No. 17-530

In the Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF NORFOLK SOUTHERN CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

M. Miller Baker
Counsel of Record
David R. Fuller
Sarah P. Hogarth
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com
Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

Norfolk Southern Corporation ("Norfolk Southern") is one of the nation's premier transportation companies, tracing its roots to the earliest days of American railroading. Its earliest predecessor, the South Carolina Canal and Railroad Company, was chartered in 1827, becoming one of the first railroads in America.

Norfolk Southern operates 19,500 railroad miles in 22 states and the District of Columbia, serves every major container port in the eastern United States, and provides efficient connections to other rail carriers. Norfolk Southern operates the most extensive intermodal network in the eastern United States and is a major transporter of coal, automotive, and industrial products.

Norfolk Southern employed an average of 28,044 people in 2016. In 2011, less than 5 percent of Norfolk Southern's remuneration to its employees was in the form of stock. Norfolk Southern disagrees with respondent's position on the proper treatment of stock payments under the Railroad Retirement Tax Act ("RRTA"). Rather than face Internal Revenue Service ("IRS") enforcement, collection, and penalty actions, Norfolk Southern has instead timely paid such disputed RRTA taxes on stock remuneration while it has long sought refunds for itself and its employees for those overpayments made contrary to

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[1] No counsel for any party authored this brief in whole or in part nor did any party make a monetary contribution to the brief. Petitioners and respondent consented to the filing of this brief.

the RRTA. The Court's decision in this case will have far-ranging effects on Norfolk Southern's past, present, and future tax liability.

STATEMENT

1. The railroad industry was the first to implement private employer pension plans, resulting in coverage of more than 80 percent of railroad workers by employer-sponsored pensions by the late 1920s. Railroad employees received considerable nonmonetary benefits, including lodging, food, and transportation, as a result of their employment with the railroads. Railroad employers, however, did not use these nonmonetary benefits to calculate an employee's pensionable compensation, basing these amounts instead on the employee's salary or base pay.

In the 1930s, the Great Depression aggravated an underfunding crisis in railroad pension plans. To protect the hard-earned pensions of railroad employees, Congress enacted a single railroad-specific scheme to federalize the then-existing plans. Congress funded the retirement benefits payable under the Railroad Retirement Act of 1937 ("RRA"), Pub. L. No. 75-162, 50 Stat. 307, through a payroll tax enacted in what is now the Railroad Retirement Tax Act or RRTA. *See* Carriers Taxing Act of 1937, Pub. L. No. 75-174, 50 Stat. 435; 26 U.S.C. § 3231(e).

Consistent with the then-existing railroad pension plans, the RRTA defined pensionable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." *See* Carriers Taxing Act of

1937, Pub. L. No. 75-174, 50 Stat. 435, 436; 26 U.S.C. § 3231(e)(1). The definition did not include the substantial nonmonetary benefits railroad employers provided their employees.

2. Unlike railroad retirement, the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), was not designed to secure a pre-existing pension system on the verge of failure but was instead designed as an entirely new social system to provide retirement benefits in the future. Social Security's funding was achieved through a payroll tax known as the Federal Insurance Contributions Act ("FICA") tax. *See* 26 U.S.C. § 3101 *et seq.* The FICA tax swept far more broadly than the RRTA tax, extending to "wages" defined as "all remuneration . . . including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a).

Railroad employees were purposefully excluded from the Social Security system in light of their unique retirement-benefit system. In fact, almost 50 percent of the American workforce was originally excluded from the Social Security system, including domestic service and agricultural employees. William J. Nelson, Jr., *Employment Covered Under the Social Security Program 1935–84*, 48-4 Soc. Sec. Bull. 33, 33 (1985). These employees were excluded from Social Security because they, like railroad workers, received substantial nonmonetary compensation in the form of lodging, meals, and other benefits that were administratively difficult to calculate. Subsequent changes to Social Security brought domestic service and agricultural workers within the

fold but excluded all forms of nonmonetary compensation from FICA's reach.

It was not until the 1990s—nearly 60 years after the RRTA's passage—that the IRS took the position that RRTA "compensation" and FICA "wages" are coterminous. The IRS based this interpretation on a 1994 regulation providing that RRTA "compensation" has "the same meaning" as "wages" under FICA "except as specifically limited by the Railroad Retirement Act." *See* 26 C.F.R. § 31.3231(e)-1(a)(1).[2]

Norfolk Southern agrees with petitioners that the plain language of both the RRTA and the regulation mandates otherwise. Were there any doubt, however, the historical circumstances surrounding the RRTA's conception and enactment confirm the petitioners' reading. *E.g.*, *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012) (finding it "telling" that the statute's drafting history "confirms what we have concluded from the text alone").

SUMMARY OF THE ARGUMENT

1. Before enactment of the RRA and RRTA, the majority of railroad employees received private pension benefits from their railroad employers. These private pension plans calculated benefits based on an employee's base pay or salary. The plans did not include stock or other nonmonetary benefits, such as lodging or meals, in their pensionable compensation.

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[2] Before the IRS issued the regulation in 1994, a Senate bill proposed modifying the definition of "compensation" under the RRTA to conform to the definition of "wages" under FICA, but the bill never left the Finance Committee. *See* Economic Growth Act of 1992, S. 2217, 102d Cong., tit. XLI.

When Congress federalized railroad retirement benefits to protect the pre-existing railroad pensions, it preserved the railroads' treatment of nonmonetary remuneration, limiting "compensation" only to "money remuneration" and excluding the substantial nonmonetary benefits, including stock, that railroads provided to their employees.

2. Separate and apart from its preservation of pre-existing railroad pensions, Congress enacted the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), to provide future old-age insurance benefits to American workers more generally. To fund Social Security, Congress imposed a tax, known as FICA, on "*all* remuneration." But Congress was forced to exclude a large swath of American workers from Social Security's reach. In particular, domestic service and agricultural workers were excluded from Social Security due to difficulties in defining their FICA "wages" in light of their receipt of substantial nonmonetary benefits, including housing and meals.

Two decades later, Congress brought domestic service and agricultural employees into the Social Security program. But to remedy the administrative difficulties, Congress limited FICA's otherwise more broad "all remuneration" to "cash remuneration," including monetary media of exchange, for these two groups. Thus, to the extent that the FICA regime informs the meaning of the separate and distinct RRTA tax, FICA's treatment of domestic service and agricultural employees—who, like railroad employees, receive considerable nonmonetary remuneration from their employers—confirms petitioners' reading. Like Congress's limitation for domestic service and

agricultural workers, its limitation to "money remuneration" for railroad employees should likewise be upheld.

ARGUMENT

I. The History Surrounding The RRTA's Enactment Demonstrates That "Money Remuneration" Does Not Extend To Stock

As detailed below, by the late 1920s, a substantial majority of railroad employees were covered by employer-sponsored pension plans that offered retirement benefits tied to employees' base pay. The railroad pension plans, however, were massively underfunded, a condition aggravated by the Great Depression. To protect the railroad pensioners' benefits, Congress adopted a comprehensive legislative solution to federalize the railroad pensions, including their calculation based on base pay.

A. Before The RRTA's Enactment, Railroad Employee Pensions Were Tied To Regular Pay, Base Pay, Or Base Salary

The first private pensions plans in the United States were created by railroads for railroad workers. *See* U.S. Gov't Accountability Off., GAO-18-111SP, The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security 1 (2017); U.S. R.R. Ret. Bd., The Railroad Retirement System: Its First Seventy-Five Years 1 (2010), https://www.rrb.gov/sites/default/files/2017-05/NR1004.pdf.

In 1875, "[t]he American Express Company, a railroad freight forwarder, established the first pri-

vate pension plan in the United States in an effort to create a stable, career-oriented workforce." U.S. Gov't Accountability Off., *supra*, at 114. American Express pioneered a "noncontributory plan," meaning a pension to which employees were not required to contribute. *Id.* In 1880, the Baltimore & Ohio Railroad "established the second U.S. private pension plan, a contributory plan." *Id.* Thereafter, the Pennsylvania Railroad, Chicago & North Western, and Illinois Central railroads followed suit, establishing their own private pension plans. *Id.*

By the late 1920s, "more than 80 percent of railroad workers were employed by companies with existing pension plans." Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68-2 Soc. Sec. Bull. 41, 41 (2008); *see also* U.S. R.R. Ret. Bd., *supra*, at 1. By the end of 1927, the railroad industry accounted for 42 percent of the estimated 4,000,000 American employees covered by private pension plans. *See* Murray W. Latimer, *Old Age Pensions in America*, 19 Am. Lab. Legis. Rev. 55, 61 (1929). The next most-covered industries—public utilities other than railroads and metal products—accounted for only 17 percent of covered employees a piece. *Id.*

Murray Latimer (one of the primary drafters of the Social Security Act and the first Chairman of the Railroad Retirement Board ("RRB"))[3] authored a two-volume treatise focusing on the growth and future of industrial pension plans in America. *See*

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[3] *See Murray Latimer, 84; U.S. Pension Architect*, N.Y. Times (Oct. 5, 1985), http://www.nytimes.com/1985/10/05/us/murray-latimer-84-us-pension-architect.html.

Murray Webb Latimer, *Industrial Pension Systems in the United States and Canada* (1933). Because railroads were the first private employers to offer pension plans, Latimer's study necessarily analyzed dozens of railroads and their pension plans.

Each railroad pension plan Latimer examined computed the railroad pensions solely on the basis of "base pay," "base salary," "regular pay," and other regular payroll amounts. 2 Latimer, *Industrial Pension Systems*, *supra*, at 1028–35.[4] During this time, railroads paid wages in cash, checks, hard currency, or, when necessary, scrip or merchandise orders. *See generally* Note, *Payment of Advance Wages in Trade Checks on Company Store*, 40 Yale L.J. 1105, 1105–06 (1931) (discussing "[t]he practice of paying wages in trade-checks, or scrip"); Nat'l Park Serv., *Scrip—A*

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[4] In many respects, these private railroad pension plans used the same definition of pensionable compensation that Congress used when enacting the Civil Service Retirement Act. *See* Act of May 22, 1920, Pub. L. No. 66-215, 41 Stat. 614. The Act created the Civil Service Retirement System ("CSRS") to provide federal employees retirement benefits. Congress defined pension benefits for federal employees by reference to "basic salary, pay, or compensation" and "exclude[d] from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation." *Id.* at 615.

When designing the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), Congress, as with railroad employees, specifically excluded federal employees from its reach in light of their retirement coverage under CSRS. *See* Soc. Sec. Bd., Social Security in America 208 (1937); Wilmer L. Kerns, *Federal Employees' Retirement System Act of 1986*, 49-11 Soc. Sec. Bull. 5, 5 (1986).

Coal Miner's Credit Card (Feb. 19, 2016), https://www.nps.gov/biso/learn/historyculture/scrip.htm ("Scrip was used as a means of exchange in place of hard money, and it was issued in paper form as coupons or metal rounds called tokens.").[5]

In addition to such monetary media of exchange, railroads also provided substantial nonmonetary compensation to their workers, including meals, lodging, transportation, and stock. *See Shelton v. Missouri-Kansas-Texas R.R. Co.*, 74 F. Supp. 961, 962 (E.D. Mo. 1940) ("The practice of furnishing such meals and lodging to such employees was and is customarily followed by this defendant and other railroad companies. Such has been the custom for many years."); *Taxation of Interstate Carriers and Employees: Hearings on H.R. 8652 Before the H. Comm. on Ways and Means*, 74th Cong. 9 (1935) (statement of Rep. Robert Crosser); U.S. Eight-Hour Comm'n, Report of the Eight-Hour Commission, at 399–00, 402 (1918) (explaining that "some railroads encourage and assist their employees to buy homes"; some provide "[b]unk houses . . . for the accommodation of train crews obliged regularly to rest over between runs"; and some offer "vacation and transportation privileges, . . . a much esteemed feature of railway employment"); Nat'l Indus. Conf. Bd., *Employee*

[5] Scrip was prohibited from use for Fair Labor Standards Act ("FLSA") purposes beginning in 1939, *see* 29 C.F.R. § 531.34 ("Scrip, tokens, credit cards, 'dope checks,' coupons, and similar devices are not proper mediums of payment under [FLSA]."), and its role as a circulating media of exchange began to die out in the American economy shortly after World War II.

Stock Purchase Plans in the United States, 204–06, 208–14 (1928).

Despite the prevalence of stock compensation, no railroad pension plan Latimer identified included stock in its definition of pensionable compensation. 2 Latimer, *Industrial Pension Systems*, at 1028–35. And the widespread nonmonetary compensation paid by the railroads such as food, lodging, and transportation were also not included in the plan documents for purposes of computing pension benefits. *Id.* Indeed, Latimer's study does not identify a single railroad pension plan that defined pensionable compensation as including nonmonetary payments of food, lodging, and transportation to railroad employees despite the industry's heavy use of such nonmonetary forms of compensation.

Instead, the retirement benefits and the requisite funding were based solely on the salary received by the workers in the form of monetary media of exchange. 2 Latimer, *Industrial Pension Systems*, at 1028–35; *see also* Latimer, *Old Age Pensions*, *supra*, at 60 ("Typical provisions of the non-contributory pension plans are: . . . One, 1.5 or 2 per cent of the annual average salary . . . ."); *id.* ("In a larger proportion of the contributory plans than of the non-contributory plans, the pension is based on the whole *salary* rather than on the final or last few years of service." (emphasis added)).

In sum, "at the time the RRTA was enacted existing railroad pension plans were based on an employee's cash compensation only, rather than on other, broader types of compensation, despite the fact that some railroad companies apparently offered

stock-option benefits." *BNSF Ry. Co. v. United States*, 775 F.3d 743, 755 (5th Cir. 2015).

B. Congress Enacted The RRTA To Secure Pre-Existing Railroad Pension Plans

Railroad employee pension plans were underfunded, a problem further exacerbated by the Great Depression. *See* Whitman, *supra*, at 41; Latimer, *Old Age Pensions*, *supra*, at 65 (noting "some doubts as to the ability of voluntary charity to continue to carry as large a share of responsibility as in the past"); U.S. Gov't Accountability Off., *supra*, at 116 (estimating unfunded liability of private pension plans in 1932 to be $2 billion).

The underfunding of railroad pension plans led to calls to federalize the system to protect railroad pensioners. *See* U.S. Gov't Accountability Off., *supra*, at 116 (Between 1931 and 1934, "[t]he Railroad Employees' National Pension Association (RENPA) called on the government to protect the railroads' pension system, which was at risk of failing."); Whitman, *supra*, at 41 ("The initiative for establishing a separate federal retirement program for railroad workers arose during the late 1920s as a response to the myriad problems facing the railroad industry's private pension plans."); U.S. R.R. Ret. Bd., *supra*, at 1 ("Railway labor sought legislation to continue railroad pensions as part of a reliable and equitable national program.").

In 1937, Congress enacted the RRTA. *See* Carriers Taxing Act of 1937, Pub. L. No. 75-174, 50 Stat.

435.[6] Consistent with the pre-existing railroad pension plans and their focus on base salary, the RRTA imposed taxes only on "money remuneration." *Id.*; *see also Taxation of Interstate Carriers and Employees: Hearings on H.R. 8652 Before the H. Comm. on Ways and Means*, 74th Cong. 3 (1935) (statement of Rep. Robert Crosser) ("The bill simply provides for a tax of 2 percent on all railroad workers in the United States, and a 4 percent excise tax on the railroads, based on the pay rolls for each year."). The RRTA's use of "money" instead of "cash" captured all monetary mediums of exchange—including the railroads' payment of scrip in lieu of cash wages—but excluded nonmonetary compensation such as meals, lodging, transportation and, as relevant here, stock payments.[7]

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[6] Congress's first enactment to protect railroad pensioners was the Railroad Retirement Act in 1934. The Act, however, was declared unconstitutional. *See R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *see also* Whitman, *supra*, at 41. In 1935, Congress enacted the Railroad Retirement Act of 1935, Pub. L. No. 74-399, 49 Stat. 967, and the corresponding taxing act, *see* Act of Aug. 29, 1935, Pub. L. No. 74-400, 49 Stat. 974. Though the industry-specific retirement tax was declared unconstitutional, *Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936), the Railroad Retirement Board began paying benefits in July 1936 and awaited the final taxing legislation, Whitman, *supra*, at 41.

[7] This understanding was borne out in decisions issued shortly after the RRTA's enactment. *See Bhd. of Maint. of Way Emps. v. Nashville, Chattanooga & St. Louis Ry.*, 56 F. Supp. 559 (M.D. Tenn. 1944). In *Nashville*, the court addressed whether the cost of board could be included in computing "wages" for purposes of the FLSA. Though the court held that the railroad could treat the cost of board as "wages" to comply with FLSA,

II. Insofar As FICA Has Any Relevance, Congress Has Similarly Excluded Nonmonetary Remuneration For Domestic Service And Agricultural Workers

Unlike railroad retirement, the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935), was "an unprecedented new form of social provision." *See* Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70-4 Soc. Sec. Bull. 49, 54 (2010). But to the extent that the Social Security Act and its corresponding FICA tax informs construction of the RRTA at all, the treatment of railroad workers most closely aligns with the Social Security Act's treatment of domestic and agricultural workers whose non-cash remuneration FICA does not tax.

Like railroad workers, employees in the agricultural and domestic service industries received substantial amounts of nonmonetary forms of remuneration from their employers, including food, lodging, and transportation. *See, e.g.*, Soc. Sec. Bd., Social Security in America 208 (1937). The compensatory food, lodging, and transportation received by agricultural and domestic service workers provoked concerns about the administrative hurdles involved in determining these employees' remuneration. *See id.* ("Administrative difficulties suggested further limi-

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id. at 564, it explained that "[t]he cost to defendant Railway of furnishing board is *not included* in the amount of wages from which deductions are made *for the purposes of [RRTA]* which provides that the term 'compensation' means any form of money remuneration," *id.* at 561 (emphases added).

tations of coverage to eliminate, at least in the early years of a system, certain types of employments in which it would be difficult to enforce the collection of contributions. In the case of farm labor and domestic servants in private homes, . . . the usual provision of a part of compensation in the form of maintenance would greatly handicap effective enforcement.").

Congress initially resolved this issue by excluding these workers entirely from Social Security. *See* Nelson, *supra*, at 33. This proved unpopular because these two employment sectors comprised approximately 10 percent of the entire employee workforce within the United States at this time and nearly 25 percent of the employees excluded from Social Security. *Id.*

Social Security's Commissioner described the effort to overcome the administrative hurdles posed by agricultural and domestic service employees as "one of the toughest things that Social Security ever undertook." DeWitt, *supra*, at 63. To do so, Congress decided to limit FICA taxes for these groups to "cash remuneration" and monetary media of exchange; in other words, only money remuneration was taxed. *See* 26 U.S.C. § 3121(a)(7)(A) (excluding from "wages" "remuneration paid in any medium other than cash" for domestic service employees); § 3121(a)(8)(A) (same for agricultural labor).

In implementing regulations, the Treasury Department itself defined and continues to define the term "cash remuneration" for FICA purposes as follows:

> Cash remuneration includes checks and other monetary media of exchange.

> Cash remuneration does not include payments made *in any other medium*, such as lodging, food, clothing, car tokens, transportation passes or tickets, farm products, or other goods or commodities.

26 C.F.R. § 31.3121(a)(8)-1(f) (emphasis added); *see also* 26 C.F.R. § 31.3121(a)(7)-1(b) (defining "cash remuneration" for domestic workers using similar language).

And the Treasury Department defines "noncash remuneration" elsewhere in Subtitle C as follows:

> The term "noncash remuneration" includes remuneration paid in any medium other than cash, such as goods or commodities, *stocks*, bonds, or other forms of property. The term does not include checks or other monetary media of exchange.

26 C.F.R. § 31.3402(j)-1(c) (emphasis added) (implementing 26 U.S.C. § 3402(j), which allows employers to exempt noncash remuneration from income tax withholding for commissioned salespeople).

These statutory and regulatory exclusions still exist today and parallel RRTA's limitation to "money remuneration." In *Rowan Cos. v. United States*, 452 U.S. 257 (1981), this Court recognized that, in the tax context, "[c]ontradictory interpretations of substantially identical definitions do not serve" the interest of "promot[ing] simplicity and ease of administration." *Id.* at 257. The terms "money remuneration" and "cash remuneration" are far more similar

than "money remuneration" and FICA's "all remuneration." The terms "money remuneration" and "cash remuneration" should therefore be construed similarly.

The Treasury Department's own implementing regulations recognize the critical difference between property (such as stocks) as opposed to cash, money remuneration, and other monetary media of exchange. Property payments such as food, lodging, transportation, commodities, and stock are still excluded from FICA taxes for agricultural and domestic workers. Given the historical circumstances giving rise to these exclusions and the similar history of railroad workers, the RRTA's money limitation should continue to be respected just as it is for domestic service and agricultural workers for FICA purposes.

CONCLUSION

For the reasons provided above and in the petitioners' brief, this Court should reverse the judgment below.

February 23, 2018 Respectfully submitted,

M. Miller Baker
Counsel of Record
David R. Fuller
Sarah P. Hogarth
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Counsel for Amicus Curiae