Nos. 24-11076, 24-11300, 24-11366, 24-11367,
24-11428, 24-11444, 24-11445, 24-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FLORIDA EAST COAST RAILWAY, ET AL.,

Petitioners,

v.

FEDERAL RAILROAD ADMINISTRATION, ET AL.,

Respondents.

On Petition for Review Of A Final Rule Of The Federal Railroad Administration

AMICUS CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for *Amicus Curiae* certifies that in addition to the entities set forth in the parties' briefs, the following have an interest in the outcome of this matter:

(1) National Taxpayers Union Foundation as *Amicus Curiae*; and

(2) Martinez, Tyler as counsel for *Amicus Curiae*.

s/ Tyler Martinez
Tyler Martinez

Dated: August 2, 2024

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amicus Curiae* certifies that the National Taxpayers Union Foundation is a nonprofit, tax-exempt organization under Internal Revenue Code §501(c)(3) and is incorporated in the District of Columbia. *Amicus* further states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

s/ Tyler Martinez
Tyler Martinez

Dated: August 2, 2024

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Founded in 1973, the National Taxpayers Union Foundation ("NTUF") is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal level. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, produces scholarly analyses, and engages in direct litigation and *amicus curiae* briefs upholding taxpayers' rights and challenging administrative overreach by tax authorities. Accordingly, *Amicus* has an institutional interest in this case. All parties consented to the filing of this brief.[1]

STATEMENT OF THE ISSUE

Amicus will address two issues:

Whether FRA failed to consider an important aspect of the problem by ignoring the substantial costs the final rule will impose.

Whether the Final Rule exceeds FRA's statutory authority because it is not necessary for railroad safety.

[1] *Amicus Curiae* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Federal Railroad Administration Final Rule prohibiting one-person train crews, *Final Rule—Train Crew Size Safety Requirements*, 89 Fed. Reg. 25052 (Apr. 9, 2024), ignores the enormous costs the rule will impose on American taxpayers and consumers and is beyond the agency's delegated power to regulate safety.

The Final Rule would halt innovation and impose billions of dollars in costs, at odds with Congress's stated policy in this area. For decades, Congress has removed regulatory barriers to a vibrant railroad industry that has delivered a national mass market and lower prices to consumers, avoided costs to taxpayers, and jobs and higher wages to workers. The Final Rule would halt these gains, and harmfully stop continued progress on automation and use of technology that railroad competitors (such as trucking) will continue to embrace. Congress has never directed minimum crew size laws nor delegated such power to any agency, and on frequent occasions has directed that such matters be handled at management-labor negotiations.

The Final Rule's purported safety rationale is unsupported by evidence, while there is an openly-understood political rationale to reward labor unions with excess staffing. The FRA and others concede that one-person trains can be operated safely and are operated safely today. Because make-work regulations are not a legitimate exercise of the FRA's safety regulatory authority, the Final Rule is invalid.

ARGUMENT

I. THE FRA DID NOT ACCURATELY ESTIMATE THE ENORMOUS COSTS THE RULE WILL IMPOSE ON AMERICAN TAXPAYERS AND CONSUMERS.

A. The Rule Would Halt Innovation and Impose Billions in Costs, Defying Congressional Directives Not To Do So.

One hundred years ago, 1.7 million railroad employees moved 400 billion ton-miles of freight in the U.S. on Class I railroads; in 2023, about 120,000 railroad employees moved 1.5 trillion ton-miles. *See* St. Louis Federal Reserve, "Railroad Revenue Freight Ton-Miles for United States, 1916-2012," https://fred.stlouisfed.org/data/A033CBUSA253NNBR; Bureau of Transportation Statistics, "U.S. Ton-Miles of Freight (Railroad)," https://www.bts.gov/content/us-ton-miles-freight; Surface Transportation Board, "Employment Data," https://www.stb.gov/reports-data/economic-data/employment-data; Professor Richard Saunders, Jr., *Merging Lines: American Railroads, 1900-1970*, 1, 121 (2001) ("Basic Statistics for All Class I Railroads 1928-1959"). Americans mostly take freight rail for granted as it moves 28 percent of all goods in the United States. *See* U.S. Department of Transportation, "The Freight Rail Network," https://railroads.dot.gov/rail-network-development/freight-rail-overview.

This enormous increase in productivity – from deploying technology, investment in capital improvements, and embracing innovation – created billions of dollars of value for all Americans, who have benefitted from fast, national mass

market availability of once-regional items like Florida oranges, lower-cost grain and chicken, and imports into ports. Inflation-adjusted freight rates fell, and are now one-third of truck haulage rates (and emit one-quarter the greenhouse gas emissions). *See* RSI Logistics, "Comparing the Costs of Rail Shipping vs Truck," April 20, 2021, https://www.rsilogistics.com/blog/comparing-the-costs-of-rail-shipping-vs-truck; Association of American Railroads, "Freight Rail & Preserving the Environment," https://www.aar.org/wp-content/uploads/2020/06/AAR-Sustainability-Fact-Sheet.pdf. Carriers benefitted, transforming from a visibly dying industry where there "were fewer and fewer services that railroads could perform as well as their competitors for which anyone would pay enough for the railroads to make a profit" to "efficient providers of transportation for a growing economy…a vibrant economic force." Saunders, *Merging Lines* at 416-19. Taxpayers benefitted, for "[i]f the railroads died, or if they ceased to function as a national system, then more expensive and less fuel-efficient transportation would have to be substituted…. [Or] nationalization would embalm all the inefficiencies of the old system within the federal budget. The taxpayer would pay." *Id.* at 418. And workers benefited even as average crew size fell from five to two, with average railroad compensation rising from 63 cents per hour in 1928 to $143,000 a year in 2022, now among the highest paid jobs in the nation. *See id.* at 121; Association of American Railroads, "Railroad Jobs," https://www.aar.org/issue/railroad-jobs.

Admittedly, this success was neither destiny nor without twists and turns. In the early twentieth century, "[r]ailroads, tightly confined by regulation, could not respond when increased intermodal competition arrived with highway carriers…. [R]egulation limited the railroads' ability to respond, either through rate changes or productivity innovations…. With dreadful financial returns and large segments in bankruptcy, the railroad industry was on the brink…[b]y the 1970s, it was clear that rail regulatory policy had to change." Frank N. Wilner, *Railroads & Economic Regulation (An Insider's Account)* at xiv (2023). The commitment to fixing the cost and regulatory structure to enable railroads to prosper spanned decades and crossed partisan lines: costly passenger service was transferred to Amtrak under the Nixon Administration, the northeastern railroads were restructured into Conrail with $7 billion in taxpayer funds and loan guarantees under the Ford Administration, rate regulation was repealed under the Carter Administration, railroad taxes were overhauled and Conrail became profitable and was re-privatized under the Reagan Administration, and the Interstate Commerce Commission was terminated under the Clinton Administration.

Never, in all this history, has Congress directed or even hinted at a federal minimum railroad crew size requirement. If anything, federal directives before now have been in the other direction. In 1963, Congress ordered binding arbitration on management's demand to discontinue employing steam firemen in diesel

locomotives, which ultimately resulted in their phaseout. Pub. L. 88-108, 77 Stat. 132 (1963). President Lyndon Johnson in 1964 ordered federal intervention to halt sabotage of the Florida East Coast railroad's three-person crew operations (as opposed to the then-five-person standard), and "[o]nce ex-union men stopped sabotaging its trains, the FEC posted consistently excellent safety records" and "put the lie to union claims that reduced crews sacrificed safety." Saunders, *Merging Lines* at 286-87. The Rail Service Improvement Act of 1981 pre-empted state "full crew" laws that required a third crewmember, resulting in immediate dismissals of 3,300 brakemen. Pub. L. 93-236, 87 Stat. 986 (1981); Professor Richard Saunders, Jr., *Main Lines: Rebirth of the North American Railroads, 1970-2002* (2003) at 204. After a railroad strike loomed in 1991 to oppose the elimination of distinct road and yard crews and to direct crew size to be determined by local labor negotiation with a provision for binding arbitration, Congress voted (the House 400 to 5, the Senate without objection) to end the strike on management's terms, reducing railroad labor headcount by perhaps a third. Pub. L. 102-29, 105 Stat. 169 (1991); Saunders, *Main Lines* at 217-18. The Rail Safety Improvement Act of 2008 required the installation of Positive Train Control (PTC), which enables automated or centralized train operation previously done by on-board engineers or conductors. Pub. L. 110-432, 122 Stat. 4848 (2008). A bill to do what the FRA seeks to do here—the Railway Safety Act of 2023, which would mandate two-person crews—has languished

without action on the Senate floor. *See* S. 576, 118th Cong. (2023). So the FRA proceeded to claim delegated power from Congress to do what Congress will not itself do. *Cf. West Virginia v. EPA*, 597 U.S. 697, 725 (2022) ("It located that newfound power in the vague language of an ancillary provision of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.") (cleaned up).

The FRA's proposed rule sharply diverges from these frequent and still-in-effect congressional directives, and thereby jeopardizes continuing productivity gains and cost savings for taxpayers and consumers. "[A]n incremental automation phase-in could allow for reducing train-crew sizes from two to one, which consultancy Oliver Wyman in 2015 estimated could save U.S. railroads up to $2.5 billion per year by 2029." Testimony of Marc Scribner Before the U.S. House Committee on Transportation & Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials, Hearing: Getting Back on Track: Exploring Rail Supply Chain Resilience and Challenges" at 4 (May 11, 2023), https://democrats-transportation.house.gov/imo/media/doc/20230511%20RPHM%20Testimony%20Scribner,%20Marc.pdf, *citing* Association of American Railroads, *Analysis of North American Freight Rail Single-Person Crews: Safety and Economics* (2015), https://www.aar.org/wp-content/uploads/2022/06/AAR-Oliver-Wyman-Crew-Size-

2015-Report.pdf. One easily foreseeable automation is shifting conductor responsibilities to monitor trackside equipment and alerts from on-board to centralized off-board locations. "The benefits of automated track inspection include more reliable defect detection, more robust maintenance data and planning, redeployment of visual inspectors to higher-need areas, and for infrastructure that cannot be inspected by ATI equipment, reduced human exposure to safety hazards in the field, and reduced delays to trains in revenue service." Scribner at 4.

In addition to foregone savings from future automation (that competitor industries such as trucking are pursuing), and the direct costs of adding unnecessary staff, "[r]equiring that freight rail operators have two crew members as opposed to one would raise the cost of shipping goods… [and] these increased costs would be passed on to the consumer in the form of higher prices." American Consumer Institute, Center for Citizen Research, "Comments on Proposed Two Crew Size Safety Requirements" (Sep. 2022), https://www.theamericanconsumer.org/2022/09/aci-files-comments-on-fras-proposed-crew-size-mandate/. The FRA did not model projected diversion from railroads to trucks that would be caused by higher railroad staffing costs, but even a 10 percent increase in railroad shipping rates would requiring passing billions of dollars in extra costs to consumers. If the trucking industry proceeds with adopting automation technology while the FRA Final Rule prohibits railroads from doing the

same, the diversion could be much larger as railroad pricing becomes uncompetitive. "Railroads must have the resources to continue private investment, and customers must be able to secure affordable, market-based shipping services. Without this synergy, taxpayers will witness another decline in one of the nation's most vital infrastructure components, and with it, increased pressure for direct federal involvement through loans, subsidies, and other strictures." Pete Sepp, "Rail Policy—Taxpayers & Consumers Are Watching and Worried," National Taxpayers Union, Sep. 19, 2022, https://www.ntu.org/publications/detail/rail-policy-taxpayers-consumers-are-watching-and-worried.

The FRA failed to analyze these anticipated effects of their Final Rule, for they estimate that the Final Rule will impose only $6.6 million in costs over 10 years. 89 Fed. Reg. at 25057. The FRA even disagrees with itself, as in 2016 it had estimated a cost of one-person crew operation of $27.7 million over ten years. It gave no explanation for its dramatic cost estimate change, nor did it acknowledge the multiple comments listing these foreseeable costs. *See Hewitt v. Comm'r*, 21 F.4th 1336, 1350 (11th Cir. 2021) (holding that an agency's "fail[ure] to respond to [a] relevant and significant comment" is arbitrary and capricious). Under the Administrative Procedure Act, a court "shall…hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

B. The Final Rule is Driven by Politics, Not Safety.

A bill to do what the FRA seeks to do here—the Railway Safety Act of 2023, which would mandate two-person crews—has languished without action on the Senate floor. *See* S. 576, 118th Cong. (2023). So the FRA proceeded to claim delegated power from Congress to do what Congress will not itself do. *Cf. West Virginia v. EPA*, 597 U.S. 697, 725 (2022) ("It located that newfound power in the vague language of an ancillary provision of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to hesitate before concluding that Congress meant to confer…the authority [the agency] claims…."). (cleaned up). Here, instead of delegating the authority to set crew-size minimums to the FRA, Congress has declined to enact such a statute and instead has repeatedly enacted statutes leaving that matter up to management-labor negotiations.

Congress has, however, delegated to the FRA the power to issue regulations "necessary" for "railroad safety." 49 U.S.C. § 20103(a). Consequently, the Final Rule and related statements by the agency shoehorn the word "safety" throughout, "as though it were a talisman under which any agency decision is by definition unimpeachable." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*,

463 U.S. 29, 50 (1983). The Department of Transportation press release, for instance, includes "safety" twice in the title and 15 more times across six paragraphs. *See* U.S. Department of Transportation, "Biden-Harris Administration Announces Final Rule on Train Crew Size Safety Requirements to Improve Rail Safety," Apr. 2, 2024, https://www.transportation.gov/briefing-room/biden-harris-administration-announces-final-rule-train-crew-size-safety-requirements.

But the Final Rule is not justifiable as a safety regulation. The FRA concedes it lacks "any meaningful data" supporting the claim that two-person crews are safer or one-person crews are less safe, stating the available data "does not support any conclusion about the safety of single-person crews." Train Crew Size Safety Requirements, Notice of Proposed Rulemaking, Federal Railroad Administration, Docket No. FRA-2021-0032, 87 Fed. Reg. 54,564 (28 July 2022). "[M]any Amtrak and commuter trains in the United States operate with only one person in the locomotive. Second, freight trains in Europe and Australia also operate with only one person." David Kemp & Peter Van Doren, "Federal Rail Administration's New Two-Person Train Crew Rule Is A Union Concession, Not A Legitimate Safety Rule," Cato Institute, Apr. 5, 2024, https://www.cato.org/blog/federal-rail-administrations-new-two-person-train-crew-requirement-union-concession-not. Falling crew sizes over the past decades have been accompanied by falling, not rising, rail accidents and employee injuries. Eric Boehm, "How Many Union

Members Does It Take To Operate a Train," Reason, Aug./Sep. 2021, https://reason.com/2021/08/28/how-many-union-members-does-it-take-to-operate-a-train/ ("[A]ccidents are down 30 percent since 2000, while employee injuries have fallen by more than 40 percent. Railroading is safer now than it has ever been, in large part due to those technological advances.").

Instead, the Final Rule's true purpose is a sweetener to labor unions as well as a feckless political response to one unusual train crash. The Senate bill to require two-person crews was introduced shortly after a 53-car freight train derailed in Ohio in 2023, but the derailment of that train (which had been operating with a crew of three men) was caused by an overheated wheel bearing, the alert for which was missed by a faulty track-side detector. *See* Eric Boehm, "No, Biden's New Rail Crew Mandate Doesn't Make Common Sense," Reason, Apr. 2, 2024, https://reason.com/2024/04/02/no-bidens-new-rail-crew-mandate-doesnt-make-common-sense/. The FRA Final Rule, pursued after the Senate bill went nowhere, has an identical non-safety rationale. "The derailment in East Palestine was bad, and something must be done. This is something, so now it is being done—and bonus points can be scored because doing this specific thing will please the Biden administration's labor union allies, which have been lobbying the government for years to impose exactly this two-person crew mandate." *Id.*

Rail labor union leaders in decades past sought to keep steam firemen on fireless diesel engines, brakemen to throw switches that have long been automated, and even caboose-retention laws, "make-work laws under the guise of safety." Saunders, *Main Lines* at 213. (Cabooses, formerly a place to monitor the train's integrity, were made obsolete by electronic monitoring devices. Professor Saunders colorfully remarked that the technology is safer than more humans on the train "because it never snoozed or sneezed or went to the bathroom." *Id.*) When Congress has intervened on railroad staffing size matters it has been to reject union efforts, but generally it has left the matter of work rules and crew size to management-labor negotiations. Given the lack of compelling safety evidence for the Final Rule, and the clear evidence of its actual motivation, the Final Rule is beyond the FRA's power to regulate safety.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court vacate the final rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains 2,759 words, as counted by Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Tyler Martinez
Tyler Martinez
NATIONAL TAXPAYERS UNION FOUNDATION

Dated: August 2, 2024

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of National Taxpayers Union Foundation in Support of Petitioners using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

/s/ Tyler Martinez
Tyler Martinez
NATIONAL TAXPAYERS UNION FOUNDATION

Dated: August 2, 2024

Counsel for *Amicus Curiae*