkey" service: a contractor which will not only operate and maintain the trains along the state sponsored railroad, but also handle many of the federal regulatory and administrative requirements for that service.

2. The relationship between FRA, Amtrak, and public authorities changed, however, with the implementation of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, div. B, 122 Stat. 4907. That Act reauthorized Amtrak's continued operation, but also mandated that all intercity passenger rail routes that are not more than 750 miles and located outside of the Northeast Corridor be funded by the States using a consistent nationwide methodology. *Id.* § 209.

The Passenger Rail Investment and Improvement Act also gave States the option to "select an entity other than Amtrak to provide services required for the operation of an intercity passenger train route." *Id.* § 217 (codified as amended at 49 U.S.C. § 24702 note). As a result, several States became more active in managing, organizing, and contracting for passenger rail services. And, with respect to some operations, this increased the States' role in making substantive operational and safety-related decisions, including selecting contractors to perform such services and determining what safety-related provisions to include in their contracts with those contractors, just like state sponsors of other passenger railroads.

3. Two state sponsors of intercity passenger railroads have contracted with a third party other than Amtrak to operate or maintain intercity passenger rail services. One is petitioner North Carolina Department of Transportation ("North Carolina DOT"), which uses Amtrak to operate its Piedmont railroad service, but has contracted with RailPlan International to maintain the equipment for the service.

The other state sponsor is the Indiana Department of Transportation ("Indiana DOT"). In 2014, Indiana DOT initiated a request for proposals for contractors on its Hoosier State rail service, and accepted a bid from a contractor who, to FRA's knowledge, lacked experience with federal rail safety requirements. To assist Indiana DOT with the transition, FRA provided Indiana DOT with FRA's start up spreadsheet, *see* JA4–12, which identifies all FRA safety regulatory requirements. FRA also contacted Indiana DOT to make clear that Indiana DOT, as the sponsor, would be responsible for ensuring that these regulations were satisfied with respect to the new service, and suggested a meeting to discuss the process for ensuring compliance. JA13–14. In subsequent correspondence, FRA explained that its statement regarding the responsibility of state sponsors of railroads to ensure that their contractors comply with safety requirements "is not a new position," while emphasizing that "many of the responsibilities for implementation of safety requirements likely flow down to other organizations [Indiana DOT] already has contracted with." JA23.

Ultimately, FRA approved an arrangement between Indiana DOT, Amtrak, and a second contractor, Iowa Pacific, to address its concerns "that [Indiana DOT]

maintain assurances that the Federal requirements that FRA and the U.S. Department of Transportation administer will be met." JA25–26. The State agreed to include provisions in its contracts assigning responsibilities for compliance with the federal rail safety requirements to its contractors, and to maintain an Indiana DOT staff person responsible for overseeing compliance with the contracts and acting as FRA's point of contact. *Id.* Accordingly, FRA concluded that, notwithstanding any statements in its previous letters, "this arrangement will be sufficient to ensure that a framework is in place so that Federal safety laws and regulations will be met." *Id.* That arrangement was in place until recently, when Indiana DOT resumed use of Amtrak for all services.

C. FRA's Guidance Letter

1. While collaborating with Indiana DOT, FRA expressed the desire to address confusion among States with respect to their safety roles after the passage of the Passenger Rail Invesment and Improvement Act. Accordingly, FRA noted that it was considering issuing a policy statement that more thoroughly explained state sponsors' roles and responsibilities for public comment. *See* JA23. The States for Passenger Rail Coalition ("Coalition"), an advocacy group, thereafter requested that FRA conduct a "less formal, more collaborative dialogue" with the States on the subject. JA19. FRA subsequently held a series of discussions and gave presentations at industry meetings in order to better explain to state sponsors their responsibilities and to hear the States' concerns. JA27–34, 41–49.

Also in response to that request for "less formal, more collaborative dialogue," FRA then drafted an informal preliminary guidance document for the States' comment, which it circulated in February 2016. JA51–58. That document explained FRA's longstanding position: that all sponsors of passenger rail services are responsible for the safety of that service, and that in the event of non-compliance, "FRA may choose to take enforcement against the sponsor, the contractor(s), or both." *Compare* JA51 *with* 65 Fed. Reg. at 41,291 (Passenger Equipment Safety Standards, final rule; response to petitions for reconsideration). This approach, the draft guidance explained, "ensures that safety oversight is organized and coordinated, and all entities are brought together under a centralized program to fulfill safety responsibilities," JA51, and further ensures that sponsors take seriously their "general responsibility to oversee their contractors and have regulatory programs and plans in place and submitted to FRA as required for the service." JA58.

That document also explained that if a state sponsor contracts with providers other than Amtrak to perform safety-related functions, FRA would consider the sponsor to be the primary point of contact for safety management of the service, which meant that the sponsor would be required to: (1) demonstrate that it had included provisions in all of its contracts requiring compliance with federal rail safety requirements; (2) designate at least one full-time employee to oversee the contracts and act as FRA's point of contact; and (3) establish and use a single service-specific

reporting code for its railroad under which FRA would file all regional inspection reports. JA57.

Several public authorities, including petitioners, provided comments on this document. Many States expressed concern about the guidance's "ultimate responsibility" language. In particular, commenters were worried that this language suggested that sponsors would be held liable for violations that were clearly the fault of contractors, *see* JA60–61, 64–65, or that the language would prevent them from including indemnity agreements in their contracts, *see* JA68, 75–76. States also expressed concern that the language in the guidance would require States who contracted with Amtrak to exercise significant oversight of Amtrak's operations or else be subject to civil penalties—something that States were not sure they could do under the law, nor had they ever attempted to do. *See, e.g.*, JA68, 72–73.

2. In response to these comments, FRA made significant revisions to the document. The agency reduced the February Draft into a bulleted list of "Guiding Principles" for state-provided intercity passenger rail operations. *See* JA86–88 ("June Draft"). In these principles, FRA omitted any discussion of which entity bears the "ultimate responsibility" for compliance with federal rail safety requirements, as well as any explanation of how or why FRA might take enforcement actions against state sponsors of intercity passenger rail service. *Id.* FRA also removed the language regarding the state sponsors' responsibility to become the point of contact for its railroad. *Id.*

Instead, the revised guidance made two simple points, both of which emphasize FRA's flexibility and willingness to cooperate with state sponsors of intercity passenger railroads. First, the revised guidance reiterated that FRA would "continue to recognize [intercity passenger rail] operations as part of Amtrak's National Network for FRA Regulatory Matters" if Amtrak operated the trains and maintained the passenger equipment. JA86. FRA made clear, however, that this did not absolve state sponsors of any responsibility they might have to comply with federal rail safety requirements. To the contrary, sponsors have a continuing obligation to participate "as necessary" in the development of some regulatory programs, and to comply with all requirements that "may apply independently to the State," such as those regulations "applicable to track owners" when the State owns the track on which Amtrak operates. *Id.*

Second, the revised guidance explained, consistent with the Passenger Rail Investment and Improvement Act, that States may choose to contract outside of Amtrak. JA86. That decision, however, "may have safety implications" of which the State should be aware, namely, that someone would need to fulfill the regulatory and administrative responsibilities in Amtrak's absence, including becoming FRA's primary point of contact, under whose name and reporting code various plans, programs, and reports would be submitted. *Id.* The revised guidance stated that FRA would continue its collaborative dialogue with the States, and would "work closely" with those States considering changing contractors to discuss how to ensure that no

compliance gaps were created by Amtrak's absence, *id.*, just as FRA did with Indiana DOT for the Hoosier State railroad.

The revised guidance concluded with an example of these basic points in operation, focusing on the requirement (then still undergoing notice and comment) that passenger railroads develop a written "system safety program" that proactively identifies potential safety hazards across their operations and works to reduce and mitigate them. *See* System Safety Program (Notice of Proposed Rulemaking), 77 Fed. Reg. 55,372 (Sept. 7, 2012).[3] As the example explained, Amtrak is responsible for developing a system safety program (or as it is sometimes referred, an "SSP") that encompasses its *entire* national network. States which provided routes that were integrated into this national system would therefore not need to develop a second system safety program for their rail operations. Instead, those States need only

[3] The final System Safety Program rule was published in the Federal Register on August 12, 2016, one day after the guidance was circulated. 81 Fed. Reg. 53,850 (Aug. 12, 2016). The effect of the rule has been stayed until May 22, 2017, and FRA is currently in the process of responding to multiple petitions for reconsideration that were filed after the publication of the final rule. This rule, however, was only included within the guidance as an example of how the guidance's general principles might work on any preexisting or future rule. Indeed, FRA could have used many other regulations as an example, such as the Passenger Train Emergency Preparedness rule, which requires all railroads "involved in hosting, providing, and operating a passenger train service" to "jointly adopt" an emergency preparedness plan. 49 C.F.R. § 239.101(a)(3)(ii). Accordingly, it is FRA's position that any changes to the system safety rule would not affect the general principles stated within the agency's nonbinding guidance document.

cooperate with Amtrak as necessary in the development of Amtrak's national system plan and adopt the portion of Amtrak's plan that covered the route they provide.

If, however, the state-supported route is not part of Amtrak's national network, then its route would not be included in Amtrak's program. Accordingly, a separate system safety program would need to be created. The example made clear that States did not necessarily have to develop the plan themselves, and indeed, that there "may be several approaches" to meeting this regulatory requirement. JA88. Consistent with the principles stated in the guidance, the example encouraged States to contact the agency to discuss appropriate options.

FRA circulated this revised draft to the Coalition with a request that the advocacy group share it with another advocacy group, the States for Passenger Rail Leadership, and let FRA know of any further comments. After seeking "consensus" from its members, the Coalition provided redlined comments on the document, most of which involved the rearranging of the bullet points made by the agency. JA89–101. FRA adopted most of these technical revisions, and circulated the guidance document to the Coalition and all relevant States on August 11, 2016. JA109–13; *see also* JA114–36.

D. The Petitions for Review

The petitioners are both public authorities that provide intercity railroad service. Petitioner Capitol Corridor is organized under the law of California to manage and oversee the Capitol Corridor intercity passenger rail service, a route that

runs between San Jose, Oakland, and Sacramento, with additional service northeastward to Roseville and Auburn, California. Amtrak has been the exclusive contract operator of the Capitol Corridor route since its inception in 1991. Petitioner Capitol Corridor, by contrast, is responsible for service planning, marketing, and funding of the intercity passenger rail service, which uses rail equipment owned by the California Department of Transportation.

Petitioner North Carolina DOT is a state agency of North Carolina that provides two intercity passenger rail routes: the Carolinian and the Piedmont. Both routes operate between Charlotte and Raleigh, North Carolina, and the Carolinian provides continuing service to New York City. Amtrak is the exclusive operator of the Carolinian service, which is integrated into its national system and uses Amtrak equipment. Amtrak also operates state-owned trains for the Piedmont service, although North Carolina contracts with a third party, RailPlan International, for the inspection and maintenance of the Piedmont trains.

Both petitioners participated in FRA's discussions prior to the circulation of any written guidance, *see* JA35, 41, and both petitioners are members of the Coalition, which commented on all written versions of the guidance on behalf of its members. *See* JA67–71, 89–101. Petitioner North Carolina DOT also submitted its own comments on the February Guidance. JA74–76.

After FRA sent the challenged guidance letter, both petitioners filed petitions for review in this Court, alleging, *inter alia*, that the guidance was a legislative rule

which should have been promulgated pursuant to formal notice and comment procedures. This Court consolidated the petitions.

SUMMARY OF ARGUMENT

Contrary to petitioners' contentions, the challenged guidance letter does not fundamentally alter the legal landscape or create new and binding legal obligations or rights. Instead, the guidance reiterates FRA's longstanding, common-sense position: that all intercity passenger railroads must comply with federal rail safety requirements, regardless of which entity operates or maintains the railroad, and that the entities engaged in providing that railroad service—both the sponsor and the contractors it hires—have responsibilities to achieve that compliance.

As the guidance explains, one way to ensure that the many requirements are met is to contract for the railroad route to be part of Amtrak's national system. As the guidance notes, Amtrak has traditionally handled many required regulatory tasks for such services, including developing and submitting safety-related plans, as well as managing FRA regulatory notifications and correspondence. This is the route that has traditionally been taken by state sponsors. *See, e.g.*, Passenger Equipment Safety Standards (Final Rule), 64 Fed. Reg. 25,540, 25,654 (May 12, 1999) ("The evaluation also takes into consideration that individual States will contract with Amtrak for the provision of rail service on their behalf. In that regard, for example, a State may utilize Amtrak's inspection forces trained under the rule, and thus not have to train inspection forces on its own."); *see also* JA 1 (Guidance I.B) ("In general, State-

sponsored [intercity passenger rail] operations have been conducted under the umbrella of Amtrak's National Intercity Passenger Rail System (National System), with Amtrak providing regulatory safety-related services.").

States may also contract outside of Amtrak. If they do so, however, they can no longer rely solely on the extensive regulatory legwork Amtrak provides for the routes within its national system. Instead, the guidance explains, some other entity will have to take on these responsibilities. The sponsor may wish to oversee these responsibilities itself. It may also wish to contract with another "turnkey" contractor which, like Amtrak, will handle not only the operation and maintenance of the trains, but also manage all regulatory submissions and correspondence for the state railroad route. Or it may wish to allot responsibilities among subcontractors in the most cost-effective fashion. All are permissible. The guidance therefore informs States considering contracting outside of Amtrak that the agency is willing to work closely with them in the event of a change in contractors to help States understand the requirements, identify their roles, and ensure that no regulatory requirements are overlooked.

Nothing in the guidance letter creates new legal obligations, rights, or consequences. Petitioners' and amicus's arguments to the contrary are based almost exclusively on the erroneous view that state sponsors of intercity passenger railroads have no preexisting regulatory responsibilities, a position which is directly contradicted by longstanding agency practice and federal law. Accordingly, the

guidance letter—which merely expresses FRA's longstanding view of the law and provides nonbinding advice to state sponsors regarding the many ways they can ensure compliance with that law—is not a reviewable final agency action within the meaning of the Hobbs Act, 28 U.S.C. § 2342(7). *See Bennett v. Spear*, 520 U.S. 154, 177–79 (1997); *see also Center for Auto Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006).

Similarly, although the Court need not reach this issue if it concludes the guidance is not final agency action, the guidance is not a legislative rule for which the Administrative Procedure Act ("APA") requires notice and comment. Indeed, the challenged guidance is not a rule at all. It does not announce any new law, interpretation, or agency practice, but merely restates the agency's longstanding policies and practices. Further, despite petitioners' contrary contentions, the guidance is fully consistent with preexisting regulations, including the system safety program. The guidance's recognition that a state sponsor may rely on safety programs developed by Amtrak for the railroad service provided by the State does not create a "safe harbor" or exception from the requirement that these plans be developed and submitted; it simply describes one way in which the requirement may be satisfied. In any event, petitioners were afforded ample opportunity to participate in the agency's collaborative process of developing the advisory guidance, and can identify no prejudice from the manner in which the agency proceeded.

STANDARD OF REVIEW

Whether this Court has subject matter jurisdiction over petitioners' claims is a question of law which this Court reviews de novo. *See Munsell v. Department of Agric.*, 509 F.3d 572, 578 (D.C. Cir. 2007).

Whether a final agency action was promulgated "without observance of procedure required by law" is also a question of law, one that requires the Court to take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706.

ARGUMENT

I. The Challenged Guidance Is Not Final Agency Action

The Hobbs Act, 28 U.S.C. § 2342(7), grants the courts of appeal exclusive jurisdiction to review all "final agency actions" taken by the Secretary of Transportation with regard to railroad safety. An agency action is "final" only if two conditions are satisfied. First, "the action must mark the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Second, it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178. The challenged guidance is not final agency action under this standard.

A. The Challenged Guidance Does Not Determine or Create Legal Obligations, Rights, or Consequences

The challenged guidance cannot be final agency action because it does not determine or alter the existing legal obligations of any person or entity, nor do legal

consequences flow from it. *See Bennett*, 520 U.S. at 177–78. Rather, the guidance merely reiterates pre-existing requirements and advises parties, including state sponsors and the companies with whom they contract to facilitate passenger railroad service, on how to achieve compliance with federal rail safety requirements. As the transmittal letter to the guidance explains, it "outlines the principles for FRA's safety oversight of Intercity Passenger Rail operations" in an effort to "clarify existing policies on [intercity passenger rail] sponsors' roles and responsibilities for the safe operation of passenger rail service." JA110; *see also* JA114–36. This characterization of the document, while not dispositive, is "entitled to respect in a finality analysis." *National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005); *see also National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

The guidance imposes no new obligations, but simply offers two possible ways in which state sponsors can meet their already existing obligations. First, States may contract for the railroad route they provide to be part of Amtrak's national system, as they have traditionally done and as most States continue to do. Amtrak, which has extensive experience complying with federal rail safety requirements, must ensure that its entire national system complies with federal law, including preparing and submitting safety-related programs for that system as well as receiving related FRA regulatory notifications and correspondence. By contracting to be part of Amtrak's system, therefore, States receive a "turnkey" contractor: one that will not only operate and maintain the rail service, but also handle the vast majority of the

regulatory and administrative legwork for that service. Though, as the guidance makes clear, there may be regulatory requirements which, by their very terms, state sponsors must handle themselves. These include helping Amtrak to develop regulatory programs "as necessary," JA1 (Guidance II.C.i), or complying with any regulatory requirements that apply independently to the State, such as those applicable to track owners, if the State owns the track. *Id.* (Guidance II.C.ii); *see also* 49 C.F.R. § 213.5(d).

State sponsors are free, however, to contract with other parties to provide intercity passenger rail services. In those instances, the state sponsor cannot rely solely on Amtrak's previous work, and the state sponsor must find another way to meet its existing obligations. The guidance thus advises that choosing another contractor "may have safety implications" for the railroad that the state sponsors, namely, that a variety of federal rail safety requirements must be complied with in Amtrak's absence, and that someone other than Amtrak "may" need to be designated FRA's point of contact for the receipt of various inspection and violation reports. JA1–2 (Guidance II.D, E).

FRA wanted to make clear, however, that it was *not* requiring States to take up these responsibilities in Amtrak's absence. Instead, the guidance advises "there may be several approaches" to ensure that these requirements are being fulfilled. JA3 (Guidance Example). States may, for example, wish to contract with a replacement "turnkey" contractor, which, like Amtrak, would handle the majority of required

regulatory submissions to FRA. They may also wish to delegate the regulatory requirements to various subcontractors in the most cost efficient manner. Because no single solution can or should be applied to every intercity passenger railroad, the guidance informs States that FRA will work with States that are considering contracting with someone other than Amtrak to develop a plan that assures there are no gaps in the railroad's safety compliance in Amtrak's absence. JA1–2 (Guidance II.E).

In the course of providing this advice, FRA consistently utilized non-mandatory language referencing States' preexisting obligations. *See, e.g.*, JA1 (Guidance II.A) ("FRA *seeks* to have a single entity") (emphasis added); *id.* (Guidance II.C.ii) (the "sponsor *continues to have* responsibilities") (emphasis added); *id.* (Guidance II.D) ("Those decisions *may have* safety implications") (emphasis added). The guidance therefore does not read like a "ukase" that "commands," "requires," "orders," or "dictates" anything that is not already required of passenger railroad sponsors. *National Mining Ass'n*, 758 F.3d at 252–53; *Center for Auto Safety v. National Highway Traffic Admin.*, 452 F.3d 798, 809 (D.C. Cir. 2006). Instead, the guidance at issue is like the agency letter in *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). It "neither announced a new interpretation of the regulations nor effected a change in the regulations themselves." *Id.* It is "purely informational in nature," and "imposed no obligations and denied no relief." *Id.* Rather, it is the "type of workaday advice letter that agencies prepare countless times

per year in dealing with the regulated community." *Id.* (internal quotation marks omitted).

Such letters are important to well-run regulatory schemes. As a matter of good governance, agencies frequently communicate with the parties they must regulate in order to assist those parties in understanding their preexisting obligations and help them understand what steps they may take in order to comply with the law. This Court has recognized that judicial scrutiny of such actions might chill this desirable communication, and accordingly, the Court's "case law is clear" that an agency action is unreviewable and nonfinal where, as here, "an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *Center for Auto Safety*, 452 F.3d at 808 (internal quotations omitted); *see also Independent Equipment Dealers*, 372 F.3d at 427 (holding that an interpretative letter that restated EPA's longstanding position did not qualify as reviewable final agency action).

In short, the guidance at issue here does not affect "a certain change in the legal obligations of a party." *National Ass'n of Home Builders*, 415 F.3d at 27. It neither creates nor alters any legal rights or obligations, but rather, explains to regulated parties FRA's "existing policies" regarding their "roles and responsibilities for the safe operation of passenger rail service." JA114. It is therefore an unreviewable "express[ion] [of the agency's] view of the law." *Center for Auto Safety*, 452 F.3d at 808. The Court should dismiss these petitions.

B. Neither the Petitioners nor the Amicus Provide Any Persuasive Arguments that the Guidance Is Binding or Final

Petitioners and the amicus argue that the guidance is a final agency action because it alters the rights and legal obligations of regulated parties. That argument is based on a misreading of the guidance. The guidance does not in fact contain the supposedly "critical and entirely original pronouncements" that petitioners claim, Br. 26, and indeed, does not change the legal obligations of state sponsors at all.

1. First, petitioners err in their contention that the guidance "fundamentally alters the legal regime" by making state sponsors "ultimately" responsible for compliance with the federal rail safety requirements, even if the sponsor has contracted that responsibility elsewhere. Br. 28, 33–34, 52. The guidance contains no such language. It does not mandate or even suggest which of the many entities engaged in the provision of passenger rail transportation should be "ultimately" responsible for fulfilling certain regulatory requirements, nor does it mention which entity FRA can or will take enforcement action against in the event of a regulatory violation.

Instead, the guidance explains that certain existing regulatory requirements are currently being satisfied by Amtrak and will need to be fulfilled in Amtrak's absence, should the State choose to look elsewhere for the operation and maintenance of the railroad service it provides. The guidance says nothing about who should handle these tasks. It certainly does not require State employees to perform the tasks

themselves. To the contrary, the guidance explains that there are many ways to ensure that the railroad is compliant with all federal rail safety requirements, and that FRA will continue its collaborative dialogue with the States to avoid gaps in safety compliance. *See, e.g.*, JA3 (Guidance Example) ("FRA will work closely on a case-by-case basis with State service sponsors . . . as there may be several approaches that the State service sponsor could pursue.").

Petitioners cite no language in the guidance to support their theory that it designates state sponsors as "ultimately responsible" for personally handling the burden of FRA's regulatory requirements, except that, in a footnote, they suggest the guidance's use of the phrase "point of contact" is synonymous with the entity that has ultimate responsibility for the service. Br. 21 n.22. Even assuming the validity of petitioners' statement, however, the guidance decidedly does not mandate that a railroad have only one point of contact, or that state sponsors be this point of contact. Instead, the guidance makes clear that a change in contractors "may" require the sponsor to be the point of contact for various regulatory matters, and that the FRA inspectors "may" also continue "to deal directly with any contract provider of safety-related service." JA1 (Guidance II.C, D).

Even if the guidance were interpreted as opining on the responsibilities of state sponsors, moreover, such a pronouncement would not be an "entirely original" proposition or a change in the legal obligations of the States. Br. 26. On the contrary, FRA has long maintained that sponsors of passenger railroads share

responsibility for ensuring that the railroad services they provide are compliant with federal rail safety requirements. Indeed, FRA described this view as "longstanding" nearly seventeen years ago in its response to petitions for reconsideration of the Passenger Equipment Safety Standards rule. 65 Fed. Reg. at 41,291 (explaining that although a "number of entities may be involved in a single passenger train operation," all contractors "are performing services for, or on behalf of, the governmental authority funding and organizing the operation," and so, "the governmental authority holds ultimate responsibility" for compliance with the federal rail safety standards). And FRA has, for many years, taken enforcement actions against state sponsors of passenger railroads. *See* FRA's Fiscal Year Enforcement Reports for 2010–2016.[4]

Thus, contrary to petitioners' arguments, Br. 27, 40–44, this case is unlike *Syncor International Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997). In that case, the Food and Drug Administration issued a notice announcing that it had newly determined that certain drug manufacturers "should be regulated" under the Food, Drug, and Cosmetic Act, and that these manufacturers must now comply with various provisions of that Act. *Id.* at 92–93. This Court determined that the notice was a final agency action subject to notice and comment because the agency had previously

[4] FRA began posting its annual enforcement reports online in 2009. The above cited enforcement reports are available at https://www.fra.dot.gov/eLib/Find#p1_z5_gD_kenforcement%20report. Earlier examples exist, although only in FRA's internal archives and outside the scope of the record under review.

made a "careful, considered decision" not to regulate those manufacturers, and it "unequivocally stated" that position in a prior publication. *Id.* at 93, 95.

Here, by contrast, the guidance decidedly does not announce that FRA has changed its position, nor has the agency previously and unequivocally stated that state sponsors of intercity passenger railroads do not have responsibilities under federal rail safety requirements. Petitioners are simply wrong when they assert that FRA has previously "back[ed] down" or "relented" from its longstanding position that sponsors of passenger railroads have regulatory responsibilities. Br. 15–16 & n.19. Far from "relent[ing]" in its efforts to ensure compliance with respect to the Hoosier State railroad, as petitioners claim, FRA coordinated with Indiana DOT to extract assurances that the State could meet its regulatory obligations. JA25–26.[5]

Petitioners' further reliance on an e-mail from an industry official relaying a conversation in which the then FRA Administrator purportedly said States are not considered "railroads," plainly is insufficient to establish that the guidance changes

[5] Petitioners also cite an extra-record letter sent by FRA to North Carolina DOT in 2008, and portray the agency's subsequent conduct as "back[ing] down" on its efforts to hold North Carolina DOT to any rail safety requirements. Br. 15–16 & n.19. FRA has prosecutorial discretion when choosing whether to assess civil penalties for railroad safety violations, and any discretionary choice not to pursue a state for a violation cannot be understood as a lack of FRA jurisdiction. *See, e.g.*, *Railway Labor Executives Ass'n v. Dole*, 760 F.2d 1021, 1024–25 (9th Cir. 1985). Moreover, although not in the record in this case, we note that it is simply wrong to suggest FRA has not enforced railroad safety regulations against North Carolina DOT in the past. FRA has in fact enforced the federal rail safety requirements against the petitioner in actions that predate the Passenger Rail Investment and Improvement Act of 2008.

agency policy. JA106. A single e-mail reporting a hearsay statement (devoid of context) is not the sort of "careful, considered" and "unequivocal[]" statement at issue in *Syncor*, 127 F.3d at 93, 95, nor is it sufficient to overcome years of FRA practice regulating state sponsors of passenger railroads. *See* FRA's Fiscal Year Enforcement Reports for 2010–2016, *supra* p.29 note 5.

2. Petitioners are also mistaken in their assertion that the guidance establishes a "safe harbor" from any liability or responsibility for those state sponsors that choose to contract with Amtrak for the operation and maintenance of their rail service. As already explained, the guidance decidedly does not impose ultimate responsibility on state sponsors, nor does it bind FRA's enforcement discretion in any way. Accordingly, it could not possibly create a "safe harbor" from any ultimate responsibility or from potential liability in an enforcement action.

Instead, the guidance explains to state sponsors what has always been true: there are many regulatory requirements that must be complied with for *every* intercity passenger railroad, regardless of who operates or maintains that railroad service. Amtrak, of course, already knows of these requirements. The trains Amtrak operates and maintains run across its entire national rail system, the majority of which it funds without the assistance of States. And Amtrak must comply with federal railroad safety laws and regulations for that entire system, including on corridors provided by the States.

Thus, the guidance merely recognizes the common sense notion that one way a state sponsor can meet its obligations is by contracting with Amtrak, allowing the State to take advantage of the work Amtrak has already done. That is not a "safe harbor"; it is merely a recognition of reality.

Contracting with Amtrak, moreover, does not absolve the State of all regulatory responsibility, as the guidance makes clear. *See* JA1 (Guidance II.C) (discussing continuing state sponsor responsibilities); *see also, e.g.*, Passenger Equipment Safety Standards rule, 65 Fed. Reg. at 41,291 (explaining the duty for compliance with the passenger equipment safety standards remains with the sponsor even though contractors must also comply); 49 C.F.R. § 213.5(d) (holding the owner of track responsible for compliance with FRA's track safety standards, even if the track owner has assigned track maintenance responsibility to another entity); 49 C.F.R. § 239.101(a)(3)(ii) (similarly not relieving an entity responsible for compliance with the emergency preparedness planning requirements where multiple entities are involved in a passenger train service and that entity assigned responsibility elsewhere).

Thus, contrary to petitioners' contention, the guidance neither requires States to personally handle regulatory responsibilities, nor does it establish a "safe harbor" from liability for States that contract with Amtrak. It merely reiterates that federal rail safety requirements must be met by every railroad, whether those requirements are met by Amtrak, by the State itself, or by some other contractor.

3. Finally, petitioners assert (Br. 6, 25, 36) that the guidance imposes a new, "affirmative obligation" to "work with FRA," because it declares that state sponsors who change contractors "*must* work with FRA to establish a plan that assures regulatory safety-related requirements are being met." But petitioners attach far more to "must" than the word can bear in the context of the guidance.

Contrary to petitioners' suggestion, the guidance does not create a regulatory hurdle that state sponsors must clear before changing contractors. Rather, it reflects the longstanding obligation of state sponsors, along with the contractors they hire, to work to ensure that the railroad service they provide complies with federal rail safety requirements. FRA therefore expects to have continued conversations with these sponsors regarding the submission of required safety plans, as well as which contractors will be responsible for fulfilling various required roles. And indeed, some of these plans may need to be amended in the event of a change in contractors. *See, e.g.*, Passenger Train Emergency Preparedness (Final Rule), 63 Fed. Reg. 24,630, 24,642 (1998) (explaining that all entities involved in providing passenger rail transportation must "work together and file one emergency preparedness plan for the operation setting forth each [entity's] procedures and responsibilities under the plan.").

The statement referenced by the petitioners, moreover, is not a new affirmative obligation for the States, but a continuation of the dialogue that was initiated by the States in early 2015. At that time, States asked FRA for advice regarding their role in

the federal rail safety scheme, and FRA attempted to provide it through industry meetings and through the challenged guidance letter. That discussion is not over. Every railroad is different, and a States' role for a given railroad can vary widely depending on the contracting decisions it makes. Thus, as the guidance explains, when a state sponsor changes contractors, "FRA will work closely with the State service sponsor to identify its role," JA1–2 (Guidance II.E), and help develop a plan that assures all requirements are met. Accordingly, this statement does not create some binding legal obligation, but rather, reflects that this guidance is part of the "ongoing dialogue" initiated by state sponsors when they requested advice from FRA regarding their role in the federal rail safety scheme. *See General Motors v. EPA*, 363 F.3d 442, 450 (D.C. Cir. 2004) (holding that the Environmental Protection Agency letters stating that the agency's position on a disputed issue, and encouraging settlement talks with regulated industries under the threat of enforcement, were not final agency action because they were part of a broader, "ongoing dialogue initiated by industry" about the agency's enforcement actions).

In short, read in the context of its history, and in light of the fact FRA has clearly announced its view that this explanatory document has no binding legal effect, the guidance statement that state sponsors "must" work with FRA to ensure federal rail safety requirements are being met by the railroad that the State sponsors does not impose a new affirmative obligation on the States. FRA cannot and will not take enforcement action against state sponsors for failing to contact FRA to discuss their

new service contractors. Rather, this sentence merely facilitates the satisfaction of other regulatory requirements, and its inclusion within the guidance illustrates that the ongoing dialogue between FRA and state sponsors continues.

II. The Guidance Is Not Subject to APA Notice and Comment Requirements

Because the challenged document does not constitute final agency action, the consolidated petitions should be dismissed. But if this Court reaches the issue of whether the guidance is subject to notice and comment, the Court should reject petitioners' contention that the challenged guidance constitutes a legislative rule promulgated without notice and comment.

A. Under the APA, federal agencies generally must undertake notice-and-comment rulemaking when they promulgate "legislative rules" (also known as substantive rules); they need not do so when they issue "interpretive rules" or "general statements of policy." *See* 5 U.S.C. § 553(b); *Carter v. Cleland*, 643 F.2d 1, 8 (D.C. Cir. 1980). Broadly speaking, a legislative rule will have "the 'force and effect of law,'" *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)), and would itself "be the basis for an enforcement action for violations" of its terms. *Nat'l Mining Ass'n*, 758 F.3d at 251. An interpretive rule does not have such effect, and is instead issued to advise the public of the agency's construction of preexisting sources of law. *See Mortgage Bankers*, 135 S. Ct. at 1204; *Association of Flight Attendants v. Huerta*, 785 F.3d 710, 716 (D.C. Cir.

2015). And a policy statement "merely explains how the agency will enforce a statute or a regulation—in other words, how it will exercise its broad enforcement discretion . . . under some extant statute or rule." *National Mining Ass'n*, 758 F.3d at 252.

"[W]hether an agency action is the type of action that must undergo notice and comment depends on 'whether the agency action binds private parties or the agency itself with the "force of law."'" *Catawba Cty. v. EPA*, 571 F.3d 20, 33 (D.C. Cir. 2009) (per curiam) (quoting *General Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002)). Central to this analysis is "the [a]gency's own characterization of the action," as reflected in "[t]he language used by [the] agency" in the challenged statement. *Center for Auto Safety*, 452 F.3d at 806. Additionally, the Court may consider other factors, including (1) whether absent the rule "there would not be an adequate legislative basis for enforcement" by the agency; (2) whether the agency published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked its legislative authority; and (4) "whether the rule effectively amends a prior legislative rule." *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). As this Court has recognized, this inquiry resembles in significant respects the inquiry into whether an agency action is final for the purposes of judicial review. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011).

As previously explained, the challenged guidance does not alter any legal rights or obligations. It merely reiterates already existing obligations and offers guidance on how parties can achieve compliance. Indeed, the transmittal letter for the guidance

states that the document is designed merely to explain "existing policies on [intercity passenger rail] sponsors' roles and responsibilities for the safe operation of passenger rail service," and outlines "principles for FRA's safety oversight of Intercity Passenger Rail operations." JA114.

As noted above, there is nothing new or surprising in the statement that all federal rail safety requirements must be met for a given railroad service, and that sponsors as well as the contractors they hire are responsible for achieving compliance. The fact that one way to comply is to rely on work already done by Amtrak in no way implies the other methods of compliance (such as creating a safety plan in conjunction with hiring a new contractor) somehow imposes "new" obligations.

The guidance also does not bear any other hallmarks of a legislative rule. It does not purport to supply a basis for novel enforcement action against regulated parties. *Cf. American Mining Cong.*, 995 F.2d at 1112 (inquiring into whether a "legislative gap" existed that required the challenged agency statement "as a predicate to enforcement"). FRA did not publish the guidance in the Code of Federal Regulations. And, despite petitioners' argument to the contrary (Br. 41-42), the guidance does not invoke any of FRA's statutory rulemaking authorities. It merely points out, as an underlying premise, that FRA "has jurisdiction over intercity passenger rail (IPR) operations in all areas of railroad safety." JA1 (Guidance I.A). But it does not invoke FRA's ability to "prescribe regulations" related to railroad

safety, 49 U.S.C. § 20103(a), nor does it purport to invoke its jurisdiction over railroad safety to "modif[y] or add[] to a legal norm." *Syncor Int'l Corp.*, 127 F.3d at 95.[6]

Finally, the guidance in no way amends or vitiates the agency's existing policies or regulations. To the contrary, the guidance states all existing federal railroad safety laws and regulations must be fulfilled, regardless of which entity the state sponsor chooses to operate and maintain the subject rail service, and discusses options for achieving compliance.

B. Petitioners contend (Br. 44–45) that the guidance is a legislative rule because it fundamentally alters the existing legal regime and is in direct conflict with the system safety program rule. According to the petitioners, the guidance "presumptively charges the State sponsors with ultimate responsibility" for railroad safety laws, and then establishes a "safe harbor" for state sponsors who contract with Amtrak. *See id.* The final system safety program rule, petitioners contend, does not

[6] Indeed, that the guidance letter was not issued by anyone in the agency with the authority to promulgate regulations further shows that FRA did not intend to invoke its rulemaking authority, but rather, sought to issue a general policy statement which could not alter either the state sponsors' or the agency's obligations. *See, e.g.*, *Center for Auto Safety*, 452 F.3d at 810 ("In other words, Associate Administrator Weinstein had no authority to issue binding regulations . . . and his statements regarding [the agency's] policy [in a guidance letter] could not change an automaker's legal obligations under the Act."); *see also Amoco Production Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005) (holding that a guidance letter signed by someone without authority to announce rules binding on the agency was "not an agency rule at all, legislative *or* otherwise, because it does not purport to, nor is it capable of, binding the agency") (quoting *Independent Petrol. Ass'n of America v. Babbit*, 92 F.3d 1248, 1257 (D.C. Cir. 1996)).

allow for "waiving or delegating" compliance and therefore is inconsistent with the supposed "safe harbor" allowed by the guidance. Br. 45. These arguments, however, are based on a misreading of both the guidance and the system safety program rule.

As already discussed, the guidance does not dispense with or change the agency's longstanding position that all parties involved in providing railroad services, including the state sponsor and its contractors, share responsibility for maintaining compliance with federal rail safety requirements. And it does not create an "exception" or "safe harbor" for state sponsors that contract with Amtrak.

Rather, the guidance merely recognizes the common sense notion that a state sponsor can *meet* its obligations under the federal rail safety requirements by contracting with an entity that has already implemented appropriate safety measures. But its regulatory obligations do not evaporate. Indeed, the guidance makes clear that a state sponsor that contracts with Amtrak must "participate as necessary in the development and implementation of regulatory programs for the operation's safety," and will "continue[] to have responsibilities" for complying with safety requirements that apply independently. JA1 (Guidance II.C).

If a State contracts outside of Amtrak, however, it cannot piggy-back exclusively on Amtrak's existing programs, but must ensure that new ones are created (either by itself or through another contractor). But the fact that a state sponsor may have to meet its obligations in a different way does not make the use of Amtrak a "safe harbor."

The guidance is therefore entirely consistent with the final system safety program rule. That rule, which had not yet been published in the Federal Register at the time the guidance was first circulated, requires each applicable "railroad"—a term which in the system safety program rule includes "railroad carriers" of passenger services—to "adopt and fully implement a system safety program through a written [system safety] plan," that "continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities." *See* System Safety Program, 81 Fed. Reg. at 53,897. The plan itself, however, need not necessarily be created by the host of the railroad, although "[e]ach railroad subject to this part shall communicate with each railroad that hosts passenger train service for that railroad and coordinate the portions of the [system safety] plan applicable to the railroad hosting the passenger train service." *Id.*

It is true, as petitioners point out (Br. 46), that the preamble to the system safety program rule states that contracting out operations to another railroad "does not result in the delegation of the duty to comply with the [system safety program] rule." 81 Fed. Reg. at 53,857. But nothing in the guidance suggests anything different. Instead, the guidance recognizes, as does the system safety program rule, that state sponsors may "adopt" any system safety program which has been developed for a railroad operation, whether that plan is developed by the State, by Amtrak, or by some other contractor. And, as the guidance explains, even in the event the State

adopts such a plan, it still has duties under the system safety program rule, including the duty to participate "as necessary" in the development of the plan.

Accordingly, unlike *Mendoza v. Perez*, 754 F.3d 1002, 1023–24 (D.C. Cir. 2014), on which petitioners rely, the guidance does not create an "exception" to FRA's regulatory scheme or the system safety program rule. It is fully consistent with both.

For the same reasons, petitioners' contention (Br. 55) that the guidance requires notice and comment because it creates an "implied preference" for Amtrak in State-contracting decisions is incorrect. States have always been free to choose contractors other than Amtrak to provide intercity passenger rail services, and that has not changed. The mere recognition that contracting with Amtrak is one way a State can meet its obligations, along with recognition of the reality that Amtrak handles much of the legwork required for compliance, does not "create" a preference.

Petitioners also err in their contention (Br. 57–58) that FRA's previous statement—made in the early stages of development of the policy—that it would be published for public comment binds the agency to engage in notice and comment. First, petitioners misstate the terms of an FRA regulation as stating that FRA "must" follow notice and comment procedures when it deems it "necessary and desirable." Br. 55. In fact, the regulation states that "interpretive rules, general statements of policy, and rules relating to organization, procedure, or practice" will *not* be subject to "notice or other public rulemaking proceedings" "[u]nless the Administrator

determines that notice and public rulemaking proceedings are necessary or desirable." 49 C.F.R. § 211.15(b).

The statement upon which petitioners rely, made in a letter from the Associate Administrator for Railroad Safety, does not constitute a binding determination requiring notice and comment. And indeed, the challenged guidance bears little resemblance to the document that FRA originally contemplated issuing for public comment at the time of that statement. As already discussed, FRA originally intended to issue a policy statement that covered a much broader swath of issues. Ultimately, however, it did nothing more than restate the agency's longstanding policies and inform States that it would continue collaborating with them in the future. The Associate Administrator's general statement of intent at the beginning of this process therefore has no bearing on whether the guidance FRA actually issued requires notice and comment.

The cases cited by petitioner are inapposite. *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 95 n.5 (D.C. Cir. 2002), simply recognized that the government had waived the good-cause exemption from notice and comment when it had not raised the exemption in its brief or identified good cause in its final rulemaking. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1025–26 (D.C. Cir. 2000), held that an EPA issued guidance was broader than its previously issued rule, thereby requiring notice and comment. In so holding, the Court rejected EPA's argument that the agency had signaled the guidance's position in its final rulemaking. EPA's

argument, the court determined, was contradicted by other statements in the rule, including EPA's promise to undertake further rulemaking if issues like those addressed by the guidance arose. *Id.* And *Lee v. Kemp*, 731 F. Supp. 1101, 1112–13 (D.D.C. 1989), merely recognized that, even though the APA "expressly excludes from the rulemaking requirements actions pertaining to public property," the Department of Housing and Urban Development's own regulations require notice and comment for such rulemaking, with some narrow exceptions. None of these cases, therefore, suggests that a single statement of intent made at the beginning of a collaborative process binds the agency to use notice and comment when issuing an otherwise nonbinding advice letter.

C. In any event, given the extensive collaborative and informal dialogue initiated at the request of the States, petitioners cannot show any prejudice resulting from any alleged procedural shortcoming. 5 U.S.C. § 706 (in determining whether an agency action was procedurally improper, "due account shall be taken of the rule of procedural error"). As already explained, this document made no change to the existing legal landscape, and there can be no doubt that petitioners had a full and fair opportunity to comment on, and indeed, work with FRA to develop this guidance letter. FRA seriously considered these proposed changes, as evidenced by the fact the agency significantly revised its February Draft at the request of the States, and sought further comment from the state sponsors on the June Draft. The advocacy group

which represented those States received "consensus" on the various edits it made, the majority of which FRA accepted, even though most were merely structural changes.

Only after achieving this consensus did FRA issue the letter. And the message of the guidance—that all intercity passenger railroads must comply with regulatory and administrative burdens, regardless whether they are operated and maintained by Amtrak—is an "inevitable" result required by the law. *Cf. United States v. Ross*, No. 11-3115, 2017 WL 728040, at *3 (D.C. Cir. Feb. 24, 2017) ("To find an agency's short-circuiting of notice-and-comment harmless, we have relied on true inevitability—cases where to heed adverse comments the agency would have had to violate the controlling statute."). Under the circumstances, there can be no "uncertainty at all as to the effect" of the agency's failure to utilize notice and comment. *Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003). Accordingly, petitioners could not have been prejudiced by FRA's failure to utilize notice and comment procedures.

CONCLUSION

For the foregoing reasons, the court should dismiss the petitioner's challenge or, alternatively, deny the petition for review.

Respectfully submitted,

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May 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that, according to the count of Microsoft Word and excluding the parts of the brief exempted under Rule 32(f), this brief contains 10,670 words.

/s/ Jennifer Utrecht
Jennifer Utrecht

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jennifer Utrecht
Jennifer Utrecht