Nos. 22-3648 & 23-1325

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA, *Respondents*; and
AMERICAN CHEMISTRY COUNCIL, et al., *Intervening Respondents*.

ASSOCIATION OF AMERICAN RAILROADS, *Petitioner*,

v.

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

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE SURFACE TRANSPORTATION BOARD

RESPONDENTS' JOINT BRIEF

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SUMMARY OF THE CASE

The Surface Transportation Board is statutorily required to regulate freight rail rates paid by captive shippers. High-volume shippers of certain commodities, primarily coal and bulk chemicals, have access to rate-review procedures that are complicated and costly. But most captive shippers cannot feasibly access those procedures, and so must pay whatever rate their serving railroad charges.

At Congress's direction, the Board has sought for decades to develop usable rate-review procedures for all businesses shipping by rail. But even the simplified procedures it has produced have proved so complex and costly that shippers find small rate cases still not worth bringing. As a result, railroads have essentially enjoyed de facto immunity from regulation with regard to many of the rates they charge their captive shippers.

Final Offer Rate Review (FORR) is a new procedure designed to remedy that problem by giving shippers a practical way to seek rate relief through accelerated procedural schedules and flexible substantive directives. It is a permissible exercise of statutory authority that represents the best chance of ensuring access to reasonable rail rates for all businesses.

Given FORR's importance, the Board recommends the Court allow oral argument with twenty minutes per side.

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JURISDICTIONAL STATEMENT

The Board has jurisdiction to issue rules governing freight rail rate disputes. 49 U.S.C. §§ 1321(a), 10501(b), 11701(b). The court of appeals in which the record is filed has jurisdiction to review such rules if challenged within sixty days of issuance. 28 U.S.C. §§ 2321(a), 2342(5), 2344, 2349(a).

Both petitions for review are timely. The final rule issued on December 19, 2022. Union Pacific Railroad Company, which is headquartered in Nebraska, sought review in this Court on December 27, 2022. The Association of American Railroads (AAR) sought review in the U.S. Court of Appeals for the District of Columbia Circuit on January 18, 2023. AAR's case was transferred here under 28 U.S.C. § 2112(a)(5).

This Court has jurisdiction over both petitions because the record was filed here in accordance with 28 U.S.C. § 2112(a)(1).

STATEMENT OF THE ISSUES

I. Whether the Board has statutory authority to use a final-offer procedure to select the maximum rate to be prescribed in certain small rate disputes after a rate has been found unreasonable.

- 49 U.S.C. § 10704(a)(1) ("[T]he Board may prescribe the maximum rate . . . .").

- *CSX Transp., Inc. v. STB*, 754 F.3d 1056, 1063-64 (D.C. Cir. 2014) (describing Board's broad discretion in rate-case design).
- *Ark. AFL-CIO v. FCC*, 11 F.3d 1430, 1441-42 (8th Cir. 1993) (en banc) (construing "operate in the public interest").
- *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1438 (D.C. Cir. 1996) (construing "full hearing").

II. Whether the Board permissibly exercised its discretion to develop small-case rate-reasonableness standards through individual adjudications rather than a general rule.

- *Oiciyapi Fed. Credit Union v. Nat'l Credit Union Admin.*, 936 F.2d 1007, 1010 (8th Cir. 1991) (rejecting vagueness attack because agencies have broad discretion to establish standards via adjudication rather than rulemaking).
- *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555-56 (4th Cir. 2012) (same).
- *Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 916-17 (D.C. Cir. 1982) (same).

III. A. Whether final-offer procedures can produce reasoned decisionmaking.

- *Union Pac. R.R. Co. v. STB*, 628 F.3d 597, 606-08 (D.C. Cir. 2010) (upholding final-offer decision against reasonableness challenge).

B. Whether the Board provided a reasoned explanation for departing from a prior approach in setting the $4 million relief cap.

- *Ass'n of Oil Pipe Lines v. FERC*, 876 F.3d 336, 342 (D.C. Cir. 2017) (no heightened standard for agency policy changes).

C. Whether the Board reasonably addressed the railroads' argument that final-offer procedures are "unduly coercive."

- *BNSF Ry. Co. v. STB*, 526 F.3d 770, 776 (D.C. Cir. 2008) (deferring to Board's considered policy judgment).

STATEMENT OF THE CASE

The Interstate Commerce Act was passed in 1887 to protect shippers in a developing economy from abusive practices by powerful, dominant railroads. Thus, the Board's predecessor, the Interstate Commerce Commission (ICC), was given authority to regulate the rates that railroads charged shippers that could not fend for themselves in the market. After regulating rates on a case-by-case basis for most of its existence, the ICC in 1985 developed more formal procedures for very large cases. But,

recognizing that shippers with small cases could not use those procedures, the ICC in 1986 started looking for usable rate-review procedures that would give captive businesses a practical means of challenging rates on smaller-value shipments.

The railroad industry participated in those efforts, for example proposing an approach to rate relief that "labeled reasonable a rate set at 5000 percent of the railroad's variable costs." *CSX Transp., Inc. v. STB*, 568 F.3d 236, 239 (D.C. Cir.), *vacated in part on other grounds on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009). But the agency was not able to produce a satisfactory model for handling small rate cases, and indeed, since 1996, few small rate cases have been brought to the agency, notwithstanding that some shippers report paying rates 800% higher than the railroads' variable cost of providing the service. Therefore, on two occasions, most recently in 2015, Congress directed the Board to make available procedures for handling smaller cases. 49 U.S.C. § 10701(d)(3).

After the 2015 law was enacted, the Board first explored a new small-rate-case methodology. *See Expanding Access to Rate Relief*, EP 665 (Sub.-No. 2) (STB served Aug. 31, 2016). But when even those modest steps received a chilly reception, App. 170, the agency created the Rate Reform Task Force, which, after extensive research and outreach,

recommended a flexible "Final Offer" approach. The Board accepted that recommendation, began a proceeding that garnered extensive comments from a variety of stakeholders, and issued the decision under review.

A. The Statutory Framework for Rate Disputes

The rates that railroads set for captive shippers "must be reasonable," 49 U.S.C. § 10701(d)(1), and shippers wishing to challenge rates can bring cases before the Board, 49 U.S.C. § 10704(b). The statute does not define reasonableness, however. It does state that, "[i]n determining whether a rate established by a rail carrier is reasonable," the Board "shall give due consideration" to three non-exhaustive factors, known as the "Long-Cannon" factors, that generally relate to rate levels and traffic mix. *See* 49 U.S.C. § 10701(d)(2). The Board must also "recogniz[e]" the railroad's need for adequate revenues, *id.*, and it considers the general rail transportation policy goals in 49 U.S.C. § 10101 to the extent that they are relevant.

The statute further provides: "When the Board, after a full hearing, decides that a rate charged or collected by a rail carrier . . . does or will violate [the rate-reasonableness requirement], the Board may prescribe the maximum rate . . . to be followed." 49 U.S.C. § 10704(a)(1). The Board has construed the statute as precluding it from prescribing a rate below the level at which the railroad would recover 180% of its variable costs. App. 13

n.21; *see* 49 U.S.C. § 10707(d)(1)(A). The Board can also award damages for past unreasonable rates. 49 U.S.C. § 11704(b).

B. The Stand-Alone Cost Test for Large Rate Cases

From 1887 through the 1970s, the ICC developed its rate-reasonableness standards through adjudication, looking to a variety of metrics and criteria as appropriate in a given case. *See Burlington N., Inc. v. United States*, 555 F.2d 637, 641 & n.3 (8th Cir. 1977); *see also Balt. & Ohio R.R. Co. v. United States*, 345 U.S. 146, 149-50 (1953).

In 1985, the ICC adopted a general analytical framework for rate reasonableness that since has been used in all large rate cases. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). Although there are various ways the guidelines could be applied in theory, in practice, virtually all cases have used the "Stand-Alone Cost" approach, which calculates what a hypothetical new, optimally efficient railroad would need to charge for providing rail service over the lines and facilities necessary to serve the shipper. *Id.* at 528-29.

But a Stand-Alone Cost analysis is complex, time-consuming, and expensive, due largely to the difficulty of modeling a hypothetical new railroad. *See Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No.

1), slip op. at 9, 13-14 (STB served Sept. 5, 2007), *aff'd CSX Transp.*, 568 F.3d 236. And that cost and complexity have increased substantially over time. *Id.* at 31. In 2007, the Board estimated that presenting a Stand-Alone Cost case could cost up to $5 million, *id.* at 5, 30, equivalent to about $7.2 million today. The 2019 task force found the cost to be as high as $10 million. Rate Reform Task Force, *Report to the Surface Transportation Board* 6 (Apr. 25, 2019), https://www.stb.gov/wp-content/uploads/Rate-Reform-Task-Force-Report-April-2019.pdf. As a result, shippers that routinely ship large quantities, such as coal and bulk chemical companies, are the only ones that have used the Stand-Alone Cost approach.

C. The Search for a Feasible Alternative for Small Rate Cases

Recognizing that the Stand-Alone Cost approach is "not easy to apply or economically viable for shippers of sporadic or comparatively light volume traffic," the ICC in 1986 began "the second step" in its rate-standard development proceedings and sought comment on alternative approaches for small cases. *Rate Guidelines—Non-Coal Proc.*, EP 347 (Sub.-No. 2), 1992 WL 338463, at *1 (STB served Nov. 16, 1992).

When Congress replaced the ICC with the Board in 1995, the ICC still had not settled on a simplified alternative. So Congress directed that the newly-created Board "shall, within one year," "establish a simplified and

expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." ICC Termination Act of 1995, Pub. L. No. 104-88, § 102, 109 Stat. 803, 810 (codified as amended at 49 U.S.C. § 10701(d)(3)).[1]

The Board responded with two simplified approaches. One is the Simplified Stand-Alone Cost approach (created in 2007), which approximates part of a full Stand-Alone Cost analysis but with various simplifying assumptions and evidentiary limitations. *See Simplified Standards*, slip op. at 15-16.

More relevant to this case is the Three Benchmark approach (created in 1996), which measures the challenged rate against three benchmark figures, including one that compares the challenged rate to rates for similar movements. *Id.* at 10; *see Rate Guidelines—Non-Coal Proc.*, 1 S.T.B. 1004, 1004, 1034 (1996), *pet. for review dismissed as unripe sub nom. AAR v. STB*, 146 F.3d 942 (D.C. Cir. 1998). Since 2007, the comparison group has been generated through a final-offer process, wherein the Board chooses

[1] In 2015, Congress amended the statute to require "1 *or more*" simplified and expedited methods, among other changes. Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 11, 129 Stat 2228, 2233-34 (emphasis added).

one side's proposal without modification. *Simplified Standards*, slip op. at 18. This procedure was designed to discourage extreme positions and expedite the case. *Id.* The railroads declined to challenge the Board's adoption of this final-offer procedure, *see generally CSX Transp.*, 568 F.3d at 246-50, and the D.C. Circuit has affirmed its application, *see Union Pac. R.R. Co. v. STB*, 628 F.3d 597, 604-08 (D.C. Cir. 2010).

Three Benchmark contains a $4 million relief cap. *Rate Regulation Reforms*, EP 715, slip op. at 22 (STB served July 18, 2013), *aff'd in relevant part sub nom. CSX Transp., Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014). That figure represents the Board's estimate of the cost to pursue a case under Simplified Stand-Alone Cost, which is "the next mo[st] complicated, mo[st] precise method." *Simplified Standards*, slip op. at 28; *accord Rate Regulation Reforms*, slip op. at 22. Simplified Stand-Alone Cost in turn had a similar relief cap based on the cost of a full Stand-Alone Cost case, *see Simplified Standards*, slip op. at 27-28, although that cap was later removed, *see Rate Regulation Reforms*, slip op. at 3, 15-16.

These two simplified approaches have gone largely unused. *See* App. 169. Notwithstanding the Board's sustained, repeated efforts to simplify

these procedures (and those of rate cases generally),[2] shippers continue to report that Board processes remain too complex and costly to provide effective small-case rate relief. *E.g.*, App. 101-02, 169 & n.8, 172; Rate Reform Task Force, *supra*, at 9-10, 44; *see also id.* at 9-10 (documenting shipper reports that Three-Benchmark would not work for them because their railroads "tend to charge their entire group of similar shippers uniformly high rates," in some cases "higher than 800% of variable costs"). In proposing FORR, the Board therefore found that it had "sufficient grounds to conclude that shippers lack meaningful access to the Board's existing rate reasonableness processes with respect to small disputes, due to the complexity, cost, and duration of those processes." App. 101.

D. Final Offer Rate Review

To effectuate more fully Congress's directive to provide meaningful rate relief in small cases, the Board issued FORR. App. 171-72. Its parameters are set out in the notice of proposed rulemaking, App. 11-15, as

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[2] *See Mkt. Dominance Streamlined Approach*, EP 756 (STB served Aug. 3, 2020); *Expediting Rate Cases*, EP 733 (STB served Nov. 30, 2017); *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2) (STB served Aug. 31, 2016); *Rail Transp. of Grain, Rate Regulation Review*, EP 665 (Sub-No. 1) (STB served Dec. 12, 2013); *Rate Regulation Reforms*, *supra*; *Simplified Standards*, *supra*; *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1) (STB served Oct. 30, 2006); *Mkt. Dominance Determinations—Prod. & Geographic Competition*, 3 S.T.B. 937 (1998); *Rate Guidelines—Non-Coal Proc.*, 1 S.T.B. 1004 (1996).

modified by the supplemental notice of proposed rulemaking, App. 112-16, and by the final rule, App. 176. *See* App. 171.

FORR is a new simplified and expedited procedure for adjudicating small rate cases. *See* App. 171-72; 49 U.S.C. § 10701(d)(3). In contrast to Simplified Stand-Alone Cost and Three Benchmark, it achieves simplicity and speed principally through procedural limitations, rather than substantive ones. App. 170. To reduce litigation costs and complexity, FORR employs abbreviated briefing and discovery schedules. *E.g.*, App. 11, 113-14. And to encourage parties to moderate their positions (thereby facilitating resolution), FORR establishes the final-offer procedure described below. That is, if the shipper demonstrates its entitlement to relief, the Board will prescribe only a maximum rate that one of the parties has proposed. *E.g.*, App. 171.

Procedurally, parties submit simultaneous briefs addressing all issues in the case after the close of discovery. *Id.* They next submit simultaneous replies. *Id.* The Board's analysis then proceeds in two stages:

1. Merits stage

At the merits stage, the shipper must demonstrate that the railroad has market dominance (i.e., that the shipper is captive) and that the challenged rate is unreasonable. App. 171. Cognizant of the Board's

unsuccessful efforts to mandate specific small-rate-case methodologies, the Board opted not to prescribe a particular rate-reasonableness standard or formula. *E.g.*, App. 13, 109-10. Instead, following the approach the ICC took throughout most of its existence, the Board allows parties to attack or defend the challenged rate with "their preferred methodologies," including existing Board methodologies, revised versions of those methodologies, "or new methodologies altogether." App. 13; *accord* App. 110. Parties might submit, for example, "robust comparison group approaches, cross-subsidy analyses, analyses that incorporate market-based factors," or still other approaches that the Board has yet to consider. App. 109.

The Board evaluates the parties' rate-reasonableness arguments on a case-by-case basis according to the relevant statutory criteria and appropriate economic principles, which the parties must address in their pleadings. *E.g.*, App. 13. "Appropriate economic principles" include agency and court precedents, generally accepted economic theory, and analogous economic regulatory materials from other tribunals. App. 110. The parties need not address every statutory criterion or economic principle, but only those that are relevant to the individual case. App. 109. The Board has made clear that its written decision will explain any methodology on which it relies. App. 111. *Contra* Pets. Br. 10-11.

Given the underutilization of its previous approaches, the Board chose this open-ended procedure "to allow for innovation with respect to rate review methodologies." App. 13. "[T]he use and creation of precedent through an adversarial process" creates incentives for stakeholders to help the Board develop new methodologies over time, while allowing parties to select for themselves the best approach for their particular situation. *See id.* If the shipper fails to convince the Board that its chosen methodology is valid and that the challenged rate is unreasonable, the case ends.[3] App. 171. Otherwise, the analysis proceeds to the remedy stage.

2. Remedy stage

At the remedy stage, the Board selects one of the parties' offers to become "the maximum rate . . . to be followed." 49 U.S.C. § 10704(a)(1); *see* App. 171. The parties simultaneously submit their offers with their opening briefs. App. 171. They must also justify their offers in terms of the statutory factors and appropriate economic principles. *Id.* A shipper's failure to support its offer can result in dismissal of the complaint without a ruling on the merits. App. 176; 49 C.F.R. § 1111.10(a)(3)(v).

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[3] For this reason, the railroads are wrong to say that FORR "confin[es] the potential outcomes to the two proposals offered by the parties." Pets. Br. 13; *accord id.* at 2, 20, 24, 25, 27, 28, 31, 41. The shipper could simply lose on the merits, entitling it to no relief.

The railroad's offer need not be based on the same methodology that it used to defend the reasonableness of its rate at the merits stage. App. 176. In other words, the railroad is free to "argue in the alternative" and assume for purposes of its offer that its merits arguments were rejected and its rate was deemed unreasonable. *Id.*

This final-offer procedure intentionally takes away the Board's discretion to impose a rate that is different from one the parties have proposed. *E.g.*, App. 14, 15. It does so to discourage parties from taking extreme positions and to encourage the settlement of disputes. *E.g.*, App. 11, 14 & n.28, 104, 105, 171-72. The Board acknowledged that FORR constrains its flexibility but deemed that loss "justified by the cost and time savings" it expected from the final-offer process. App. 15.

Prevailing shippers in FORR cases are subject to a relief cap of $4 million, adjusted for inflation, with a maximum prescription period of two years. App. 180. In other words, each time a shipper pays the prescribed rate, the difference between the prescribed rate and the challenged rate counts toward the relief cap. When that number plus any amount awarded in damages equals $4 million, or when two years have passed, the prescription period ends and the railroad is again free to set its own rate. *See* App. 14. The Board chose this cap for consistency with Three

Benchmark because both procedures are intended to apply to the smallest category of cases. App. 15.

No FORR cases have been brought since the rule became effective on March 6, 2023.[4]

SUMMARY OF THE ARGUMENT

I. The Board has statutory authority to select a remedy in rate cases by using final-offer procedures. The relevant statutory delegation says only that, after holding a full hearing and finding the challenged rate unreasonable, "the Board may prescribe the maximum rate." 49 U.S.C. § 10704(a)(1). The railroads argue that final-offer procedures "conflict" with capacious statutory terms like "due consideration," "needs of the public," and "full hearing." But the Board's procedures allow "due consideration" of the statutory criteria and any other issues presented at the "full hearing." And they meet the "needs of the public" by giving shippers a remedy that Congress directed that they have.

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[4] Simultaneously with FORR, the Board issued a final rule based on a railroad petition to establish a voluntary arbitration program for small rate cases. *See Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disputes*, EP 765 (STB served Dec. 19, 2022). That program would have postponed FORR's application for a period of at least five years, but only if all Class I railroads opted into the program by February 23, 2023. *Id.* at 11-12. Because only one railroad opted in, the program is currently inoperable.

II. The Board has substantial discretion to develop standards through adjudication rather than rulemaking. It properly exercised that discretion in relying on the statutory standard for rate reasonableness, and the railroads do not argue otherwise. The railroads do claim that the resulting rule is "void for vagueness," but precedent clearly shows that the Board had discretion to make that choice.

III. The final rule is reasonable and reasonably explained. The railroads provide no support for their assertion that *all* final-offer decisionmaking is inherently unreasoned, and they fail to reconcile it with the D.C. Circuit decision upholding the Board's application of final-offer decisionmaking against a reasonableness challenge. *See Union Pac. R.R. Co. v. STB*, 628 F.3d 597, 606-08 (D.C. Cir. 2010). In addition, the Board properly acknowledged and justified its departure from the approach it had previously used to set relief caps for simplified rate-case procedures. And the Board reasonably addressed the railroads' arguments about "undue coercion," accommodating their concerns in substantial part and otherwise explaining that those concerns arise in *any* rate case and do not outweigh the public need for a workable small-rate-case procedure like FORR.

ARGUMENT

I. Congress Authorized Final-Offer Procedures in Rate Cases.

Congress directed the Board to adjudicate small rate cases and granted it broad authority to do so in any number of appropriate ways. That authority amply covers the Board's use of final-offer procedures at the remedy stage of a rate case, as explained below.

The scope of the Board's statutory authority to make rules for rate cases is reviewed under the *Chevron* framework. *E.g.*, *CSX Transp., Inc. v. STB*, 754 F.3d 1056, 1063 (D.C. Cir. 2014); *see, e.g.*, *Northport Health Servs. of Ark., LLC v. HHS*, 14 F.4th 856, 869 (8th Cir. 2021) (demonstrating framework); *see also* 49 U.S.C. § 1321(a); *Beeler v. Astrue*, 651 F.3d 954, 959-60 (8th Cir. 2011) (notice-and-comment rulemakings exercising express rulemaking authority generally entitled to treatment under *Chevron*).

Under *Chevron*, unless Congress spoke unambiguously to "the precise question at issue," the Court defers to the agency's reasonable constructions of the statute it administers. *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984). That is because it is the agency's responsibility to formulate policy and make rules to fill gaps left by Congress. *Id.* With or without *Chevron*, however, the Board's construction

of the statute should be upheld because it was not only reasonable, but correct. *See, e.g.*, *Voigt v. EPA*, 46 F.4th 895, 902 (8th Cir. 2022).

A. The statute does not foreclose the Board's use of final-offer procedures.

The statute grants the Board broad authority to prescribe rates as remedies in rate cases without specifically addressing whether the Board may do so via final-offer procedures. It says that market-dominant rates "must be reasonable," 49 U.S.C. § 10701(d)(1), and that, when the Board decides after a full hearing that one is not, "the Board may prescribe the maximum rate," 49 U.S.C. § 10704(a)(1). It does not otherwise cabin the Board's rate prescription power. *See id.* The Board thus "enjoys broad discretion" to design procedures for rate cases and for prescribing rate relief. *See CSX Transp.*, 754 F.3d at 1063-64.

To the extent Congress *has* spoken to the procedural aspects of rate cases, moreover, it has done so to require that those procedures be quick and cost effective, particularly for small cases. In 1995 and again in 2015, Congress directed that "[t]he Board shall maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. § 10701(d)(3). Congress likewise set specific timetables for rate cases generally, *see* 49 U.S.C. § 10704(c), (d)(2),

and required the Board to "maintain procedures to ensure the expeditious handling" of those cases, 49 U.S.C. § 10704(d)(1). Congress further directed that "it is the policy of the United States Government . . . to provide for the expeditious handling and resolution" of proceedings before the Board. 49 U.S.C. § 10101(15).

These provisions only confirm that Congress directed the Board to establish timely and effective procedures for small rate cases. They do not restrict the range of such procedures that the Board might permissibly select, and they certainly do not unambiguously prohibit the Board from using final-offer decisionmaking at the small-case remedy stage. Thus, because "Congress has not directly addressed the precise question at issue," the Court should proceed to *Chevron*'s deferential second step. 467 U.S. at 843; *see infra* Part I.B.

The railroads' opening brief does not engage the *Chevron* framework, but it does assert that remedy-stage final-offer procedures "conflict[]" with certain statutory provisions. Pets. Br. 16-17. None of these provisions evinces an unambiguous congressional intent to preclude the use of such procedures, or even bears on the issue at all. Rather, as explained below, the railroads have simply identified three capacious statutory phrases—"due consideration," "needs of the public," and "full hearing"—and asked

the Court to read into them the railroads' policy preference. But broad statutory terms like these represent "an implicit delegation from Congress *to the agency* to fill in the statutory gaps." *Northport Health Servs.*, 14 F.4th at 869 (emphasis added) (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)). And the railroads' other arguments work only by attributing to the statute words it simply does not say. Final-offer decisionmaking does not "conflict," unambiguously or otherwise, with the statutory text.

1. "Due consideration"

The railroads point first to the requirement that the Board give "due consideration" to certain factors at the merits stage of a rate case. *See* 49 U.S.C. § 10701(d)(2) ("In determining whether a rate established by a rail carrier is reasonable . . . , the Board shall give due consideration to [the Long-Cannon factors and the railroad's revenue adequacy].").

According to the railroads, this language also prevents the Board from adopting a final-offer procedure at the remedy stage. In their view, the Board "cannot give 'due consideration'" to the factors if the Board limits itself to prescribing only a rate that a party has proposed. Pets. Br. 19-20.

This argument fails for several reasons. To start, the cited provision speaks only to the merits stage. By its terms, it applies only when the Board is "determining whether a rate established by a rail carrier is reasonable."

49 U.S.C. § 10701(d)(2). It does not extend to the remedy stage where the Board, having already found the challenged rate unreasonable, "prescribe[s] the maximum rate." 49 U.S.C. § 10704(a)(1); *see also CSX Transp., Inc. v. STB*, 568 F.3d 236, 241-42 (D.C. Cir.) (explaining that § 10701(d) applies only to rates "established by a rail carrier," not to rates prescribed by the Board), *vacated in part on other grounds on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009). The railroads themselves draw this same distinction. *See* Pets. Br. 29.

The railroads' argument also fails as a descriptive matter. Though not expressly required to do so by statute, the proposed and final rules nonetheless make clear that "[i]n . . . choosing between the offers, the Board *w[ill]* take into account" the relevant statutory and policy factors, including those specified "in 49 U.S.C. § 10701(d)(2)." App. 171 (emphasis added); *accord* App. 13, 109-10. Indeed, the final rule requires parties to justify their offers in terms of the relevant statutory criteria, App. 171, and warns that complainants who fail adequately to do so may have their cases dismissed, App. 176; *see* 49 C.F.R. § 1111.10(a)(3)(v). That is the opposite of "disabl[ing]" the Board from considering the statutory factors when prescribing a rate. *Contra* Pets. Br. 19.

If the railroads mean to argue that a final-offer process will inevitably cause the Board to produce an inadequate explanation of its decision, moreover, that argument is unripe and wholly speculative. The Court cannot judge whether the Board adequately considered the factors in a given case until the Board has had an actual chance to do so. *See, e.g.*, *AAR v. STB*, 146 F.3d 942, 946 (D.C. Cir. 1998) (dismissing AAR challenge to Three Benchmark as unripe); *see also Texas v. United States*, 523 U.S. 296, 300 (1998) (claim unripe if "contingent [on] future events").

The railroads are also mistaken if they mean to argue something like the following: that, even if the Board considers the statutory factors while selecting among the parties' offers, and even if the Board adequately explains its decision in terms of those factors, the Board *still* will have failed to give the factors "due consideration" because any consideration undertaken in the context of final-offer decisionmaking is by definition not "due."

Such a proposition would be simply unsupported. There is no statutory language defining "due consideration" and no preexisting background principle to suggest that Congress understood that phrase to prevent the Board from limiting its ability to impose a maximum rate other than one proposed by a party. The railroads offer no explanation of why

that would be the case and they identify no statutory language actually having that effect. This assertion from the railroads comes nowhere near establishing congressional intent to foreclose final-offer decisionmaking at the remedy stage of small rate cases.

2. "Needs of the public"

The railroads next make essentially the same argument while citing language even more abstract: the statement in 49 U.S.C. § 10101(4) that "it is the policy of the United States Government . . . to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public." According to the railroads, the Board cannot ensure that its decisions "meet the needs of the public" if the Board uses final-offer decisionmaking to select the maximum rate. *See* Pets. Br. 20-23.

Suffice it to say, Congress's general policy statement that rail regulation should "meet the needs of the public" is not an unambiguous expression of congressional intent to foreclose the Board's use of final-offer decisionmaking. The phrase "the needs of the public" is inherently imprecise. Its content depends on complex policy judgments, not just the ordinary meaning of language. It therefore represents the quintessential kind of ambiguity that administrative law empowers agencies to resolve. *See Chevron*, 467 U.S. at 843-45; *Ark. AFL-CIO v. FCC*, 11 F.3d 1430,

1441-42 (8th Cir. 1993) (en banc) (treating the statutory term "operate in the public interest" as ambiguous under *Chevron*).

Regardless, the railroads never explain why final-offer procedures prevent the Board from acting in the public interest. As explained above, the final rule preserves the Board's ability to consider all relevant statutory and policy factors, including the needs of the public, when prescribing a maximum rate. App. 171; *see supra* p. 21. It is true that the final rule restricts the Board to remedies the parties have proposed. But, as the Board explained, it chose to restrict its discretion in this way specifically to *further* the public interest: the Board found that the public interest would be best served by having a functional and cost-effective mechanism for shippers to bring small rate cases, and that a final-offer procedure at the remedy stage would best achieve this goal. *See, e.g.*, App. 105 & n.31. The railroads' argument would replace this policy judgment with their own under the guise of statutory interpretation.

The railroads also cite two irrelevant cases in support of their "needs of the public" argument. First, the railroads quote dicta from a Board decision that declined to dismiss a large rate case solely because of correctable defects in the shipper's opening presentation. Pets. Br. 21-22 (quoting *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. &*

Santa Fe Ry. Co., NOR 42057, slip op. at 3-4 (STB served Jan. 19, 2005)). But the fact that the Board has general discretion to correct errors in a party's analysis says nothing about whether Congress intended to foreclose the Board from using a remedy-stage final-offer procedure, as the Board explained. *See* App. 105. Second, the railroads cite a decision characterizing rate-making as a "legislative function." Pets. Br. 22-23 (quoting *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389 (1932)). But the railroads do not explain why that matters. It sheds no light on the statute's meaning, which is what is at issue here.

3. "Full hearing"

The railroads' third putative textual hook is the "full hearing" requirement in 49 U.S.C. § 10704(a)(1): "When the Board, after a full hearing, decides that a rate . . . does or will violate this part, the Board may prescribe the maximum rate . . . ." According to the railroads, "[i]t is inherent in the nature of a 'full hearing'" that the adjudicator will not limit the range of possible remedies to the parties' proposals. Pets. Br. 27-28.

This statutory language again cannot do the work the railroads ask of it. As above, the phrase "full hearing" is vague and value-laden; it says nothing about whether Congress meant to foreclose the Board from using a final-offer procedure. *See Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424,

1439 (D.C. Cir. 1996) ("full hearing" requirement ambiguous); *see also United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 239 (1973) ("The term 'hearing' in its legal context undoubtedly has a host of meanings."). And, as above, the requirement does not even apply at the remedy stage. Although the statute states that a "full hearing" must precede the Board's rate-reasonableness finding—as it undisputedly would in a FORR case—the statute does not similarly specify that a "full hearing" must accompany the Board's imposition of a remedy. *See* 49 U.S.C. § 10704(a)(1).

The railroads provide no interpretive argument for why the Court should read the merits-stage "full hearing" requirement to preclude final-offer procedures at the remedy stage. Instead, they rely entirely on the inapposite Due Process Clause case *Morgan v. United States*, 304 U.S. 1 (1938). *Morgan* construed a different "full hearing" requirement as coextensive with the notice-and-hearing requirements of the Due Process Clause. *See id.* at 14-15. Those requirements were violated, the Court held, when an agency invalidated the defendant entities' rate schedule without giving them notice of the charges against them or an opportunity to dispute those charges. *Id.* at 18-19. But that holding has no bearing here because the railroads do not argue that the use of final-offer procedures at the

remedy stage impairs their right to respond to a complainant's presentation or to otherwise be heard. *See* App. 106.

Looking past the facts and holding, the railroads focus exclusively on *Morgan*'s statement that "Congress, in requiring a 'full hearing,' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." 304 U.S. at 19.

But this statement does not foreclose final-offer procedures, either. It merely confirms that the Court was construing the statute in line with the due process requirements for agency adjudications—i.e., the "fundamental requirements of fairness" that are "the essence of due process" in "a proceeding of a judicial nature." *Id.*; *see also Hannah v. Larche*, 363 U.S. 420, 451 (1960) (explaining that the "judicial standards" language in *Morgan* "referred to the adjudicatory nature of the proceeding"). Again, the railroads have not brought a due process challenge to the Board's use of final-offer decisionmaking, and they provide no argument or authority to suggest that such decisionmaking violates the due process standards applicable to agency adjudications generally. *See generally Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

The railroads apparently take the quoted language from *Morgan* to mean that the procedural safeguards in rate cases must equal those available in federal district court. *See* Pets. Br. 28. That would be a radical departure from modern administrative law. Only rarely does due process require agencies to provide "a hearing closely approximating a judicial trial." *Mathews*, 424 U.S. at 333. To the contrary, in informal adjudications such as rate cases, "[t]he formulation of administrative procedures is basically to be left within the discretion of the agencies." *Coal. for Fair & Equitable Regul. of Docks on Lake of the Ozarks v. FERC*, 297 F.3d 771, 780 (8th Cir. 2002); *see Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). And any procedural requirements in an agency's enabling act still receive the benefit of *Chevron*. *See, e.g.*, *Ass'n of Oil Pipe Lines*, 83 F.3d at 1439. The railroads' broad reading of *Morgan* would nullify these bedrock principles for any agencies instructed by statute to conduct a "full hearing." No court has understood *Morgan* this way, and this Court should decline the invitation to be the first.

4. "Litigation before courts"

Straining to identify a statutory "conflict," the railroads next cite an uncodified provision directing that the Board make certain efforts to expedite its rate cases—efforts that culminated in rulemakings including

FORR. *See Expediting Rate Cases*, EP 733 (STB served Nov. 30, 2017). Specifically, Congress directed the Board "to assess procedures that are available to parties in litigation before courts to expedite such litigation" and to further assess "the potential application of any such procedures to rate cases." Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 11(c), 129 Stat 2228, 2234.

The railroads assert without analysis that, "[b]ecause final-offer techniques are not used in 'litigation before courts,' they are not a permissible way for the Board to resolve rate disputes." Pets. Br. 28-29.

That argument founders on the statute's plain text. The text merely directs the Board to "assess procedures that are available to parties in litigation before courts to expedite such litigation." It does not prohibit the Board from investigating other case-expediting procedures, nor does it limit the procedures that the Board might ultimately adopt. In other words, it "represents a floor, not a ceiling for the Board's discretion." *CSX Transp.*, 754 F.3d at 1064. The only relevance of this provision to this case is that it further demonstrates Congress's desire that the Board create new expeditious procedures like FORR for adjudicating rate cases.

5. Mandatory arbitration

The railroads' final statutory argument posits that, because the Board has concluded that the statute disallows it from mandating arbitration of rate cases, *see* App. 170 & n.11, the statute must also disallow the Board from mandating procedures sometimes *used* in arbitration, including final-offer procedures, *see* Pets. Br. 29-31.

That is an enormous leap in logic, untethered to any statutory text or other mode of interpretation. It is telling that the railroads provide no citation or reasoning for the one sentence in their brief that constitutes their entire argument on this point. *See* Pets. Br. 31. The Board properly rejected it. *See* App. 103 ("The absence of statutory authority for third-party arbitrators to conduct mandatory arbitration does not prohibit the Board from adopting decisional procedures also used by arbitrators.").[5]

The railroads' *amicus* goes further, contending that final-offer decisionmaking literally "*is* a form of arbitration." Amicus Br. 6-7 (emphasis added). Because the railroads do not make this argument, the

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[5] The railroads are wrong to assert (at Pets. Br. 29-30) that the Rate Reform Task Force thought the Board would lack statutory authority to use a final-offer procedure. Although the task force opined that the Board could not mandate arbitration, it expressed no such opinion about its FORR proposal, which it said "would not involve an arbitrator." Rate Reform Task Force, *supra*, at 12.

Court need not consider it. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 826 n.6 (8th Cir. 2009). Moreover, *amicus* is wrong. As the Board explained, FORR is not arbitration because it involves no arbitrators; the only decisionmaker is the Board. *See* App. 103.

6. The railroads' extra-statutory arguments

The railroads make two additional arguments that are not linked to the statute's text or other "tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Those arguments are therefore not germane to the interpretive inquiry, which aims to ascertain the "intent *of Congress*." *Id.* at 842-43 (emphasis added). They are also unsound, as explained below.

a. The railroads discuss at length an unpublished magistrate judge opinion that has nothing to do with the Board or the statutes it administers. *See* Pets. Br. 25-27. That opinion is *Stone v. U.S. Forest Service*, No. 03-cv-586, 2004 WL 1631321 (D. Or. July 16, 2004) (magistrate judge op.). It involved the Forest Service's efforts to obtain a fair-market valuation of a parcel of land that it sought to acquire under the Columbia River Gorge National Scenic Area Act. *Id.* at *2. Because the agency did not trust the appraiser chosen by the property owner, the agency stated that it would obtain its own valuation and use whichever one was best supported. *Id.* at *3. The property owners sought a declaratory judgment that the agency's

valuation was not equal to the fair market value as appraised under specific standards required by the statute. *See id.* at *1. The magistrate judge declined to defer to agency's valuation, concluding that "nothing in the applicable statutes . . . condone[d]" the Forest Service's procedure. *Id.* at *7. Because that procedure allowed the Service to determine unilaterally the price it must pay to acquire private property from an unwilling seller, the procedure "frustrate[d]" Congress's intent in enacting the Columbia River Gorge National Scenic Area Act. *Id.* at *5, 7.

This obviously nonbinding opinion says nothing about whether the Interstate Commerce Act, as amended, forecloses the Board from using final-offer procedures at the small-case remedy stage. The answer must turn on the features of the statute: its text, structure, purpose, etc. *Stone* discusses none of those things because the Interstate Commerce Act was plainly not at issue. The railroads provide no argument why the magistrate judge's conclusions about a wholly unrelated statute applied on wholly dissimilar facts should inform this Court's analysis.

Indeed, it should not. The Forest Service's procedure in *Stone* looked nothing like FORR's procedure for selecting the maximum rate to be prescribed in a dispute between two private entities. Unlike the agency in *Stone*, the Board has broad statutory authority to decide how best to

prescribe a maximum rate. *See supra* pp. 18-19. Unlike the procedures in *Stone*, the Board's final-offer procedures will further, not frustrate, Congress's intent to make available effective small-rate-case relief. *See infra* Part I.B. And, unlike the market valuation in *Stone*, "there is no 'maximum rate to be followed' that exists independently of a Board determination in a rate reasonableness case." App. 173. *Stone* is irrelevant.

b. The railroads assert repeatedly that final-offer decisionmaking "conflicts" with the statute by allegedly "prevent[ing] the Board from exercising independent judgment." Pets. Br. 16; *see id.* 17-19, 23-25.

This is not an argument of statutory interpretation. Although the railroads make many claims about what Congress "wanted" or "expected" from the agency, *e.g.*, Pets. Br. 18, they fail to substantiate those claims with reference to the statute or other indicia of congressional intent. Without that, this rhetoric from the railroads is merely an expression of their own policy preferences. It does not move the needle on the statutory argument. (To the extent the railroads mean only to preview their claim that *no* agency can use final-offer decisionmaking because such decisionmaking is inherently unreasoned—notwithstanding that the D.C. Circuit has already upheld an instance of the Board's final-offer decisionmaking against a

reasonableness challenge, *see Union Pac. R.R. Co. v. STB*, 628 F.3d 597, 606-08 (D.C. Cir. 2010)—that argument is addressed in Part III.A below.)

Regardless, the railroads are wrong. The Board continues to exercise independent judgment in FORR cases. The Board will exercise such judgment in deciding whether the shipper has shown that the railroad has market dominance. It will again exercise independent judgment in deciding whether the shipper has shown that the challenged rate is unreasonable. And, if the case gets that far, the Board will yet again exercise such judgment in deciding which of the parties' offers best comports with the statutory factors and sound economic policy (in which case the Board imposes it as the maximum rate), or deciding that neither offer is justified (in which case the Board dismisses the case). *See, e.g.*, App. 104, 171, 176.

Although the Board has committed not to prescribe a rate other than one a party has proposed, that is not an abdication of "independent judgment." As the Board explained, all adjudications (including Stand-Alone Cost cases) necessarily rely on the parties to define the issues, develop and present the evidence, and frame the requested relief. App. 104. There is no basis to contend that a judge or agency that, as a rule, declines to award damages or issue injunctions that no party has requested has

"disclaim[ed] the role of independent adjudicator." Pets. Br. 25. And the railroads overlook that the Board's decision to restrict its discretion in this manner was itself the result of informed judgment. As explained below, the Board found that committing itself in this way would best achieve Congress's goal of resolving small rate cases in a quick and cost-effective manner. *See infra* Part I.B. The railroads offer no reason for the Court to disturb that expert policy judgment. *See id.*

Finally, contrary to the railroads' view, Pets. Br. 18, nothing in *Board of Trade v. United States*, 314 U.S. 534, 547 (1942), is at odds with FORR. In describing one particularly difficult question of ratemaking policy, the Court said that, because "[t]here was no ready answer either in law reports or in economic experience," "[a]ny solution had to rest on informed judgment." 314 U.S. at 547. In the same way, any solution to the longstanding problem of providing effective small-rate-case relief had to rest on the Board's informed judgment. That judgment produced FORR.

B. The Board's choice to use a final-offer procedure was rationally related to the goals of the statute.

The Board should prevail at the second step of *Chevron* because it gave a reasoned explanation of how final-offer decisionmaking "rationally relate[s] to the goals of the statute." *Vill. of Barrington v. STB*, 636 F.3d 650, 660 (D.C. Cir. 2011); *see, e.g.*, *Northport Health Servs.*, 14 F.4th at

872; *Mo. Hosp. Ass'n v. Azar*, 941 F.3d 896, 899-900 (8th Cir. 2019); *Ark. State Bank Com'r v. Resol. Tr. Corp.*, 911 F.2d 161, 170 (8th Cir. 1990).

The statute could hardly be clearer that one of Congress's principal policy goals was the simplified and expedited resolution of rate cases. *See, e.g.*, App. 169. The statute explicitly states that "it is the policy of the United States Government . . . to provide for the expeditious handling and resolution" of Board proceedings. 49 U.S.C. § 10101(15). It exhorts the Board to "maintain procedures to ensure the expeditious handling" of rate cases in particular, 49 U.S.C. § 10704(d)(1), and sets specific timetables that those cases must satisfy, *see* 49 U.S.C. § 10704(c), (d)(2). And for the long-intractable problem of *small* rate cases, the statute is even more direct: "The Board shall maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. § 10701(d)(3).

The Board reasonably concluded that using a final-offer procedure at the remedy stage of small rate cases would tend to encourage those cases' quick and efficient resolution, just as Congress directed. *See, e.g.*, App. 11, 14-15, 104, 105, 171-72. The railroads do not dispute this.

As the Board explained, parties in large rate cases may have come to expect that the Board would "split the difference" between the parties' arguments, prompting litigants to stake out increasingly extreme positions. *E.g.*, App. 14 & n.28, 104. To avoid this dynamic in FORR cases, the Board announced in advance that it would not take such an approach: it would grant the relief proposed by the shipper, the relief proposed by the railroad, or none at all. *E.g.*, App. 14, 171. The Board explained that this final-offer constraint would encourage parties to moderate their positions because "[a]ny final tender that is skewed too far in one direction might well result in the selection of a more reasonable final tender presented by the opposing party." App. 11 (quoting *Simplified Standards for Rail Rate Cases*, EP 646, slip op. at 18 (STB served Sept. 5, 2007)). Moderated positions would in turn facilitate private settlements, *e.g.*, *id.*, thereby "avoiding the cost and time of litigation" and effectuating Congress's goal that small rate cases be resolved quickly and cheaply, App. 107.

The Board acknowledged that a final-offer procedure would somewhat "constrain[] its flexibility," but it concluded that this constraint was "justified by the cost and time savings" that a final-offer process would achieve, App. 15, and without which captive shippers would continue to lack meaningful access to the small-case rate relief Congress directed that

they have, *e.g.*, App. 171-72. "This is not an unreasoned explanation, and [the Court should] therefore defer to it." *CSX Transp.*, 754 F.3d at 1064.

The railroads provide no contrary argument and, indeed, provide no analysis under *Chevron* step two at all. The railroads do contend that FORR is not a "method[] for determining the reasonableness of challenged rates" under 49 U.S.C. § 10701(d)(3), *see* Pets. Br. 29, 38-39, but "[i]n light of the obvious ambiguity inherent in this statutory language," *CSX Transp.*, 568 F.3d at 244, that is obviously wrong, *see* App. 103 & n.25 ("The definition of 'method' encompasses 'a procedure or process . . . .'"). The railroads' argument is also beside the point. The Board's discretion to adopt a remedy-stage final-offer procedure derives from the Board's rate-prescription power in 49 U.S.C. § 10704(a)(1) and its rulemaking power in 49 U.S.C. § 1321(a). The special rule for small rate cases in 49 U.S.C. § 10701(d)(3) operates to *restrict* that discretion by requiring that "the Board *must* provide a simplified approach for low-relief cases." *CSX Transp.*, 754 F.3d at 1064. The railroads' argument, if credited, would mean only that the Board has discretion to decline to adopt FORR, should it choose to do so. It would do nothing to dislodge the Board's general power to craft rules for rate cases, and nothing to cast doubt on Congress's clear

and undisputed preference that small-case rate relief be meaningfully available.

Because the Board's use of final-offer procedures at the remedy stage of FORR cases carries out Congress's goals and "represents a reasonable accommodation of manifestly competing interests," it "is entitled to deference." *Northport Health Servs.*, 14 F.4th at 872-73 (quoting *Chevron*, 467 U.S. at 865). The final-offer procedure is authorized by statute.

II. The Board Permissibly Relied on the Statutory Rate-Reasonableness Standard.

In designing the merits stage of FORR cases, the Board opted not to prescribe a particular methodology that shippers must use to prove the challenged rate unreasonable. App. 13. The Board instead indicated that it would rely on the statutory reasonableness standard set forth in 49 U.S.C. § 10701(d). *Id.* That standard would be explicated via adjudication of FORR cases. App. 13; *see* App. 109-10.

This approach was permissible. The Board had no obligation to spell out in advance the interpretations of the statutory standard that it would apply in future FORR cases. *See SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 201-03 (1947). Like other agencies, the Board was free to forgo rulemaking on that point in favor of "the case-by-case evolution of statutory standards" via "individual, ad hoc litigation." *Id.* at 203. "Agencies are

ordinarily permitted to choose in adjudication among permissible meanings of statutes they are charged with administering, without spelling out their interpretations beforehand through notice-and-comment rulemaking." *West Virginia v. Thompson*, 475 F.3d 204, 210 (4th Cir. 2007); *see, e.g.*, *NLRB. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 290-94 (1974); *Oiciyapi Fed. Credit Union v. Nat'l Credit Union Admin.*, 936 F.2d 1007, 1010 (8th Cir. 1991); *North Dakota ex rel. Bd. of Univ. & Sch. Lands v. Yeutter*, 914 F.2d 1031, 1036-37 (8th Cir. 1990). This is the approach the ICC historically took to ratemaking. *See supra* p. 6. It is also the approach the ICC and the Board have long taken in regulating unreasonable practices under 49 U.S.C. § 10702 and breaches of the common carrier obligation under 49 U.S.C. § 11101. *See* App. 110.

A. For this reason, the railroads' vagueness attack fails at the threshold. They say that the final rule is "unconstitutionally vague" because it fails to prescribe a substantive standard beyond the one codified in the statute. Pets. Br. 33-38. But their complaint is not that the Board promulgated a rule with vague language; their complaint is that the Board declined to promulgate a rule on this point at all. The proper lens for this argument is whether the Board abused its discretion to proceed via adjudication rather than rulemaking. *See, e.g.*, *Oiciyapi*, 936 F.2d at 1010

(rejecting vagueness attack because "[a]n agency may develop standards by adjudication as well as by rulemaking and has substantial discretion to choose which to use"; "[w]e find no abuse of that discretion"); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555-56 (4th Cir. 2012) (same); *Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 916-17 (D.C. Cir. 1982) (same). Few if any courts have ever found such abuse, and the railroads do not purport to identify any here. Indeed, the Board had good reason to elect adjudication: it fosters development of new methodologies while allowing parties to select for themselves the most cost-effective presentation. *See* App. 13. And the Board's experience with Three Benchmark and Simplified Stand-Alone Cost suggests that the problems posed by small rate cases have no one-size-fits-all solution. *See supra* pp. 9-10; App. 9-10, 13.

The railroads object that they will not know the Board's interpretation of the statutory standard when the relevant conduct occurs. Pets. Br. 34-35, 37-38. But *Chenery II* condones exactly that. It held that agencies are generally permitted to "announc[e] and apply[] a new standard of conduct" for the first time in an adjudication. 332 U.S. at 203. That was true even though the standard in question did not exist at the time of the regulated conduct, and did not even exist until after the agency had already

decided the case and seen its decision vacated and remanded by the Supreme Court. *See id.* at 198-99; *see also Indep. U.S. Tanker Owners Comm.*, 690 F.2d at 916-17 (rejecting argument that agency rule "afford[ed] no guidance" to interested parties because agency "was not legally obliged to limit its discretion through rulemaking at all").

The railroads further object that they will be unable to determine which evidence is relevant during discovery. Pets. Br. 35-36. The legal import of that argument is unclear, but the Board addressed it in any event. The Board noted that discovery occurs successfully in other types of cases without a prescribed methodology. App. 178. Parties to a FORR case can use the discovery process to learn about each other's proposed methodologies. *See* App. 12. Discovery requests must be accompanied by an explanation of relevance. App. 178-79. And the final rule provides a mechanism for resolving discovery disputes, App. 112-13, so railroads will not need to "produc[e] vast amounts of [irrelevant] confidential information out of an abundance of caution," Pets. Br. 35.

Without citing authority, the railroads next assert that prescribing a particular methodology would better facilitate settlements, Pets. Br. 36, a sentiment *amicus* echoes, Amicus Br. 12-14, 20-21. But this policy argument has no bearing on whether the final rule is unconstitutionally

vague. And the Board gave a reasoned explanation for rejecting it. Because AAR failed to support its one-sentence assertion with evidence or reasoning, *see* App. 67, the Board instead credited the evidence supporting the opposite prediction, *see* App. 107 n.37. This choice among competing policy views was not an abuse of discretion. *E.g.*, *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *see also Mozilla Corp. v. FCC*, 940 F.3d 1, 50 (D.C. Cir. 2019) ("Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.").

The railroads lastly claim that the D.C. Circuit forbids agencies from explicating legal standards in common-law fashion via adjudications. Pets. Br. 38. That is wrong. *See, e.g.*, *Grace v. Barr*, 965 F.3d 883, 895 (D.C. Cir. 2020) ("[W]e have often recognized that agencies can and do announce new policies in adjudications."); *Shays v. FEC*, 528 F.3d 914, 930 (D.C. Cir. 2008) (agency can "flesh out its rules through adjudications"). The language the railroads quote, which the D.C. Circuit has never applied as the rule of decision in a case and has acknowledged to be "dicta," *AAR*, 146 F.3d at 946, means at most that "[a] substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking," *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d

579, 584 (D.C. Cir. 1997). The final rule does not purport to establish substantive standards in this regard, so that passage from *Paralyzed Veterans* is inapplicable.

B. Even if the Court were to apply the void-for-vagueness framework, the railroads' argument would still fail. Because the final rule merely incorporates the statutory standard, the railroads would need to demonstrate that the statute itself is unconstitutionally vague. They do not attempt to make that showing, nor could they. Non-criminal economic laws that do not implicate constitutional rights are subject to the least stringent vagueness review, *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982), and "the case law is replete with decisions rejecting vagueness challenges" to the word "reasonable," *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 42 (D.D.C. 2016) (collecting cases), particularly where the language has been subject to common law development, *id.* at 43, as this language long has been, *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 501 (1897). Invalidating 49 U.S.C. § 10701(d) would nullify a century of ICC ratemaking and throw numerous other ratemaking statutes into question. Regardless, the Board's rules provide sufficient guidance. *See* App. 178 (describing railroad conduct likely to cause rates to be found unreasonable); App. 110

(enabling FORR defendants to rely on "existing rate review methodologies"). Section 10701(d) is not unconstitutionally vague.

III. The Final Rule Is Not Arbitrary.

The final rule was reasonable and reasonably explained. This is a deferential standard, particularly in the rate context where the Board acts "at the zenith of its powers." *Burlington N. R.R. Co. v. STB*, 114 F.3d 206, 210 (D.C. Cir. 1997); *see BNSF Ry. Co. v. STB*, 526 F.3d 770, 776 (D.C. Cir. 2008). A reviewing court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). As long as the agency's path can be reasonably discerned and yields a rational explanation, "a reviewing court cannot disturb it." *Nat'l Wildlife Fed'n v. Whistler*, 27 F.3d 1341, 1344 (8th Cir. 1994); *accord Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

A. Final-offer decisionmaking is not inherently unreasoned.

1. The railroads first assert that the final rule "will prevent the Board from engaging in reasoned decisionmaking" under *State Farm* in cases where neither party's offer represents "the legally correct outcome." Pets. Br. 40-41. The railroads appear to concede, however, that there is no

"legally correct outcome" existing in the abstract, separate from any Board processes. *See* Pets. Br. 25; *see also* App. 173. What the railroads apparently mean to claim, instead, is that final-offer procedures violate *State Farm* if neither party offers the rate that "the Board would have chosen on its own." Pets. Br. 25; *see id.* at 40-41.

Even as amended, this broad, novel claim finds no support in caselaw. It is true that an agency must articulate "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. But there is no reason why final-offer procedures would make it impossible to meet that requirement. In a final-offer case, the task is to choose which of two options best achieves a certain set of goals. *E.g.*, App. 171. An agency might go about that task arbitrarily (e.g., by picking an offer out of a hat) or rationally (e.g., by comparing the offers' features to determine which one best achieves the goals). The latter, rational course is what *State Farm* requires.

Indeed, the D.C. Circuit has confirmed that final-offer decisionmaking can be rational, even when neither offer represents what the agency would have chosen. In *Union Pacific Railroad Co. v. STB*, 628 F.3d 597, 606-08 (D.C. Cir. 2010), the court upheld the Board's application of its Three Benchmark framework for small rate cases against a

reasonableness challenge. As explained above, the comparison group in Three Benchmark is generated through a final-offer process. *See id.* at 600-01, 604-05; *supra* pp. 8-9. The Board chose the shipper's offer and found the rate unreasonable. 628 F.3d at 599, 604.

On appeal, the Board's final-offer decision "easily" met the *State Farm* standard. *Id.* at 607. Even though "neither [offer] was ideal," *id.* at 599, the Board still compared them and identified certain features that made the shipper's offer the "least undesirable," *id.* at 605; *see id.* 602-04. This explanation "articulated a rational connection between the facts found and the decision made." *Id.* at 600. So "[t]he Board's decision, being rationally based on the facts presented, was not in error." *Id.* at 608. This holding directly contradicts the railroads' position.

The railroads would distinguish Three Benchmark on the ground that, in that framework, "the final offer procedure is but one component of the overall methodology." Pets. Br. 31. But the final-offer component of Three Benchmark is typically dispositive of the maximum reasonable rate. *Union Pac.*, 628 F.3d at 601. And even if it were not, the *Union Pacific* decision still rebuts the railroads' unsupported claim that final-offer decisionmaking is inherently incompatible with *State Farm*.

2. The railroads also argue that a narrow, hypothetical subset of cases would be unresolvable under FORR. Pets. Br. 41-42. Specifically, they have in mind a scenario wherein (1) the shipper's offer is below the Board's statutory minimum for rate prescriptions and (2) the railroad's offer is equal to or higher than the challenged rate that has been found unreasonable. *Id.* at 42. But the Board already addressed this: that shipper's complaint would be dismissed for lack of an adequately supported offer without a decision on the merits. App. 175.

The railroads respond that this is impossible because "the Board would not even consider the shipper's final offer" until after assessing the challenged rate on the merits. Pets. Br. 42. But the final rule is clear. "If a complainant fails to submit explanation and support for its offer, the Board may dismiss the complaint *without determining the reasonableness of the challenged rate*." 49 C.F.R. § 1111.10(a)(3)(v) (emphasis added). No matter the order of issues in the Board's written decisions, there is no reason the Board could not begin its deliberations by confirming that the offer is valid and dismissing the case if it is not. This purported defect in the final rule was adequately explained.

B. The Board adequately explained the relief cap.

The railroads next contend that the Board failed to justify its departure from a "longstanding policy" when setting the $4 million relief cap for FORR. Pets. Br. 43-46.

The "longstanding policy" the railroads have in mind is the approach that the Board used to set the relief caps for Three Benchmark and the original version of Simplified Stand-Alone Cost. Those relief caps were "based on [the Board's] estimates of the litigation cost to pursue relief under the next more complicated[] and more precise method." *Simplified Standards*, slip op. at 28.

The Board acknowledged this previous approach in enacting FORR, but gave two reasons for not following it:

First, the Board deemed the earlier approach inapt: Because FORR does not specify any particular rate-reasonableness methodology, it has no fixed place in the hierarchy of procedures ordered from "least complicated" to "most complicated" or from "least precise" to "most precise." *See* App. 14-15. A FORR case might involve a methodology that is less complicated and less precise than Three Benchmark, but it might not. So the Board concluded that the prior approach organizing the procedures this way "d[id] not necessarily or neatly apply." App. 15.

Second, with no applicable precedent to go by, the Board decided to assign FORR a relief cap of $4 million, the same as the cap for Three Benchmark. *Id.* The Board found this mirrored approach appropriate because both procedures are intended to apply to the smallest category of rate cases. *Id.*

Although agencies must acknowledge departures from prior policies, they generally do not need to provide any different or greater degree of justification than would have been necessary to sustain the new policy if enacted on a blank slate. *E.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Air Transp. Ass'n v. Nat'l Mediation Bd.*, 663 F.3d 476, 484 (D.C. Cir. 2011). To the extent that principle applies here, the Board met its obligation: it acknowledged the departure and gave the requisite "blank slate" justification in the form of the second rationale. Reasoned decisionmaking does not require more.

The railroads' attack on the first rationale is meritless in any event. The Board reasonably concluded that the prior approach did not neatly or necessarily apply because (a) the prior approach indexed small-case procedures by complexity and precision and (b) FORR's complexity and precision would vary from case to case. App. 15. The railroads call this reasoning "pure speculation," Pets. Br. 45, but they say nothing to call it

into doubt. It is difficult to know what the railroads think the problem with the first rationale even is. *See id.* Especially given the "particular deference" owed the Board in this context, *e.g.*, *Union Pac.*, 628 F.3d at 607, that is not enough.

The attack on the Board's second rationale also fails. The Board reasonably explained that it set FORR's relief cap equal to Three Benchmark's because the Board desired as a policy matter that both procedures cover the same class of cases (i.e., the smallest ones). App. 15. The railroads say this is not a valid reason to change policy because "there would be no limiting principle"; the Board could just as easily remove the relief cap altogether on the ground that it would be desirable as a policy matter for FORR to cover *all* rate cases. Pets. Br. 46. But the "limiting principle" in that case would be the Board's duty to explain and defend its policy view that FORR should apply to all cases. Here, by contrast, the railroads have not challenged the reasonableness of the Board's policy determination that FORR and Three Benchmark should apply to the same class of small cases. Again, "the agency need not demonstrate 'that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible.'" *Ass'n of Oil Pipe Lines v. FERC*, 876 F.3d 336, 342 (D.C. Cir. 2017) (quoting *Fox*, 556 U.S. at 515).

Because the second rationale explains the reasons for the new approach—and because the railroads cast no doubt on those reasons—the railroads have failed to show error in the Board's selection of FORR's relief cap.

C. The Board adequately addressed the railroads' expressed concerns about "undue coercion."

Finally, the railroads contend that the Board "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, by supposedly "fail[ing] to recognize that FORR is unduly coercive to railroads," Pets. Br. 46; *see id.* at 46-51. But the railroads go on to describe only policy considerations that the Board considered and rejected, or actually accommodated, in the final rule. They simply disagree with how the Board "balance[d the] inherently incommensurable costs and benefits" of a final-offer procedure. *BNSF*, 526 F.3d at 776. "That kind of judgment call . . . falls within the expertise of the agency, and [the Court should] not disturb it." *Id.*

1. The principal concern cited by the railroads is that, under their understanding of FORR as initially proposed, a railroad would effectively be forced to choose between defending the reasonableness of the challenged rate or submitting a viable final offer. *See* Pets. Br. 46-47. That was because the railroads thought that submitting an offer lower than the challenged rate would amount to a concession that the challenged rate was

unreasonably high. *Id.* The railroads say this choice would "pressure[] [them] to concede unreasonableness" and "surrender their constitutional and statutory rights to defend their challenged rate." *Id.* at 48.

But the Board did not ignore this problem. It fixed it. Hearing the railroads' concerns, the Board clarified in the final rule that "a carrier does not concede unreasonableness by submitting an offer that is lower than the challenged rate." App. 176. "[C]arriers are free to argue 'in the alternative'" and submit an offer and supporting analysis that "assum[e] that the challenged rate has already been found unreasonable." *Id.*

The railroads' objection persists on appeal only because they refuse to take the Board at its word. They write that a railroad that submits and justifies an offer that is lower than the challenged rate "will obviously and necessarily" undermine its case on the merits. Pets. Br. 47. But the Board made clear that that would not be so; that is what it means to "argue in the alternative," as the Board said the railroads "are free to [do]." App. 176. The Court should not vacate the final rule based on unfounded speculation that the Board will fail to abide by it.

2. The railroads also contend that FORR "unduly coerces" them because they "do not face the same risks" as shippers do in deciding whether to settle FORR cases. *See* Pets. Br. 47-49. Their brief is not

entirely clear on this point, but it appears to identify two ways in which they claim that the risks of an adverse Board decision are asymmetric.

First, the railroads say that FORR exerts unequal pressure on railroads "because the range of outcomes" in a FORR case is "limited to either the status quo or a rate reduction." Pets. Br. 48. In other words, the defendant in a FORR case risks damages or a prescription order, whereas for the plaintiff shipper, the worst-case scenario is more-or-less the status quo (minus the costs of litigation).

The Board acknowledged this asymmetry but appropriately declined to set aside FORR on that basis. *See* App. 176. As the Board explained, that asymmetry is a consequence of the fact that the Board regulates railroads, not shippers, and it exists in "all of the Board's [rate-case] processes." *Id.* "The fact that potential carrier risk is greater than potential shipper risk in a FORR case, however, does not mean that it would be improper or unfair for the Board to adopt FORR." *Id.* That logic would disable the Board from hearing rate cases at all. *See id.* Even if parties in final-offer litigation face different settlement incentives than do final-offer participants in non-litigation contexts, the Board "weighed the competing considerations and determined that FORR would [still] provide sufficient benefits" to justify its adoption. App. 107, 176.

On appeal, the railroads have no real response to the Board's analysis. They say that "[the fact t]hat the Board does not regulate shipper conduct does not mean railroads lack the right to an even-handed process that achieves fair results without coercion." Pets. Br. 49. But that ignores the substance of what the Board said. The Board's point was that some degree of this type of "coercion" is inherent in any rate case (and in any lawsuit generally). Simply observing that it exists in FORR, which is all the railroads did, was not a persuasive reason to forgo FORR's expected benefits. *See* App. 107, 176.

The second reason that the railroads say they face greater risks than shippers do in declining to settle FORR cases is that "[r]ailroads will be pressured to concede unreasonableness" because, if they do not do so and they lose, "the Board will be forced to choose [the shipper's] offer[]." Pets. Br. 48. But this is just a restatement of the "forced choice" concern above, which the Board adequately addressed. *See supra* pp. 52-53. Although the railroads argue that other rate-case procedures do not exact this same choice, *see* Pets. Br. 49, that is immaterial because FORR, as clarified in the final rule, does not do so either, *see* App. 176.

The railroads' *amicus* raises a different purported risk-asymmetry—not in the risk of an adverse Board decision, but in the risk of submitting

extreme offers. Amicus Br. 14. According to *amicus*, shippers "have no incentive" to submit high offers because "[t]hey face a no-lose situation": the Board will never prescribe a rate higher than the challenged rate. *See id.* But that view ignores the fact that, if the case reaches the offer-selection stage, the challenged rate *will have already been found unreasonable*. *See* App. 176. The range of viable offers thus extends from the lowest possible prescription (180% of variable costs) to a rate just below the challenged one. Both parties have incentives to avoid the extreme that is least favorable to them, *e.g.*, App. 11, and *amicus* cites no reason why those incentives will be systematically greater for the railroads than the shippers.

Shippers also face risks in submitting extreme offers, as the railroads' own example illustrates. The railroads posit a scenario wherein the shipper's offer is $25 and the railroad's is $100. *See* Pets. Br. 47. Although they do not say what the challenged rate was, *see id.*, it was presumably greater than $100. Thus, even if the Board in that scenario were to determine that the "ideal" rate it would have chosen on its own is $99, *see* Pets. Br. 25, 47, the Board could well choose *the railroad's* offer of $100 because that is the closer number. *See, e.g.*, App. 176 (Board will "select the offer that best accomplishes the Board's statutory and economic goals"). Contrary to the railroads' assertion, Pets. Br. 47-48, nothing in 49 U.S.C.

§ 10701(d)(2) would per se prohibit that selection because finding that $99 is the rate the Board would have chosen absent a final-offer constraint is not the same as finding all higher rates unreasonable. The shipper's lowball $25 bet that the railroads hypothesize here simply would not have paid off.

3. The last two paragraphs of the railroads' opening brief, which are copied nearly verbatim from AAR's opening comment, cannot show that the Board's decisionmaking was unreasoned because they fail to address the Board's decision at all. *See, e.g.*, *State Farm*, 463 U.S. at 43 (arbitrary-and-capricious review depends on the content of the agency's explanation). *Compare* Pets. Br. 49-51 *with* App. 71-72. Any objections to the Board's responses to those paragraphs were not included in the railroads' opening brief and thus are now waived. *See, e.g.*, *McChesney v. FEC*, 900 F.3d 578, 587 n.3 (8th Cir. 2018). On these and other issues on which the railroads "were obscure . . . in their opening brief," the Court should not allow the railroads to "sandbag[]" the agency by articulating a clear line of argument only upon reply. *CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014) (quoting *Novak v. Cap. Mgmt. & Dev. Corp.*, 570 F.3d 305, 316 n.5 (D.C. Cir. 2009)); *accord Hot Stuff Foods, LLC v. Houston Cas. Co.*, 771 F.3d 1071, 1080 n.5 (8th Cir. 2014).

In any event, the Board did not "entirely fail[] to consider" AAR's miscellaneous concerns. *State Farm*, 463 U.S. at 43.

First, AAR complained that FORR as initially proposed did not include "a back-and-forth process of negotiation," such as "mandatory mediation." App. 71. But the Board responded that final-offer procedures function in Canada without such a process, App. 105 n.32, and adopted mandatory mediation to facilitate such negotiations anyway. *See* App. 114. Apparently satisfied, AAR did not repeat this complaint in its supplemental comment. *See* App. 139-41.

Second, AAR projected that FORR settlements would become future comparators, "driving railroad pricing down." App. 71-72. But, as the Board explained, *any* small-rate relief would have that effect. App. 108. Although AAR responded that FORR's downward force would be "more severe," App. 142, the Board reasonably rejected that claim as unsupported, App. 177, and the railroads do not repeat it here, *see* Pets. Br. 50.

Third, AAR called FORR's expedited schedule "inadequate" because shippers will have "as much time as they wish" to prepare a complaint before filing. App. 72. But the Board responded that (1) that asymmetry exists to some extent in any litigation; (2) short discovery deadlines could benefit railroads, which hold virtually all the relevant information; and (3)

any burden on defendants from an expedited schedule was offset by the benefits to the shipper of a speedy decision. App. 113. And the Board accommodated AAR's concern anyway by extending the discovery deadlines and having them tolled during motions to compel. App. 113-14. AAR's supplemental comment merely repeated the same arguments on this point, *see* App. 140-41, and the Board rejected them for the same reasons, App. 179, which the railroads still do not challenge, *see* Pets. Br. 50.

The railroads have therefore failed to demonstrate that the Board "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, or otherwise failed to provide a reasoned explanation for FORR.

CONCLUSION

The Court should deny the petitions for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Drew Van Denover, hereby certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, using the Microsoft 365 version of Microsoft Word, in 14-point Georgia font.

3. This brief and addendum comply with 8th Cir. R. 28A(h)(2) because they have been scanned for viruses and have been determined to be virus-free.

/s/ Drew Van Denover

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June 16, 2023

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I electronically filed the foregoing Respondents' Joint Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system and that the participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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