CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

CASE NO. 16-1352
Consolidated With Case No. 16-1355

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.

FINAL JOINT BRIEF OF PETITIONERS NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND CAPITOL CORRIDOR JOINT POWERS AUTHORITY

Review of FRA Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations (Issued Aug. 11, 2016)

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners certify as follows:

1. Parties and Amici: The Petitioners are the Capital 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 (FRA) and the United States of America. The Association of American Railroads participated as an amicus. The States for Passenger Rail Coalition, of which Petitioners are members, submitted written comments to the FRA on the ruling under review, as did the following individual members: the North Carolina Department of Transportation; the Indiana Department of Transportation; the Northern New England Passenger Rail Authority; and the Connecticut Department of Transportation.

2. Rulings under Review: The ruling under review is an Order of the FRA in the form of a document entitled, "Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations." The FRA issued the document via e-mail and U.S. mail only on August 11, 2016.

3. Related Cases: This case has not previously been before this Court or any other court. Certain issues discussed herein are related to Petitions for Reconsideration of the FRA's System Safety Program Final Rule, 81 Fed. Reg. 53,849 (Aug. 12, 2016) filed by Petitioners, as well as the Indiana Department of Transportation, the San Joaquin Joint Powers Authority, the Northern New England Passenger Rail Authority, and the Vermont Agency of Transportation. The Massachusetts Department of Transportation also filed comments in support of these Petitions. These Petitions remain pending before the FRA.

/s/ *W. Eric Pilsk*
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STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), copies of the following pertinent statutes and regulations are set forth in the separately bound Addendum:

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GLOSSARY OF ABBREVIATIONS

Amtrak ..... National Passenger Railroad Company

APA ..... Administrative Procedure Act

DOT ..... Department of Transportation

FRA ..... Federal Railroad Administration

Guidance ..... FRA, *Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations* (Issued Aug. 11, 2016) (J.A. 1–3)

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to review a final action of the Secretary of the U.S. Department of Transportation ("DOT") under the Federal railroad safety laws. 28 U.S.C. § 2342(7) (Addendum of Statutes and Regulations ("Addendum") 1); 49 U.S.C. § 20114(c) (Addendum 3). The Secretary has delegated its authority

under these laws to the Administrator of the Federal Railroad Administration ("FRA"). 49 C.F.R. § 1.89(a) (Addendum 4).

On August 11, 2016, the FRA issued an order in the form of a document entitled, "Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations" (the "Guidance") (Joint Appendix ("J.A.") 1–3).

The Guidance is a final action within this Court's jurisdiction, because it (1) represents the consummation of agency decision-making, (2) establishes rights and obligations, and (3) is an order from which legal consequences flow. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). The Guidance was issued after the FRA informally circulated an earlier draft and received comments from four[1] members of the States for Passenger Rail Coalition and the States for Passenger Rail Coalition itself. *See* Cover Letter to Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations (Aug. 11, 2016) ("Cover Letter") (J.A. 114). The FRA represented the Guidance as the final product "outlin[ing] the principles for FRA's safety oversight of

[1] The Guidance's transmittal letters state that the FRA received "six" written comments from States for Passenger Rail Coalition members. (J.A. 114). Counsel for the FRA has informed Petitioners that this tally was incorrect, and that only four written comments were received.

Intercity Passenger Rail Operations," and the Guidance no longer bears any indicia of a draft. *Id.* It accordingly reflects the "consummation of the agency decision-making process." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (internal quotation omitted).

As this Court has recognized, the other elements of the "finality inquiry" – whether the action establishes rights and obligations or is one from which legal consequences flow – are effectively identical to "the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule." *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). Because this latter inquiry is the central issue in this case, Petitioners respectfully refer the Court to the arguments below, *infra* at 40–56, as additional support for this Court's jurisdiction.

Petitioners Capitol Corridor Joint Powers Authority and North Carolina DOT timely filed Petitions for Review of the Guidance on October 7, 2016.

STATEMENT OF ISSUES

Does the Guidance violate the Administrative Procedure Act ("APA") as implemented by the FRA's Rules of Practice where it was promulgated without an adequate opportunity for public notice and comment and:

1. The Guidance significantly expands the scope of the FRA's jurisdiction over State sponsors of intercity passenger rail service in a substantial change from prior law by declaring State sponsors of intercity passenger rail presumptively subject to all Federal railroad safety laws and regulations pursuant to the FRA's general legislative authority; and

2. The Guidance effectively amends prior legislative rules by irreconcilably modifying the definitions of a "railroad" or "rail carrier" thereunder, including by establishing a safe harbor for State sponsors of intercity passenger rail that contract with Amtrak for the operation, maintenance, and inspection of train equipment.

STATEMENT OF THE CASE

Petitioners challenge the FRA's revision of the Federal regulatory scheme applicable to State-sponsored intercity passenger rail without observance of the procedures required by the APA and the FRA's own Rules of Practice.

For nearly fifty years, the FRA has looked to the National Railroad Passenger Company ("Amtrak"), as the near-exclusive operator of intercity passenger rail service, for compliance with applicable Federal railroad safety laws and regulations. In 2008, Congress shifted financial responsibility for certain short-distance intercity passenger rail routes to the States. In recognition of that

significant financial burden, Congress at the same time granted States the flexibility to choose an entity other than Amtrak to provide intercity passenger rail-related services. But, as State sponsors sought to exercise that flexibility, the FRA suggested on an *ad hoc* basis that State sponsors, rather than the entity replacing Amtrak, should assume ultimate responsibility for compliance with Federal railroad safety laws and regulations by doing do.

Through the Guidance, the FRA establishes this principle as a rule. Specifically, without publishing notice of its proposal in the *Federal Register*, providing all interested parties an opportunity to participate, or considering the limited comments it did receive from State sponsors, the FRA relied on its general legislative authority to:

1) Declare State sponsors of intercity passenger rail, which continue to merely provide funding for intercity passenger rail service, presumptively responsible for compliance with all Federal railroad safety laws and regulations, unless the FRA determines in its sole discretion that they are not;

2) Establish a "safe harbor" from this presumption for State sponsors that choose to continue contracting with Amtrak for the operation, maintenance, and inspection of trains;

3) Impose on State sponsors a new, affirmative obligation to "work with FRA" to allocate regulatory responsibility if or when they change service contractors; and

4) Issue "guidance" that directly conflicts with a prior FRA legislative rule.

The Guidance constitutes a legislative rule, for which notice and comment was required under the APA and the FRA's Rules of Practice. Because the FRA failed to observe those procedures, this Court must vacate the Guidance.

STATEMENT OF THE FACTS AND REGULATORY FRAMEWORK

A. State-Supported Intercity Passenger Rail Service

Amtrak was established by the Rail Passenger Service Act of 1970[2] to, among other things, operate certain intercity passenger rail routes designated by the Secretary of Transportation as part of the "basic system" of passenger rail transportation in the United States. In addition, Amtrak was required to provide intercity passenger rail service beyond the "basic system" upon the request of a State agency, if the agency agreed to "reimburse [Amtrak] for a reasonable portion of any losses associated with such services." *Id.* § 403(b) (Addendum 15). Many of the Amtrak routes in operation today, including those of Petitioners, were

[2] Pub. L. No. 91-518 (Oct. 30, 1970) (Addendum 6–21).

initiated pursuant to this provision.

B. The Petitioners

1. *Capitol Corridor Joint Powers Authority*

Petitioner Capitol Corridor Joint Powers Authority is a Joint Powers Authority[3] organized under the laws of California[4] to manage the Capitol Corridor intercity passenger rail service, a 170-mile route connecting San Jose, Oakland, and Sacramento, with additional service northeastward to Roseville and Auburn, California. Declaration of David B. Kutrosky ("Kutrosky Declaration") ¶ 8 (Addendum of Evidence Establishing Standing ("Standing Addendum")[5] 2). The service was initiated by the California DOT in 1991, with Amtrak serving as the exclusive contract operator. *Id.* Amtrak has served as the contract operator of the Capitol Corridor route since its inception, first by contract with Caltrans, and now under contract with the Capitol Corridor Joint Powers Authority.[6] *Id.* The Capitol

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[3] The Capitol Corridor Joint Powers Authority's constituent agency members are the Placer County Transportation Planning Agency, Solano County Transportation Authority, Yolo County Transportation District, Sacramento Regional Transit District, BART, and Santa Clara Valley Transportation Authority. Cal. Gov't Code § 14076.2.

[4] Cal. Gov't Code §§ 6500–6599.3, 14076–14076.8.

[5] Petitioners' Standing Addendum is annexed hereto.

[6] The California legislature permanently transferred responsibility for the Capitol Corridor to the Capitol Corridor Joint Powers Authority in 2003.

Corridor Joint Powers Authority, like most State sponsors of intercity passenger rail, is responsible for service planning (*i.e.*, matching the frequency and service schedule to current and anticipated demand), marketing, and funding the intercity passenger rail service, but does not operate the service. *Id.*

The Capitol Corridor Joint Powers Authority is a member of the States for Passenger Rail Coalition, an advocacy group made up of twenty-one state departments of transportation and four passenger rail authorities from across the United States who work together to support the development and growth of passenger rail service for America.[7] *Id.* at ¶ 9 (Standing Addendum 3). The Capitol Corridor Joint Powers Authority is also a member of the State-Amtrak Intercity Passenger Rail Committee,[8] *id.*, the entity designated by the U.S. DOT to fulfill the functions of the State-Supported Route Committee under the Fixing America's Surface Transportation Act, *see* 49 U.S.C. § 24712 (Addendum 22–23).

2. *North Carolina Department of Transportation*

Petitioner North Carolina DOT is a State agency of North Carolina with

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[7] The Managing Director of the Capitol Corridor Joint Powers Authority, Mr. David Kutrosky, serves as the Vice Chair of the States for Passenger Rail Coalition. *Id.* at ¶ 9 (Standing Addendum 3).

[8] Mr. Kutrosky serves as the Chair of the State-Amtrak Intercity Passenger Rail Committee. *Id.*

authority to, *inter alia*, act as the financial sponsor of two intercity passenger rail routes: the Carolinian and the Piedmont. N.C. Gen. Stat. §§ 136-44.35–136-44.39, 143B-345. Both routes operate between Charlotte and Raleigh, North Carolina, and the Carolinian provides continuing service to New York City. Declaration of Paul C. Worley ("Worley Declaration") ¶ 4 (Standing Addendum 8). The present Carolinian service was initiated in 1990, and the Piedmont service was established in 1995. *Id.* Amtrak is the exclusive contract operator of the Carolinian service. *Id.* Amtrak operates the state-owned trains for the Piedmont service, however North Carolina DOT contracts with a third-party to inspect and maintain them.[9] *Id.*

North Carolina DOT is also a member of the States for Passenger Rail Coalition and the State-Amtrak Intercity Passenger Rail Committee.

C. The FRA's Jurisdiction Over Intercity Passenger Rail and Enforcement of the Applicable Federal Railroad Safety Laws and Regulations

The FRA has statutory jurisdiction over all railroads. *See* 49 C.F.R. part 209, app. A (Addendum 24–34). The Federal Railroad Safety Act of 1970, Pub. L. No. 91-458 (Oct. 16, 1970) (Addendum 35–42) delegated broad legislative authority to the FRA to "prescribe regulations and issue orders for every area of

[9] Accordingly, Petitioner North Carolina DOT's Piedmont service is not "integrated in Amtrak's National System" as described in the Guidance. *See* Guidance ¶ II.B (J.A. 1).

railroad safety supplementing laws and regulations in effect on October 16, 1970."[10] 49 U.S.C. § 20103(a) (Addendum 59).

Many Federal railroad safety regulations were adopted pursuant to this general authority. For example, the FRA's regulations require each "railroad" to establish and maintain a program for conducting operational tests and compliance. 49 C.F.R. § 217.9 (Addendum 64–67). This requirement is not found in any directive from Congress, but was rather promulgated pursuant to the FRA's general legislative authority. *See Railroad Operating Rules*, 39 Fed. Reg. 41,175 (Nov. 25, 1974) (Addendum 68–70).

Other Federal railroad safety regulations are specifically mandated by Congress. Such laws generally apply to "railroad carriers," which are defined as "a person providing railroad transportation."[11] 49 U.S.C. § 20102(3) (Addendum 71). For example, the FRA's System Safety Program Final Rule, as discussed below,

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[10] Railroad safety laws prior to the Railroad Safety Act applied narrowly to "common carriers engaged in interstate or foreign commerce by rail." 49 C.F.R. part 209, app. A (Addendum 38). Congress amended these laws through the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342 (June 22, 1988) (Addendum 43–58), to apply coextensively to all "railroads." *Id.*

[11] The term "rail carrier" was added to the U.S. Code by the 1994 Act re-codifying Title 49 in order to "distinguish between railroad transportation and the entity providing railroad transportation." *See* Pub. L. 103-272 (July 5, 1994); H. Rep. 103-180 (1994).

purportedly implemented a specific statutory directive to "require each railroad carrier that . . . provides intercity rail passenger . . . to develop a railroad safety risk reduction program . . . ." 49 U.S.C. § 20156(a)(1) (Addendum 73).[12]

Whether a particular Federal railroad safety regulation finds its origins in the FRA's general legislative authority or a specific congressional mandate, the FRA rarely defines the entity responsible for compliance consistently. The requirement for operational testing applies to "each railroad," 49 C.F.R. § 217.9(a) (Addendum 64), but does not define the term "railroad." The System Safety Program rule applies to a "railroad," defined as "a person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person." 49 C.F.R. § 270.5 (Addendum 123–24). Other Federal railroad safety regulations use different definitions of railroad. *See, e.g.*, 49 C.F.R. § 228.5 ("a person providing railroad transportation") (Addendum 135); 49 C.F.R. § 200.3 ("a person providing railroad transportation for compensation") (Addendum 138). Still other Federal railroad safety regulations use entirely different terms to designate the entity ultimately responsible for compliance. *See, e.g.*, 49 C.F.R.

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[12] *See System Safety Program*, 81 Fed. Reg. 53,849 (Aug. 12, 2016) (codified at 49 C.F.R. part 270) (Addendum 76–132).

§ 243.1 (requiring each "employer" conducting certain operations to develop a training program for its safety-related railroad employees) (Addendum 139–40).

Historically, the FRA has looked to Amtrak, as the near-exclusive provider of intercity passenger rail service in the United States, for the satisfaction of these Federal railroad safety laws and regulations, including, as in Petitioners' case, where Amtrak only provides service pursuant to a funding agreement with a State sponsor.[13] *See* Draft Federal Railroad Administration Guidance for Sponsors of Passenger Rail Services ("Draft Guidance") at 4 (J.A. 54).

D. The Passenger Rail Investment and Improvement Act of 2008

Due to growing disparities between the funding arrangements negotiated between Amtrak and each State, and Congress' desire to reduce Federal funding to Amtrak, the Passenger Rail Investment and Improvement Act of 2008[14] altered the way many of Amtrak's short-distance intercity passenger rail routes were funded,[15]

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[13] The FRA has, in extremely limited circumstances, looked to entities other than Amtrak, including State sponsors, where they actually provide safety-related facilities (*i.e.*, as the owners of the track over which Amtrak operates the intercity passenger rail trains). *See*, *e.g.*, 49 C.F.R. § 213.5 (Addendum 141–42); *accord* Guidance ¶ II.C.ii (J.A. 1). Such obligations arise only when the State sponsor performs an act or role that is itself subject to regulation.

[14] Pub. L. No. 110-432, div. B (Oct. 16, 2008) (Addendum 143–206).

[15] The Passenger Rail Investment and Improvement Act's changes applies to "short-distance corridors, or routes of not more than 750 miles between endpoints,"

including Petitioners'. The Passenger Rail Investment and Improvement Act shifted total financial responsibility for the net cost of such intercity passenger rail operations (*i.e.*, costs not recovered by revenue from fares and on-board services) to the States, without effecting changes in the FRA's underlying safety regime. *See* Passenger Rail Investment and Improvement Act § 209 (Addendum 153–54).[16]

In exchange for the financial burden the Passenger Rail Investment and Improvement Act imposed, Congress gave the States additional control over the costs they would incur by allowing States to select among different entities to provide various intercity passenger rail-related services. Under this new approach, if a state chooses to "select an entity other than Amtrak to provide services required for the operation of an intercity passenger train route," Amtrak is required to make its facilities or equipment available. Passenger Rail Investment and

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and intercity rail service or routes provided by Amtrak under contract with a State, a regional or local authority, or another person." *See* Passenger Rail Investment and Improvement Act §§ 201, 209 (Addendum 145, 153–54).

[16] Specifically, the Passenger Rail Investment and Improvement Act required Amtrak and the States to "implement a single, nationwide standardized methodology for establishing and allocating the operating and capital costs among the States and Amtrak associated with" certain routes that (1) "ensure[d], within 5 years after the date of enactment of this Act, equal treatment in the provision of like services," and (2) "allocate[d] to each route the costs incurred only for the benefit of that route and a proportionate share, based upon factors that reasonably reflect relative use, of costs incurred for the common benefit of more than 1 route." Passenger Rail Investment and Improvement Act § 209(a) (Addendum 153–54).

Improvement Act § 217 (codified as amended at 49 U.S.C. § 24702 note) (Addendum 166).

Subsequent congressional hearings demonstrate that this was one of the Passenger Rail Investment and Improvement Act's defining features. Before the House Transportation and Infrastructure Committee, Representative Bill Shuster noted that the Passenger Rail Investment and Improvement Act's funding methodology "was developed as a menu approach, such that States can better control costs by picking and choosing among Amtrak's services." *A Review of Amtrak Operations, Part II: The High Cost of Amtrak's Monopoly Mentality in Commuter Rail Competitions (112-102) Before the H. Comm. on Transp. and Infr.*, 112th Cong. 16-17 (Sept. 11, 2012) (statement of Representative Bill Shuster).

The Committee Report for the hearing mirrored Representative Shuster's statement:

> The methodology was developed in a menu approach, such that States can better control route costs by picking and choosing among Amtrak services. Because States will be taking on more financial responsibility for the State-supported routes, implementation of the methodology will allow each State to make informed decisions about who should provide aspects of their State-supported route services.

H. Comm. on Transp. and Infr. Oversight and Investigations Staff Report Prepared for Chairman John L. Mica, 112th Cong., Amtrak Commuter Rail Service: The High Cost of Amtrak's Operations, 112th Cong. 19-20 (Sept. 11, 2012).

Congress gave no indication that States that chose to take advantage of the newly adopted ability to select service providers other than Amtrak would be subject to any additional regulatory (and its attendant financial) burden.

E. FRA's Efforts to Establish the "Ultimately Responsible" Entity

No sooner had the States sought to exercise this flexibility, however, than the FRA, without citing anything other than its general authority over all aspects of railroad safety, claimed that States had *also* assumed ultimate responsibility for compliance with Federal railroad safety laws and regulations.

1. *FRA Attempts to Label the Indiana DOT a Railroad, but Retreats*

Initially, the Indiana DOT announced plans to transition its "Hoosier State" service[17] from Amtrak to an independent contractor. Letter from R. Lauby to R. Zier dated Aug. 7, 2014 (J.A. 13–14). The FRA issued a letter determination acknowledging that "there may be multiple entities involved in providing passenger railroad service," but that "[e]ach of the contracting entities would be performing services for, or on behalf of, the governmental authority organizing and funding the rail operation." *Id.* at 2. Without further explanation, the FRA concluded that it would "consider [Indiana DOT] as the principal entity of record

[17] Like Petitioners' Capitol Corridor, Piedmont, and Carolinian services, the Hoosier State service is a route subject to the Passenger Rail Investment and Improvement Act Section 209.

responsible for the safety of [its] planned passenger service" as a result of Indiana DOT's proposal, even though Indiana DOT merely intended to replace one contractor "performing services for, or on behalf of, the governmental authority organizing and funding the rail operation" with another.[18] *Id.*

After a series of letters between Indiana DOT, the FRA, and the Secretary of Transportation, the FRA relented.[19] The Indiana DOT Commissioner explained that Indiana DOT could not, by merely exercising the "tools created by Congress in [the Passenger Rail Investment and Improvement Act]," agree to be considered a "railroad" for all purposes. Letter from K. Browning to U.S. DOT Secretary Foxx

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[18] Indiana DOT subsequently altered its plans and sought to retain Amtrak as the train operator, but contract with a third-party to maintain the train equipment, as well as other duties. Letter from C. Spitulnik to R. Lauby dated Dec. 31, 2014 (J.A. 15). FRA determined that Indiana DOT's alternate proposal did not affect its analysis. Letter from R. Lauby to C. Spitulnik dated Jan. 26, 2015 (J.A. 17).

[19] It was not the first time that FRA had taken this position only to back down once it was challenged. In 2008, FRA claimed that Petitioner North Carolina DOT's decision to contract with a third-party for the maintenance of train equipment for the Piedmont service rendered North Carolina DOT a "railroad carrier" for purposes of the Federal railroad safety laws. North Carolina DOT filed a Petition for Review of the FRA's determination in this Circuit, which the FRA moved to dismiss on the grounds that its decision was merely a preliminary. *See N.C. Dep't of Transp. v. Fed. R.R. Admin.*, Case No. 08-1308 (D.C. Cir. Feb. 13, 2009) (per curiam). Following this Court's dismissal, FRA did not further pursue this position with respect to North Carolina DOT, nor, to North Carolina DOT's knowledge, with other states, until FRA began pursuing the related issue with Indiana DOT.

dated Mar. 6, 2015 (J.A. 20–21). Unless FRA returned to the table, the Commissioner explained that Indiana would have no choice but to terminate the Hoosier State service due to the "significantly higher commitment of resources, the assumption of liability, and uncertainty over employment practices" that would flow from the FRA's determination. *Id.* In response, the FRA settled on a much more practical solution: it would simply review Indiana DOT's contracts to ensure that all regulatory responsibilities were appropriately allocated. Letter Agreement between Indiana DOT and FRA dated May 4, 2015 (J.A. 25–26). Indiana DOT and FRA executed a letter agreement to that effect, notwithstanding the FRA's earlier determination. *Id.*

2. *FRA Commits to Formally Promulgating a Policy, but Does Not*

While the situation with Indiana DOT was unfolding, the FRA announced to States for Passenger Rail Coalition members that it would "'open a docket and a 60-day comment period' regarding the issue of designating entities that contract for intercity passenger rail services as a 'railroad.'" Letter from P. Quinn to FRA Administrator Feinberg dated Feb. 26, 2015 (J.A. 19). Because such a designation could have significant repercussions for State sponsors, the States for Passenger Rail Coalition urged the FRA to conduct a "collaborative dialogue . . . between the States and FRA on this subject in advance of a draft policy publication in the

Federal Register." *Id.* The FRA, appearing to acknowledge the significant concerns expressed by the States for Passenger Rail Coalition and its members, committed to publishing a "policy statement . . . for public comment – so every state and stakeholder (as well as Congress, since it is the original authors of [the Passenger Rail Investment and Improvement Act]) has the opportunity to understand FRA's views and provide meaningful input before FRA finalizes its policy." Letter from R. Lauby to K. Browning dated Mar. 12, 2015, at 2 (J.A. 23).

But the FRA did not open a docket or otherwise publish a document for "public comment." Rather, following a series of presentations and discussions between State sponsors and the FRA at the State-Amtrak Intercity Passenger Rail Committee and other industry meetings,[20] the FRA provided a "draft of the guidance document" to the Chair of the States for Passenger Rail Coalition via e-mail, and requested that she circulate it among States for Passenger Rail Coalition members. E-mail from B. Nachreiner to P. Quinn dated Feb. 4, 2016 (J.A. 50). The draft carried a "DRAFT" watermark and a header across each page stating: "DRAFT FOR INTERNAL FRA USE ONLY." Draft Guidance (J.A. 51–58).

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[20] *See, e.g.*, Presentation at the 2015 Annual Meeting of the Association of State Highway and Transportation Officials (J.A. 27–34); E-mail from D. Kutrosky to B. White dated Sept. 29, 2015 (J.A. 35–37); Minutes from the Sept. 29, 2015 Meeting of the State-Amtrak Intercity Passenger Rail Committee (J.A. 38–49).

Despite the earlier expressed objections of the State sponsors, the draft declared that "all sponsors of passenger rail service are ultimately responsible for the safety of that service," and that the "FRA may choose to take enforcement action against the sponsor, the contractor(s), or both." *Id.* at 1 (J.A. 51). The FRA stated that it would "primarily look to Amtrak for compliance," but that "the States would still ultimately be responsible for safety if Amtrak did not fully comply." *Id.* at 5 (J.A. 55).

Over the next several months, the FRA received written comments on the draft from four States for Passenger Rail Coalition members and the States for Passenger Rail Coalition itself.[21] All comments expressed steadfast opposition to assigning "ultimate responsibility" for Federal railroad safety laws and regulations to the State sponsors. *Id.* The State sponsors explained why such a requirement would impose significant and possibly crippling financial and regulatory burdens, how it would be difficult to implement due to the nature of the agreements between

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[21] *See* Comments from the Indiana DOT on the Draft Guidance dated Mar. 18, 2016 ("Indiana DOT Comments") (J.A. 59–63); Comments from the New England Passenger Rail Authority on the Draft Guidance dated Apr. 4, 2016 (J.A. 64–66); Comments from the States for Passenger Rail Coalition on the Draft Guidance dated Apr. 5, 2016 (J.A. 67–71); Comments from the Connecticut Department of Transportation dated Apr. 13, 2016 (J.A. 72–73); Comments from North Carolina DOT on the Draft Guidance dated May 5, 2016 ("North Carolina DOT Comments") (J.A. 74–76).

Amtrak and the States, and why it would *negatively* impact the safety of intercity passenger rail operations, rather than enhance it. Comments also noted that the FRA appeared to be "skirting the federal rulemaking requirements by issuing informal guidance." Indiana DOT Comments at 2 (J.A. 61).

3. *FRA Walks Back from its Position, then Reasserts it by Rule*

The FRA appeared to understand State sponsors' concerns. Indeed, in a June 16, 2016, meeting of the State-Amtrak Intercity Passenger Rail Committee, the States for Passenger Rail Coalition Chair understood the Administrator to say it is "ridiculous to think that a State could be a railroad." E-mail from P. Quinn to P. Nissenbaum dated Aug. 3, 2016 (J.A. 106) (describing statement of the FRA Administrator). The FRA briefed State sponsors in attendance on its new approach, and stated that it would follow-up with written guidance. Cover Letter (J.A. 114).

Later that month, the FRA e-mailed a revised draft of the guidance to the Chair of the States for Passenger Rail Coalition, asking her to review it before FRA sent it to all State sponsors. E-mail from M. Lestingi to P. Quinn dated June 21, 2016 (J.A. 85). The revised guidance departed significantly from the earlier February draft in both form and function. The document was reduced from an eight-page, detailed (yet fundamentally flawed) explanation of the FRA's position

to a list of bulleted "Guiding Principles" barely exceeding one page. *Compare* Draft Guidance (J.A. 51–58) *with* State-Sponsored Intercity Passenger Rail Operations Overview of Guiding Principles ("June Draft") (J.A. 86–88). The document asserted the FRA's general jurisdiction over intercity passenger rail "in all areas of railroad safety," and an unsubstantiated need to "have a single entity or organization as a point of contact . . . to address regulatory safety, compliance, and enforcement matters" for intercity passenger rail operations.[22] June Draft ¶¶ I.A, II.A (J.A. 86). The FRA stated that it would continue to look to Amtrak for compliance with Federal railroad safety laws and regulations if Amtrak both (1) operated the trains and (2) maintained the train equipment. *Id.* ¶ II.B (J.A. 86). Otherwise, the FRA "expect[ed]" State sponsors to work with the FRA to "identify [their] role." *Id.* ¶ II.D (J.A. 86–87).

The FRA also appended an example of how the "Guiding Principles" would be applied to its then-forthcoming System Safety Program Final Rule. If Amtrak operated and maintained the train equipment for any given intercity passenger rail service, then Amtrak would be responsible for including that intercity passenger

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[22] From both context and prior statements, it is clear that the FRA considers the "single point of contact" to be the entity with "ultimate responsibility" for compliance with Federal railroad safety laws and regulations. *See* Letter from R. Lauby to C. Spitulnik dated Jan. 26, 2015, at 1(J.A. 17).

rail service in its system-wide System Safety Program and the State sponsor would not be obligated to develop a System Safety Program. June Draft, Example of Applying Guiding Principles to the System Safety Program Requirement ("Example") (J.A. 88). If Amtrak did not both operate and maintain the train equipment, then the State sponsor would have "greater responsibility for developing and implementing the [System Safety Program] either directly on its own or through oversight of its contract providers of safety-related services, or both." *Id.* (J.A. 88).

The States for Passenger Rail Coalition Chair returned the revised draft to the FRA with several edits and additional questions and concerns. E-mail from P. Quinn to B. Nachreiner dated July 5, 2016 (J.A. 89).

On July 29, 2016, while State sponsors waited for the FRA to circulate the next iteration of the guidance document, the FRA unofficially released[23] its System Safety Program Final Rule. *FRA Issues New Rule Requiring Passenger Railroads to Proactively Identify and Reduce Safety Risks*, https://www.fra.dot.gov/eLib/details/L18291#p1_z25_gD_lPR. This Rule *again* changed the FRA's position on the entity that should be ultimately responsible for compliance with Federal

[23] The FRA did not publish the System Safety Program Final Rule in the *Federal Register* until August 12, 2016. 81 Fed. Reg. 53,849 (Aug. 12, 2016) (Addendum 76–132).

railroad safety laws and regulations.

The System Safety Program Final Rule imposes an obligation on "railroads" to develop a structured program to identify, mitigate, and eliminate hazards and the resulting risks on each railroad's system. *See generally* System Safety Program Final Rule, 81 Fed. Reg. 53,849 (Addendum 76–132). Although the revised draft guidance stated that the FRA would, at the very least, look to Amtrak to prepare an System Safety Program where Amtrak was the operator, *see* June Draft, Example (J.A. 88), the System Safety Program Final Rule defined a "railroad" for these purposes as "a person or organization that provides railroad transportation, whether directly *or by contracting out operation of the railroad to another person*." [24] 49 C.F.R. § 270.5 (emphasis added) (Addendum 123–24). Moreover, the preamble to the System Safety Program Final Rule expressly rejected a proposal that would have allowed a State sponsor to designate its primary contractor responsible for compliance with the Rule. FRA stated that such a delegation would "not be

[24] Petitioners, as well as the Indiana Department of Transportation, the San Joaquin Joint Powers Authority, the Northern New England Passenger Rail Authority, and the Vermont Agency of Transportation, have filed Petitions for Reconsideration of the System Safety Program Final Rule that remain pending before the FRA. *See Railroad System Safety Program*, Regulatory Docket No. FRA-2011-0060. Among other things, these Petitions generally challenge the FRA's definition of a "railroad" for the purposes of the Rule. The FRA rejected Petitioners' request for its consent to move for a stay of the present litigation pending the FRA's resolution of the Petitions.

consistent with [its] statutory jurisdiction over passenger railroads," believing it "important for the passenger railroad to be responsible for compliance with the rule to ensure that the railroad is involved in system safety planning and implementation under the rule." 81 Fed. Reg. at 53,861 (Addendum 88).

State sponsors immediately recognized the clear conflict between the System Safety Program Final Rule's plain language and the FRA's prior representation as to its impact, and asked the agency for an explanation. E-mail from P. Quinn to P. Nissenbaum dated Aug. 3, 2016 (J.A. 106–108).

F. The Guidance Under Review

Without resolving that inconsistency, the FRA issued the final version of the Guidance on August 11, 2016, via e-mail to the Chair of the States for Passenger Rail Coalition and through U.S. Mail to each State sponsor of intercity passenger rail individually. E-mail from M. Lestingi to P. Quinn dated Aug. 11, 2016 (J.A. 109); Cover Letters (J.A. 114–136). The FRA's cover letter states that the FRA "substantially revised the draft guidance" from its February draft in response to comments, Cover Letter (J.A. 114), but the Guidance makes no attempt to summarize the comments it received, present the FRA's views on the issues raised by the comments, or in any way explain what changes were made to the Draft Guidance and why.

Like the June draft shared with the Chair of the States for Passenger Rail Coalition, the only stated basis for the Guidance is the FRA's general "jurisdiction over intercity passenger rail (IPR) operations in all areas of railroad safety." Guidance ¶ I.A (J.A. 1). The Guidance states that FRA requires a single entity to bear ultimate responsibly for compliance with Federal railroad safety laws and regulations, but does not explain this requirement or ground it in any specific statute. *Id.* ¶ II.A (J.A. 1). The FRA states it will continue to look to Amtrak for compliance with Federal railroad safety laws and regulations as long as Amtrak both operates and maintains the trains. *Id.* ¶ II.B (J.A. 1). However, if a State sponsor changes its service contractors, the FRA may not look to the *replacement* contractor for compliance with such laws. Rather, the Guidance provides that State sponsors "*must* work with FRA to establish a plan that assures regulatory safety-related requirements are being met," without identifying a statutory basis for such an obligation or otherwise explaining why the FRA requires the State sponsor, as opposed to the replacement operator, to initiate this discussion. *Id.* ¶ II.E (emphasis added) (J.A. 1).

The FRA also appended the example of how the Guidance would apply to the System Safety Program Final Rule, stating again that Amtrak is responsible for compliance with the Rule, notwithstanding the Rule's clear language to the

contrary, as long as Amtrak both operates and maintains the trains. Guidance, Example of Applying Guidance to System Safety Program Final Rule ("Example") (J.A. 3). However, if a State sponsor changes its service contractors, then it must "develop[] and implement[] *its own* [System Safety Program]." *Id.* (emphasis added).

The Guidance accordingly sets forth three critical and entirely original pronouncements: (1) State sponsors of intercity passenger rail which merely provide funding for intercity passenger rail service are presumptively responsible for compliance with Federal railroad safety laws and regulations; (2) there is a safe harbor from this presumption if the State sponsor contracts with Amtrak for the operation and maintenance of train equipment; and (3) a State sponsor has an affirmative obligation to contact the FRA so it may allocate regulatory responsibility if the State sponsor changes service contractors.

SUMMARY OF ARGUMENT

The Guidance must be vacated, because it was not promulgated in accordance with notice and comment procedures.

The APA, as implemented and supplemented by the FRA's Rules of Practice, require all "legislative rules" to be published in the *Federal Register* so that all interested parties have an opportunity to participate by submitting

comments, and that the FRA consider and respond to those comments. 49 C.F.R. § 211.15(a) (Addendum 210). FRA's Rules of Practice also commit the FRA to following these procedures for "interpretive rules" and "general statements of policy" where the FRA determines it would be "necessary and desirable" to do so. *Id.* § 211.15(b) (Addendum 210).

The Guidance is a legislative rule for which notice and comment was required because it relies exclusively on the FRA's general legislative authority, rather than any specific statutory directive, to impose new obligations on State sponsors of intercity passenger rail. Notice and comment is required where an agency relies only on such authority "because the agency is engaged in lawmaking." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997).

The Guidance is also a legislative rule because it amends the System Safety Program Final Rule, which *was* promulgated through notice and comment. The Guidance establishes a safe harbor for State sponsors that choose to contract exclusively with Amtrak, whereby they do not need to comply with the plain language of the System Safety Program Final Rule. Moreover, the Guidance effectively allows the FRA to reassign responsibilities under the System Safety Program Final Rule on an *ad hoc* basis, a position which it expressly rejected in

promulgating the System Safety Program Final Rule. FRA may not change a legislative rule retroactively without observing notice and comment procedures.

The Guidance is not within any of the APA's exceptions to providing notice and comment. It is not an interpretive rule, because it does not purport to interpret anything. Indeed, it could not: Congress did not intend that State sponsors of intercity passenger rail would take on additional regulatory burden simply by exercising the tools that Congress provided them through the Passenger Rail Investment and Improvement Act. Similarly, the Guidance is not a general statement of policy or procedural rule, because it goes well beyond describing how the FRA will enforce existing Federal railroad safety laws and regulations. Instead, it fundamentally alters the legal regime by regulating State sponsors of intercity passenger rail, and not its contracted operator, as the "railroad." The substantial burden imposed by that pronouncement demands that notice and comment procedures be observed.

Finally, the FRA's Rules of Practice required notice and comment procedures in this case *even if* the Guidance could be considered an interpretive rule or general policy statement. *See* 49 C.F.R. § 211.15(b) (requiring the FRA to follow notice and comment procedures for such rules where "necessary and desirable"). The FRA committed to publishing the Guidance "for public comment

– so every state and stakeholder (as well as Congress, since it is the original authors of [the Passenger Rail Investment and Improvement Act]) has the opportunity to understand FRA's views and provide meaningful input before FRA finalizes its policy." Letter from R. Lauby to K. Browning dated Mar. 12, 2015, at 2 (J.A. 23). The FRA broke that promise, and this Court should vacate the Guidance.

STANDING

The Hobbs Act grants this Court jurisdiction to review a final order of the FRA upon a petition by a "party aggrieved" thereby. 28 U.S.C. § 2344 (Addendum 207). Thus, "the Hobbs Act requires (1) 'party' status (*i.e.*, that petitioners participated in the proceeding before the agency), and (2) aggrievement (*i.e.*, that they meet the requirements of constitutional and prudential standing)." *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). Petitioners satisfy these requirements.[25]

A. Petitioners Participated Before the Agency

Petitioners are "parties" because both "participated," to the extent possible,

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[25] It is sufficient for the Court to find that only one or the other Petitioner meets these requirements. *Mako Communs. v. FCC*, 835 F.3d 146, 149–50 (D.C. Cir. 2016); *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (citing *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009)).

in the FRA's promulgation of the Guidance without observance of the procedures required by law. *Cf. Nat. Res. Def. Council v. Nuclear Regulatory Com.*, 666 F.2d 595, 601 n.42 (D.C. Cir. 1981) (holding that the "party" status requirement is relaxed where a non-adjudicatory agency action was promulgated without public notice and comment). Petitioner Capitol Corridor Joint Powers Authority submitted preliminary comments to the FRA in advance of its February draft of the Guidance. E-mail from D. Kutrosky to B. White dated Sept. 29, 2015 (J.A. 35). The Capitol Corridor Joint Powers Authority also participated through its Managing Director's role as Chair of the State-Amtrak Intercity Passenger Rail Committee. Minutes of the State-Amtrak Intercity Passenger Rail Committee Meeting on June 16, 2016 (J.A. 77–84); Minutes of the State-Amtrak Intercity Passenger Rail Committee Executive Committee Conference Call on Aug. 2, 2016 (J.A. 102–105). Petitioner North Carolina DOT also participated through discussions with the FRA at State-Amtrak Intercity Passenger Rail Committee meetings. Minutes of State-Amtrak Intercity Passenger Rail Committee Meeting on Sept. 29, 2015 (J.A. 41–49); Minutes of State-Amtrak Intercity Passenger Rail Committee Meeting on June 16, 2016 (J.A. 77–84). Additionally, North Carolina DOT submitted written comments on the FRA's February draft of the Guidance. North Carolina DOT Comments (J.A. 74–76).

B. Petitioners Have Constitutional and Prudential Standing

Petitioners are "aggrieved" because they each suffer injuries to their concrete interests stemming from the unlawfully promulgated Guidance.[26]

For the purposes of standing, the Court "must assume" the merits of Petitioners' argument (*i.e.*, that the Guidance "improperly imposed new legislative rules on [Petitioners] without providing the notice and comment safeguards required by . . . the APA"). *Conference Grp., LLC v. FCC*, 720 F.3d 957, 962–63 (D.C. Cir. 2013) (citing *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)).

Where, as here, petitioners challenge "an action taken without required procedural safeguards, they must establish the agency action threatens their concrete interest." *Mendoza*, 754 F.3d at 1010. Once that threshold is met, the other standards necessary to establish constitutional standing – immediacy and redressability – are "relaxed." *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555,

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[26] This Court has held that a party is not "aggrieved" if it seeks review of a disposition in its favor. *See Oxy USA v. FERC*, 64 F.3d 679, 689 (D.C. Cir. 1995). That concern is not implicated here. Both Petitioners advocated for the FRA to provide technical assistance to State sponsors changing their service contractors to ensure all regulatory responsibilities were properly allocated, without shifting "ultimate responsibility" for Federal railroad safety laws and regulations from the entity actually providing the service to the State sponsors. *See* E-mail from D. Kutrosky to B. White dated Sept. 29, 2015 (J.A. 35); North Carolina DOT Comments (J.A. 74–76). The Guidance does not adopt this approach.

572 n.7 (1992)). Petitioners "need not demonstrate that but for the procedural violation the agency action would have been different," or that "correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiffs' interest." *Id.* Rather, Petitioners must only "'demonstrate a causal relationship between the final agency action and the alleged injuries,' [and] the court will 'assume[] the causal relationship between the procedural defect and the final agency action.'" *Id.* (quoting *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160 (D.C. Cir. 2005)) (second alteration in original).

As set forth below, Petitioners' were denied the procedural safeguards mandated by the APA and the FRA's Rules of Practice, and the procedures which the FRA expressly committed to providing. The FRA did not publish the proposed Guidance in the *Federal Register*, and therefore denied all interested parties an opportunity to participate. *See* 5 U.S.C. § 553(b) (Addendum 208–09); 49 C.F.R. § 211.15(a) (Addendum 210). The FRA received limited comments only informally, outside of any formal period in which it would clearly accept them, and largely through *ex parte* discussion that is not documented in the administrative record permitting judicial review. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977) (holding *ex parte* contact inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned

decisionmaking on the merits"). And, the FRA did not respond "in a reasoned manner to those [comments] that raise[d] significant problems," or indeed provide any response to comments at all. *Reytblatt*, 105 F.3d at 722; *see also* Cover Letter and Guidance (J.A. 110–113).

These procedural safeguards are not "meaningless ritual." *Chamber of Commerce of the U.S. v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Indeed, "[g]iven the lack of supervision over agency decisionmaking that can result from judicial deference and congressional inattention . . . this protection, as a practical matter, may constitute an affected party's only defense mechanism." *Id.* "By the same token, public scrutiny and participation before a legislative rule becomes effective can reduce the risk of factual errors, arbitrary actions, and unforeseen detrimental consequences." *Id.*

Here, the FRA's failure to engage in reasoned decision-making affects Petitioners' concrete interests in at least four ways:

1. By presumptively declaring State sponsors of non-integrated routes ultimately responsible for compliance with the Federal railroad safety laws and regulations, *see* Guidance ¶ II.A, II.D (J.A. 1), the Guidance impairs Petitioners' exercise of a substantive right granted by Congress. Through the Passenger Rail Investment and Improvement Act, Congress sought only to modify the way short-

distance intercity passenger rail service was funded, and did not express any intention to subject sponsors who select service providers other than Amtrak to any additional regulatory (and the attendant financial) burden. *See* Passenger Rail Investment and Improvement Act § 209 (Addendum 153–54). Assuming ultimate responsibility for compliance with Federal railroad safety laws and regulations is not only inconsistent with Congress' intent, but would (a) conflict with and require renegotiation of Petitioners' allocation of risk in its existing contracts with their service providers,[27] (b) require Petitioners to hire additional staff,[28] and (c) obtain insurance to mitigate its financial risks[29].

2. The Guidance establishes a "safe harbor" for State sponsors that choose to contract with Amtrak for the operation and maintenance of train equipment that ensures the State sponsor will not be the entity ultimately

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[27] Comments from the New England Passenger Rail Authority on the Draft Guidance dated Apr. 4, 2016, at 3 (J.A. 64–66); Comments of the States for Passenger Rail Coalition on the Draft Guidance dated Apr. 5, 2016 (J.A. 67–71); Worley Declaration ¶ 11.b (Standing Addendum 10).

[28] Comments of the State of Connecticut on the Draft Guidance dated Apr. 13, 2016, at 1 (J.A. 72–73); Comments of the North Carolina Department of Transportation on the Draft Guidance dated May 5, 2016, at 1 (J.A. 74–76); Kutrosky Declaration ¶ 17–18 (Standing Addendum 5–6); Worley Declaration ¶ 12 (Standing Addendum 11).

[29] Comments from the New England Passenger Rail Authority on the Draft Guidance dated Apr. 4, 2016, at 3 (J.A. 64–66); Kutrosky Declaration ¶ 18 (Standing Addendum 6).

responsible for compliance with Federal railroad safety laws and regulations. Guidance ¶ II.B (J.A. 1). This will substantially affect Petitioners' compulsory competitive procurement practices by tipping the scales in favor of Amtrak. Kutrosky Declaration ¶ 14 (Standing Addendum 4–5); Worley Declaration ¶ 16 (Standing Addendum 12). Even if a proposal by Amtrak to provide all services "presents a higher cost to the State agency, the Guidance places its thumb on the scale . . . by reducing a regulatory compliance burden (and potential liability risk) on the [S]tate without concern for whether that arrangement really produces cost savings for the [S]tate." Kutrosky Declaration ¶ 15 (Standing Addendum 5); *see also* Worley Declaration ¶ 16 (Standing Addendum 12).

3. The Guidance establishes a clear and present conflict with the System Safety Program Final Rule by establishing a "safe harbor" only for those State sponsors that contract with Amtrak for the operation, maintenance, and inspection of trains. *Compare* 49 C.F.R. § 270.5 (Addendum 123–24) *with* Guidance, Example (J.A. 3). Petitioner Capitol Corridor Joint Powers Authority, which does qualify for this safe harbor, risks being found in non-compliance with the System Safety Program Final Rule (which clearly applies to the Capitol Corridor Joint Powers Authority as an entity that "contract[s] out operation of the railroad to another person") if it relies on the Guidance. Kutrosky Declaration ¶ 19 (Standing

Addendum 6). On the other hand, Petitioner North Carolina DOT does *not* contract with Amtrak for the maintenance and inspection of the train equipment on its *Piedmont* service. Worley Declaration ¶¶ 4, 7 (Standing Addendum 8–9). Thus, the Guidance subjects North Carolina DOT to immediate and unanticipated regulatory responsibility, at a minimum for the preparation of its own System Safety Program, *see* Guidance, Example (J.A. 3), which will require the commitment of substantial resources. Worley Declaration ¶ 7–8, 12 (Standing Addendum 9, 11). North Carolina DOT does not have the legal authority to assume the obligations imposed by the Guidance, and may be required to expend resources in seeking necessary legislative change. Worley Declaration ¶¶ 11.a, 11.c, 13 (Standing Addendum 10–11).

4. The Guidance imposes a new obligation on State sponsors to consult with the FRA when it considers changing service contractors. Guidance ¶ II.E (J.A. 1–2). This aspect of the Guidance will, at a minimum, encumber Petitioners' procurement practices by requiring Petitioners to consult with the FRA prior to issuing an RFP or awarding a bid by introducing a new regulatory hurdle that State sponsors must clear. Kutrosky Declaration ¶ 17 (Standing Addendum 5); Worley Declaration ¶ 17 (Standing Addendum 12–13). *See also Nat. Res. Def. Council v.*

EPA, 643 F.3d 311, 318 (D.C. Cir. 2011) (finding a concrete injury where guidance would slow the regulatory process).

ARGUMENT

I. THE FRA MUST PUBLISH ITS RULES IN THE *FEDERAL REGISTER*, AND SOLICIT AND CONSIDER COMMENTS FROM ALL INTERESTED PARTIES, UNLESS AN EXCEPTION APPLIES

The APA, as implemented and supplemented by the FRA's Rules of Practice, requires the FRA to publish a notice of proposed rulemaking in the *Federal Register* and give interested parties a formal opportunity to submit comments with respect to each of the FRA's legislative rules. The FRA must also follow these procedures for other types of rules where, as here, it has determined such procedures are "necessary or desirable." 49 C.F.R. § 211.15(b) (Addendum 210).

A. The APA and the FRA's Rules of Practice Subject All Proposed Legislative Rules to Public Notice and Comment

All Federal agencies must generally follow a "three-step procedure" to formulate, amend, or repeal a "rule."[30] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). First, the agency must issue a "general notice of proposed

[30] The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5. U.S.C. § 551(4) (Addendum 211).

rulemaking." 5 U.S.C. § 553(b) (Addendum 208–09). Second, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c) (Addendum 209). Third, the agency must "must consider and respond to significant comments received during the period for public comment," *Perez*, 135 S. Ct. at 1203 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 416 (1971)), and ultimately publish its final rule with a "concise general statement of their basis and purpose," 5 U.S.C. § 553(c) (Addendum 209).

The FRA may fulfill the first of these steps only by publishing the proposed rulemaking in the *Federal Register*. The APA permits agencies to issue "general notice" by either (1) publishing notice of the proposed rulemaking in the *Federal Register*, thereby giving the public constructive notice of the proposal, or (2) expressly naming the parties subject to the proposed rule and ensuring that they have "actual notice" of the proposal through personal service or other means. *Id.* § 553(b) (Addendum 208–09). However, the FRA's Rules of Practice commit the FRA to publishing all "substantive"[31] rules in the *Federal Register* and inviting "interested persons . . . to participate in the rulemaking proceedings," unless the

[31] Courts refer interchangeably to the category of rules to which the APA's notice and comment requirements apply as "legislative" or "substantive" rules. *See Mendoza*, 754 F.3d at 1021.

Administrator determines it would be "impractical, unnecessary, or contrary to the public interest (and incorporates the findings and a brief statement of the reasons therefore in the rules issued)[32] . . . ." 49 C.F.R. § 211.15(a) (Addendum 210).

Where, as here, an agency commits to a certain course in implementing the APA, the agency is bound to follow it. *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("It has become axiomatic that an agency is bound by its own regulations."); *accord Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014); *see also Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95 n.5 (D.C. Cir. 2002) (holding that USDA had by regulation waived an otherwise available statutory exemption from notice and comment); *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 815 n.9 (D.C. Cir. 1975) (finding agency bound by procedural regulations that went beyond the APA); *Lee v. Kemp*, 731 F. Supp. 1101, 1112–13 (D.D.C. 1989) (holding an otherwise exempt rulemaking subject to the APA where the agency had "voluntarily subjected itself" to notice and comment requirements). Thus, where a rule is legislative, the APA's notice and comment provisions apply. The FRA must provide the public with constructive notice through publication in the *Federal Register*, and solicit and

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[32] The FRA included no such statement in the Guidance. Cover Letter and Guidance (J.A. 109–113).

consider public comments.

B. The APA and the FRA's Rules of Practice Exempt Only a Narrow Category of Rules from Notice and Comment Procedures

Pursuant to the APA, the "three-step" procedure outlined above does not generally apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A) (Addendum 208). "Congress intended the[se] exceptions to [the APA's] notice and comment requirements to be narrow ones." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

"Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). Instead, the latter are "prescribed as final without notice or other public rulemaking proceedings," *unless* the Administrator determines such procedures are "necessary or desirable." 49 C.F.R. § 211.15(b) (Addendum 210).

The "crucial distinction" between legislative rules and the other types of agency action is that the former "modifies or adds to a legal norm based on the agency's own authority." *Syncor*, 127 F.3d at 95. "That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And, it is because the agency is engaged in lawmaking

that the APA requires it to comply with notice and comment." *Id.* Conversely, the exceptions to this requirement "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense." *Am. Hosp. Ass'n*, 834 F.2d at 1045 (quoting *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978)).

II. THE GUIDANCE IS A LEGISLATIVE RULE AND, IN ANY EVENT, THE FRA COMMITTED TO PROMULGATING IT THROUGH NOTICE AND COMMENT PROCEDURES

While determining which of the three boxes a rule falls within is often "quite difficult and confused," *McCarthy*, 758 F.3d at 251, here it is relatively simple and straight-forward. The Guidance bears nearly all of the indicia of a legislative rule, and virtually none of an interpretive rule or general statement of policy. And, even if the Guidance could be considered an interpretive rule or general statement of policy, the FRA's Rule of Practice require FRA to follow notice and comment procedures where, as here, it expressly resolves to do so.

A. The Guidance is a Legislative Rule Because it Expressly Invokes the FRA's General Legislative Authority and Effectively Amends a Prior Legislative Rule

This Court has emphasized that the "most important factor [in determining whether a particular rule is legislative] concerns the actual legal effect (or lack

thereof) of the agency action in question on regulated entities." *McCarthy*, 758 F.3d at 252. A rule has such an effect where "Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1006, 1109 (D.C. Cir. 1993). This occurs where, *inter alia*, an agency has "explicitly invoked its general legislative authority," or where "the rule effectively amends a prior legislative rule." *Id.* at 1112.

1. *The Guidance is Based Only the FRA's General Legislative Authority over All Areas of Railroad Safety*

The "clearest possible example" of a legislative rule is one where Congress has not set a substantive standard, but has rather left it to the agency to develop, pursuant to delegated general legislative authority. *Mendoza*, 754 F.3d at 1022 (quoting *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 169–70 (7th Cir. 1996)). Thus, this Court looks to whether a rule explicitly invokes such authority, *Syncor*, 127 F.3d at 95, or whether a rule could *only* be based on such authority, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011). In such cases, Congress has not "legislated and indicated its will," and so the agency must be doing more than exercising its power to "fill up the details." *Chamber of Commerce*, 636 F.2d at 469.

The Guidance is a legislative rule because it is based exclusively on the

FRA's general legislative authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a) (Addendum 59). The Guidance proceeds from the premise that the "FRA has jurisdiction over intercity passenger rail (IPR) operations in all areas of railroad safety." Guidance at I.A (J.A. 1). This statement is virtually identical to the FRA's general authority to prescribe regulations and issue orders "for every area of railroad safety," 49 U.S.C. § 20103(a) (Addendum 59), and the FRA does not cite any other authority for the Guidance's pronouncements.

Moreover, the Guidance appears only to be grounded in the FRA's asserted (yet unexplained) need for "a single entity or organization as a point of contact . . . to address regulatory safety, compliance, and enforcement matters." Guidance I.B (J.A. 1). While the FRA ostensibly made this decision to provide for railroad safety in general, it cannot be traced to any specific statutory directive. Indeed, in providing State sponsors with the ability to contract with entities other than Amtrak for certain services required for the intercity passenger rail operation, Congress did not mandate that FRA consolidate regulatory responsibility. *See* Passenger Rail Investment and Improvement Act §§ 209, 217 (Addendum 153–54, 166).

Because the FRA "uses wording consistent only with the invocation of its general rulemaking authority," the Guidance must be considered a legislative rule subject to notice and comment. *Syncor*, 127 F.3d at 95.

2. *The Guidance is Irreconcilable with the System Safety Program Final Rule*

Irreconcilable conflicts between the Guidance and the System Safety Program Final Rule, which *was* promulgated with notice and comment, also establish that the Guidance is a legislative rule for which notice and comment was required.

Where "a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." *Am. Mining*, 995 F.2d at 1109 (quoting *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)) (alterations in original). "An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1091 (9th Cir. 2003) (quoting *Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront*, 193 F.3d 730, 737 (3d Cir. 1999)).

Fundamentally, the Guidance presumptively charges the State sponsors with

ultimate responsibility for all Federal railroad safety laws and regulations, and then establishes a "safe harbor" for State sponsors that contract entirely with Amtrak for the operation and maintenance of train equipment. Guidance ¶ II (J.A. 1–2). In the "Example of Applying Guidance to [System Safety Program] Final Rule," the FRA explains that State sponsors contracting with Amtrak must "participate as necessary" in the development of Amtrak's system-wide System Safety Program, but would not be required to develop an System Safety Program of their own. Guidance, Example (J.A. 3). By contrast, a State sponsor that has chosen to exercise its right to contract with entities other than Amtrak would be required to "develop[] and implement[] its *own* [System Safety Program] either directly on its own, through oversight of its contract providers of safety-related services, or both." *Id.* (J.A. 3).

The System Safety Program Final Rule does not allow for such an approach. The Rule imposes an obligation on "railroads" operating intercity passenger rail to develop and implement a System Safety Program, and defines "railroads" to include "[a] person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person." 49 C.F.R. § 270.3–5 (Addendum 123–124). There is no exception for organizations that have contracted out to Amtrak, as opposed to other persons. Indeed, the

preamble to the Rule unequivocally states that "contract[ing] . . . operations to [another] railroad does *not* result in the delegation of the duty to comply with the [System Safety Program] rule to that . . . railroad." 81 Fed. Reg. at 53,857 (Addendum 84). The Guidance effectively changes the rule by carving out an exception where a person contracts with Amtrak for the operation, inspection, and maintenance of trains, and thus constitutes an amendment.

There is also no basis in the System Safety Program Final Rule for waiving or delegating compliance on an *ad hoc* basis. To the contrary, the preamble to the System Safety Program Rule expressly rejected *precisely* the mechanism that the FRA now proposes to implement through the Guidance. The Rail Safety Advisory Committee ("RSAC") had proposed that the FRA define a railroad broadly, as it has, but allow a State sponsor to delegate compliance responsibility to the actual operator with the FRA's approval. *Id.* at 53,861 (Addendum 88). The FRA rejected this proposal, however, stating, "[i]t would not be consistent with FRA's statutory jurisdiction over passenger railroads to allow delegation of responsibility under this part, so that a passenger railroad could effectively divest itself of legal responsibility under the rule." *Id.* Rather, the FRA "believe[d] it is important for the passenger railroad to be responsible for compliance with the rule to ensure that the railroad is involved in system safety planning and implementation under the

rule." *Id.* The Guidance abandons and reverses this conclusion by establishing a "safe harbor" for State sponsors that contract entirely with Amtrak. Guidance, Example (J.A. 3). The Guidance therefore effectively amends the System Safety Program Final Rule, and the FRA was required to issue it through notice and comment. *See Hemp Indus. Ass'n*, 333 F.3d at 1090 (holding that a rule required notice and comment where it reversed a conscious decision made by the agency in an existing regulation).

In *Mendoza*, this Court considered a factually similar scenario where the Department of Labor had established, through notice and comment rulemaking, certain standards applicable to agricultural employers seeking certification under the H-2A visa program. 754 F.3d at 1008. The Department's regulation included certain minimum terms and conditions that employers must offer to workers, including certain minimum wage requirements and standards for employer-provided housing. *Id.* In 2011, the Department issued two "Training and Employment Guidance Letters" ("TEGLs") which imposed "significantly different procedures" for herder employers, a subset of agricultural employers to which the regulations applied. *Id.* at 1008–09. The Court recognized that "in the absence of the TEGLs, petitions for certification of H-2A herders would be subject to the standards found in 20 C.F.R. part 655." *Id.* at 1024–25. Under the TEGLs,

however, such employers would be subject to different minimum wage and payroll standards, among other substantive obligations. *Id.* "Because the TEGLs change[d] the regulatory scheme for herding operations, they [were] legislative rules . . . [and] [t]he APA required the Department of Labor to give the public notice and an opportunity to comment before it promulgated [them]." *Id.* at 1025.

The Guidance likewise changes the "regulatory scheme" as it applies to State sponsors of intercity passenger rail. While the System Safety Program Final Rule unequivocally requires State sponsors to develop an System Safety Program and expressly rejects the delegation of that responsibility, the Guidance relieves State sponsors that choose to contract entirely with Amtrak of that obligation. Accordingly, the FRA was required to proceed, if at all, through notice and comment procedures.

B. The Guidance Does Not Fall Within the APA's Exceptions to Providing Notice and Comment

The Guidance not only meets the tests for a legislative rule, but also fails to meet this Court's criteria for interpretive rules, general statements of policy, or procedural rules. *See Elec. Privacy Info. Ctr.*, 653 F.3d at 7 (concluding that a rule was legislative in part on the basis that it failed to qualify as anything else).

1. *The Guidance is Not an Interpretive Rule Because it Does Not Purport to Interpret Anything*

"An interpretive rule describes the agency's view of the meaning of an existing statute or regulation." *Mendoza*, 754 F.3d at 1021 (internal quotation omitted). "The legal norm is one that Congress has devised; the agency does not purport to modify that norm, in other words, to engage in lawmaking." *Syncor*, 127 F.3d at 94. "[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U. S. 87, 99 (1995)). Accordingly, an interpretive rule must "construe the product of congressional lawmaking 'based on specific statutory provisions.'" *Syncor*, 127 F.3d at 94; *see also Mendoza*, 754 F.3d at 1021 ("To be interpretative, a rule must derive a proposition from an existing document whose meaning compels or logically justifies the proposition.") (internal quotations omitted). Once an agency interprets a statutory term by regulation, it cannot later claim to "interpret" the same term through non-binding guidance in a way that is fundamentally inconsistent with the prior regulation. *Hemp Indus. Ass'n*, 333 F.3d at 1090.

Here, the Guidance "does not purport to construe any language in a relevant statute or regulation; it does not interpret anything." *Syncor*, 127 F.3d at 94. The

FRA does not cite or quote any statutory language to be interpreted. *See generally* Guidance (J.A. 1–3). Instead, the FRA relies only on its general authority over "all areas of railroad safety" to declare an unsubstantiated need for a "single entity or organization as a point of contact . . . to address regulatory safety, compliance and enforcement matters," and to prescribe new rules. Guidance ¶ I.A (J.A. 1).

The Guidance does not ground that regulatory fiat or any of its other pronouncements in "an existing document whose meaning compels or logically justifies the proposition." *Mendoza*, 754 F.3d at 1021. Indeed, no such document exists. Congress expressed no intention – express or implied – that State sponsors inheriting financial responsibility for short-distance intercity passenger rail corridors under the Passenger Rail Investment and Improvement Act would be subject to Federal railroad safety laws and regulations. *See* Passenger Rail Investment and Improvement Act § 209 (Addendum 153–54).

The Guidance also could not be interpreting statutory terms like "railroad carrier," 49 U.S.C. § 20102(3) (Addendum 71), because the FRA has reached fundamentally different conclusions as to what that term means in other legislative rules than it has in the Guidance.[33] For example, Congress directed the FRA to "require each *railroad carrier* that . . . provides intercity rail

[33] *See, e.g.*, *supra* at 11–12.

passenger . . . transportation . . . to develop a railroad safety risk reduction program . . . .” 49 U.S.C. § 20156(a)(1) (emphasis added) (Addendum 73). The FRA implemented that directive by promulgating the System Safety Program Final Rule, which applies to “railroads” defined as a “person or organization that provides railroad transportation, whether directly *or by contracting out operation of the railroad to another person*.” 49 C.F.R. § 270.5 (emphasis added) (Addendum 123–24). And in the System Safety Program Final Rule’s preamble, the FRA stated that this definition was derived from the statutory definition of “railroad” and “railroad carrier.” 81 Fed. Reg. at 53,863 (Addendum 90).

The Guidance, on the other hand, requires *Amtrak* to prepare an System Safety Program – not the State sponsor “contracting out operation of the railroad” – so long as Amtrak both operates and maintains the trains. Guidance, Example (J.A. 3). If both the System Safety Program Final Rule, which expressly *was* interpreting the term “rail carrier,” and the Guidance were interpreting the same term, it is “difficult to imagine how those rules could produce such different schemes.” *Mendoza*, 754 F.3d at 1022 n.15.

2. *The Guidance Goes Beyond a Policy Statement by Imposing a New Legal Norm*

“An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how

it will treat – typically enforce – the governing legal norm." *Syncor*, 127 F.3d at 94. "By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach." *Id.* Distinguishing between a legislative rule and a general policy statement requires the Court to inquire "whether a statement is of present binding effect." *Elec. Privacy Info. Ctr.*, 653 F.3d at 7 (quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988)). A statement of policy "may not have a present effect," and must "genuinely leave[] the agency and its decisionmakers free to exercise discretion." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting *Am. Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)); *see also Elec. Privacy Info. Ctr.*, 653 F.3d at 7 ("[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding.").

As established above, the Guidance does not simply indicate how the FRA will enforce existing Federal railroad safety laws and regulations. Rather, it fundamentally alters the legal regime. In *Syncor*, the FDA had traditionally considered manufactures of certain nuclear medicines to be pharmacies, and therefore not subject to the Federal Food, Drug, and Cosmetic Act. *Syncor*, 127 F.3d at 95. Several years later, in light of changed technology and increased

applications for nuclear medicines, the FDA issued an order without notice and comment declaring that it would begin regulating these manufacturers. *Id.* The Court concluded:

> This is not a change in interpretation or in enforcement policy, but rather, is fundamentally new regulation. The reasons FDA has advanced for its rule – advancement in PET technology, the expansion of procedures in which PET is used, and the unique nature of PET radiopharmaceuticals – are exactly the sorts of changes in fact and circumstance which notice and comment rulemaking is meant to inform.

Id.

The Guidance does not constitute a policy statement for similar reasons. The draft guidance stated that FRA is undertaking this action because of "several important changes to the nature of the relationship between Amtrak and State departments of transportation, or other public authorities, that provide funding for, and oversight of, intercity passenger rail services." Draft Guidance at 4 (J.A. 54). Just as the FDA had never treated PET manufacturers as subject to its adulteration rules until it determined technology had changed, here the FRA has never treated State sponsors of intercity passenger rail as the "railroad" responsible for compliance with Federal railroad safety laws and regulations until they sought to exercise their prerogative under the Passenger Rail Investment and Improvement Act. *See id.* Presumptively charging State sponsors with responsibility for all

Federal railroad safety laws and regulations is akin to regulation of a new entity based on changed circumstances as in *Syncor*, and may not therefore constitute a general statement of policy.

3. *The Guidance is Not a Procedural Rule Because it Imposes New Substantive Burdens with Effects Implicating the Policies Underlying the APA*

A procedural rule may not "impose new substantive burdens." *Elec. Privacy Info. Ctr.*, 653 F.3d at 5. Instead, a procedural rule "covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *James V. Hurson Associates, Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000). Procedural rules are "'primarily directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights [or] interests of affected parties.'" *Mendoza*, 754 F.3d at 1023 (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980)). Even a rule that does not impose new substantive burdens on its face may carry a "substantive effect . . . sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *Elec. Privacy Info. Ctr.*, 653 F.3d at 5–6 (internal quotation omitted). "In order to further these policies, the exception for procedural rules 'must be narrowly construed.'" *Id.* (quoting *United States v.*

Picciotto, 875 F.2d 345, 347 (D.C. Cir. 1989)).

The Guidance does not meet the definition of a procedural rule. Certainly the Guidance may appear procedural "stated at a high enough level of generality," as requiring State sponsors "merely" to present themselves to the FRA upon contemplating a change in service providers. *See Mendoza*, 754 F.3d at 1023. But "a more practical account of the rule[]," makes it clear that it in fact imposes new and significant substantive burdens. *Id.*

The Guidance "creates an implied preference for Amtrak" that skews the competitive procurement processes that Petitioners are required by law to follow, and thereby interferes with the mechanism Congress provided State sponsors to ensure cost-effective delivery of intercity passenger rail services. Kutrosky Declaration ¶ 14–16 (Standing Addendum 4–5); Worley Declaration ¶ 16 (Standing Addendum 12). The Guidance will slow and inject uncertainty into the procurement process as a result of the need to consult with FRA and obtain its approval before issuing a Request for Proposals. Worley Declaration ¶ 17 (Standing Addendum 12–13). Even if a State sponsor overcomes these barriers to selecting an operator other than Amtrak, the Guidance subjects them to regulatory compliance burdens that they are not structured, staffed, or in some cases possessed with legal authority to assume. Kutrosky Declaration ¶ 15, 17 (Standing

Addendum 5); Worley Declaration ¶ 9, 11–13 (Standing Addendum 10–11). At the very least, the Guidance therefore drives up the cost of State-supported intercity passenger rail service, and may, at worst, lead to the cessation of some service altogether. *See* Letter from K. Browning to U.S. DOT Secretary Foxx dated Mar. 6, 2015 (J.A. 20–21).

This Court has rejected attempts to cast rules with such substantive impacts as mere procedure. In *Electronic Privacy Information Center*, the Transportation Security Administration argued that a rule merely changed the manner in which passengers were screened at an airport rather than imposed a new burden, and therefore was a procedural rule. 653 F.3d at 5–6. This Court acknowledged that security screening was not a new burden, but found that the change in procedure – from a magnetometer to a device effectively producing an image of an unclothed passenger – implicated passengers' privacy interests in a way that the TSA previously had not. The change effected passengers "to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Id.* (internal citation omitted).

The effects of FRA's impairment of State sponsors' ability to change its service contractors without incurring additional regulatory liability, as Congress intended, is "sufficiently grave so that notice and comment are needed to safeguard

the policies underlying the APA." *Id.*

C. Even if an Exception to the APA Did Apply, the FRA Was Required To Follow Notice and Comment in this Case

Under the FRA's Rules of Practice, even an interpretive rule or general statement of policy must follow notice and comment procedures if the Administrator deems it "necessary and desirable." 49 C.F.R. § 211.15(b) (Addendum 210).

Here, the FRA made such a determination. *See* Letter from R. Lauby to K. Browning dated Mar. 12, 2015 ("[The] policy statement will be published for public comment – so every state and stakeholder (as well as Congress, since it is the original authors of [the Passenger Rail Investment and Improvement Act]) has the opportunity to understand FRA's views and provide meaningful input before FRA finalizes its policy.") (J.A. 23); Letter from P. Quinn to FRA Administrator Feinberg dated Feb. 26, 2015 (J.A. 19).

Having made this determination, the FRA may not now abandon it. *See Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 95 n.5 (USDA had by regulation waived an otherwise available statutory exemption from notice and comment); *Appalachian Power*, 208 F.3d at 1025–26 (finding it persuasive that EPA had previously committed to issuing a rulemaking to revise a requirement); *Lee*, 731 F. Supp. at 1112–13 (D.D.C. 1989) (otherwise exempt rulemaking subject to the APA

where the agency had "voluntarily subjected itself" to notice and comment requirements).

CONCLUSION AND RELIEF SOUGHT, AND REQUEST FOR ORAL ARGUMENT

Because the Guidance constitutes a legislative rule, the APA and the FRA's Rules of Practice required the FRA to follow notice and comment procedures. Because the FRA failed to observe those procedures in this case, Petitioners respectfully request the Court to grant the Petitions for Review, and schedule the case for oral argument.

Respectfully submitted this 8th day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2017, I electronically filed the foregoing FINAL JOINT OPENING BRIEF OF PETITIONERS NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND CAPITOL CORRIDOR JOINT POWERS AUTHORITY with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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