No. 17-1002

In the Supreme Court of the United States

UNITED STATES OF AMERICA

v.

UNION PACIFIC RAILROAD COMPANY

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY

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QUESTION PRESENTED

Did the Eighth Circuit correctly hold that corporate stock is a not a "form of money remuneration" taxable under the Railroad Retirement Tax Act, 26 U.S.C. § 3201 *et seq*.?

RULE 29.6 STATEMENT

Respondent Union Pacific Railroad Company has one parent corporation—Union Pacific Corporation—which is publicly held and owns 100% of Respondent's stock.

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BRIEF OF RESPONDENT

In the decision below, the Eighth Circuit became the first court of appeals to hold that corporate stock a railroad transfers to its employees is not, and never has been, taxable under the Railroad Retirement Tax Act because corporate stock is not, and never has been, a "form of money remuneration." See Pet. App. 2a–14a; see also 26 U.S.C. § 3231(e). The Eighth Circuit's correct interpretation of the RRTA opened up a split with the Fifth and Seventh Circuits. The Seventh Circuit case got here first, and in that case, *Wisconsin Central Ltd.* v. *United States*, No. 17-530, this Court is poised to resolve the split.

Union Pacific agrees with the United States that this case should be held for *Wisconsin Central*. See Pet. 8. Both cases hinge on the meaning of the phrase "any form of money remuneration" in the RRTA. Yet the two cases are different in key respects. How the Court should dispose of the government's petition in this case depends on how the Court decides *Wisconsin Central*. If the Court reverses in *Wisconsin Central* and holds, as the Eighth Circuit held, that stock is not a "form of money remuneration," the Court should deny the government's petition and leave the Eighth Circuit's judgment intact. If, however, the Court affirms in *Wisconsin Central*, the Court should remand and give the Eighth Circuit an opportunity to consider whether the differences between this case and *Wisconsin Central* warrant preserving some or all of Union Pacific's victory on its refund claims.

STATEMENT

1. Economics teaches that employee ownership of company stock aligns employees' interests with stockholders' interests, helping companies prosper. Many companies, whether publicly traded or privately held, therefore run programs so their employees can acquire corporate stock directly from the company. Railroads have done so since the 1800s.

Over the years, Union Pacific has maintained several programs to facilitate employee ownership of company stock. These programs are not just for executives. For instance, in 1998, Union Pacific granted options to virtually every employee.

Some of Union Pacific's stock programs transfer stock without any cost to the employees. Under those programs, employees receive either (1) shares of stock that cannot be transferred until a specified condition is met or (2) a promise that Union Pacific will transfer shares of stock when a specified condition is met. (These are called restricted stock and restricted stock units, respectively.) Either way, when the condition is met, employees possess unrestricted stock, which they may retain or transfer however they please. An employee who chooses to sell his or her unrestricted stock must sell it on the open market; Union Pacific does not purchase or repurchase shares directly from employees. See Pet. 3–4; Pet. App. 22a–24a; see also CA App. A55, A65–67.

Other Union Pacific stock programs transfer stock to employees via options. Under these programs, employees get a nontransferable contract right to purchase a specific number of shares at a preset price during a predetermined window of time. The option price (or "strike price") equals the market

price on the date the option is granted, and the exercise period runs between one and ten years after the grant date. It is up to employees to exercise their stock options. If they don't, the options expire and employees get nothing from Union Pacific (and, in the past, hundreds of employees have let options for hundreds of thousands of shares expire). Employees who exercise their options use their own resources to buy stock directly from Union Pacific. Some then sell their stock right away; others keep it. The choice is theirs. See Pet. App. 18a–22a; see also CA App. A58–60.

2. Union Pacific has long believed that none of the stock it transfers to employees—not restricted stock, not restricted stock units, and not stock sold via options—qualifies as a "form of money remuneration" under the RRTA. Stock is not a form of money. Nevertheless, to protect its employees and itself from being pursued by the IRS for alleged underpayment, Union Pacific withheld (for employees) and paid (for itself) RRTA taxes on its stock transfers. See Pet. App. 20a.

Since at least 1991, Union Pacific has asked the IRS to refund the RRTA taxes that the company and its employees paid on stock transfers. See Pet. App. 17a–20a. It took the IRS years to finish examining the relevant tax returns, and it was not until 2012 that the IRS finally denied Union Pacific's refund requests for the 1991 through 2007 tax years.

3. After the IRS's denial, Union Pacific brought this action for refunds of a small fraction of the RRTA taxes that Union Pacific and its employees paid between 1991 and 2007. Out of $20 billion in RRTA taxes paid over those years, Union Pacific seeks a refund of about $75 million—about □ of 1%

of the total RRTA taxes paid. Roughly, that sum represents about $55 million for stock transfers and about $19 million for payments Union Pacific made to union members whose unions ratified collective bargaining agreements. (The government states that it is not seeking further review of the Eighth Circuit's holding that those ratification payments are not taxable under the RRTA. See Pet. 4 n.2. So, no matter how the Court answers the question presented, that portion of the lower court's judgment must remain intact.)

The district court dismissed Union Pacific's claims, holding that stock is a "form of money remuneration" for RRTA purposes. Pet. App. 49a. A panel of the Eighth Circuit unanimously reversed the district court's misinterpretation of the RRTA and remanded the case for the district court to calculate the refunds owed. Pet. App. 16a. After the court of appeals denied the government's petition for rehearing, and after this Court granted certiorari in *Wisconsin Central*, the United States petitioned for certiorari, asking the Court to hold this case for *Wisconsin Central*.

ARGUMENT

Because this case presents basically the same question of statutory interpretation as *Wisconsin Central*, the government's petition in this case should be held for *Wisconsin Central*. How to dispose of the petition after *Wisconsin Central* depends on how the Court decides *Wisconsin Central*.

On the merits, the Court should side with the railroads in *Wisconsin Central*. Wisconsin Central, its affiliates, and its amici (one of whom is Union Pacific) persuasively argue that the text, history, and

purpose of the RRTA all show that corporate stock is not, and never has been, a "form of money remuneration" subject to RRTA taxation. The Fifth and Seventh Circuits' contrary decisions break basic rules of statutory interpretation and are based on misunderstandings of how stock options work. If this Court rejects those courts' holdings and sides with the Eighth Circuit, the Court should deny the government's petition in this case.

However, if the Court rules for the government in *Wisconsin Central*, the Court in this case should not outright reverse the Eighth Circuit's judgment on Union Pacific's stock-related refund claims, but should only grant, vacate, and remand for further proceedings. For, despite the similarity of the questions presented in both cases, Union Pacific's case is factually different from Wisconsin Central's. For example:

- Whereas Wisconsin Central transferred stock to employees *only* via stock options, Union Pacific transferred stock to employees *both* via stock options *and* via direct grants of restricted stock and restricted stock units, for which employees paid nothing.
- Whereas Wisconsin Central seeks refunds for RRTA taxes paid between 2006 and 2013, Union Pacific seeks refunds for RRTA taxes paid between 1991 and 2007. While the key statutory language "any form of money remuneration" hasn't changed since it was enacted in the 1930s, other parts of the RRTA changed between 1991 (the earliest year for which Union Pacific seeks refunds) and 2006 (the earliest year for which Wisconsin Central seeks refunds), like the 2004 amendment adding Section 3231(e)(12), an exclu-

sion for "remuneration on account of" sale or disposition of stock acquired via qualified stock options. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 251(a), 118 Stat. 1418 (2004); see also 26 U.S.C. § 3231(e)(12). Also between 1991 and 2006, the IRS repudiated its prior interpretation of Section 3231(e) and promulgated a new one that has applied since the 1993 tax year. See 59 Fed. Reg. 66,188 (Dec. 23, 1994); see also 26 C.F.R. § 31.3231(e)-1. In other words, Wisconsin Central's refund claims arose *after* relevant legislative and administrative activity, but Union Pacific's claims arose *before* it.

The factual differences between Union Pacific's case and Wisconsin Central's might warrant preserving some or all of Union Pacific's victory below even if the Court rules against Wisconsin Central. Given the Eighth Circuit's greater familiarity with the record in this case, that court will be better positioned to decide whether the differences between the cases matter.

CONCLUSION

If the Court holds in *Wisconsin Central* that stock is not a "form of money remuneration," the government's petition for certiorari in this case should be denied. If the Court holds in *Wisconsin Central* that stock is a "form of money remuneration," the Court should vacate only the portion of the Eighth Circuit's judgment that addresses Union Pacific's refund claims for stock transfers (leaving intact the portion addressing ratification payments), and should remand for further proceedings in light of *Wisconsin Central*.

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