No.

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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD F. RILEY JR.
WILLIAM J. MCKENNA
JONATHAN W. GARLOUGH
FOLEY & LARDNER LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654-5313
(312) 832-4500

THOMAS H. DUPREE JR.
Counsel of Record
RAJIV MOHAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioners

QUESTION PRESENTED

The Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), defines taxable "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee."

Petitioners' employees obtained stock when they exercised stock options granted by petitioners. The Seventh Circuit—agreeing with the Fifth Circuit but in direct conflict with the Eighth Circuit—held that stock is "money remuneration" and hence taxable "compensation."

The question presented is:

Whether stock that a railroad transfers to its employees is taxable under the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that petitioners Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company are all indirect wholly-owned subsidiaries of Canadian National Railway Company, a publicly-traded corporation.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The Seventh Circuit's opinion (App. 1a) is reported at 856 F.3d 490. The Seventh Circuit's order denying rehearing or rehearing en banc (App. 14a) is not reported. The order and opinion of the district court granting summary judgment (App. 16a) is reported at 194 F. Supp. 3d 728.

JURISDICTION

The Seventh Circuit entered its judgment on May 8, 2017, and denied petitioners' timely petition for rehearing or rehearing en banc on July 12, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), provides, in relevant part:

> (e) Compensation—For purposes of this chapter—
>
> > (1) The term 'compensation' means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.

Section 3231(e)(1) is reproduced in full at the back of this brief, App. 43a.

INTRODUCTION

The Seventh and Fifth Circuits have split with the Eighth Circuit on an important question of federal law: whether stock is taxable "compensation" under the Railroad Retirement Tax Act ("the RRTA"). The Seventh and Fifth Circuits hold that stock acquired through the exercise of nonqualified stock options *is* taxable compensation. *See* App. 4a-5a; *BNSF Ry. Co. v. United States*, 775 F.3d 743 (5th Cir. 2015). The Eighth Circuit, in contrast, holds that it is *not* taxable compensation—and has expressly recognized the circuit split. *See Union Pac. R.R. Co. v. United States*, 865 F.3d 1045, 1052 (8th Cir. 2017) (acknowledging that the Seventh Circuit has reached the opposite conclusion, but stating that "[w]e respectfully disagree" and "decline to follow the Seventh Circuit's lead").

The circuits' disagreement turns on the words "money remuneration." Enacted during the Great Depression, the RRTA imposes a payroll tax on railroad employers and employees, and defines taxable "compensation" as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis added). One side of the split holds that "money remuneration" should be read broadly to encompass stock. In the words of Judge Posner, writing for the Seventh Circuit, because "there is no significant economic difference" between receiving $1,000 in cash and $1,000 worth of stock, the statute should be interpreted in a way that "makes good practical sense." App. 3a-5a.

The other side of the split gives "money remuneration" its plain-language meaning: cash, or some other generally recognized medium of exchange,

but not stock. As the Eighth Circuit put it, after reviewing dictionaries and examples of contemporaneous legal usage, and after examining the statute's structure and history, "the ordinary, common meaning" of "money" is a generally recognized medium of exchange. *Union Pacific*, 865 F.3d at 1049. "Like any type of property," the court explained, "stock does have cash value and can be exchanged for money, but we do not think it is a medium of exchange." *Id*. at 1052. No one pays for groceries with stock.

The acknowledged conflict over this important question of federal tax law has created an untenable situation in which a railroad in Illinois must pay tens of millions of dollars in federal taxes based on the transfer of stock to its employees, whereas a railroad across the Mississippi River in Missouri does not. Because most of the nation's major railroads issue stock options as a way to incentivize employees, this is a significant and recurring question that affects not just the railroads, but thousands of railroad employees who face millions of dollars in potential tax liability.

STATEMENT

Petitioners are railroads who filed suit seeking refunds of taxes they paid when their employees exercised stock options. The Seventh Circuit rejected petitioners' claims, holding that the stock was "money remuneration"—and hence taxable "compensation"—under the RRTA.

A. The RRTA

Whereas most employers pay and withhold taxes under the Federal Insurance Contributions Act ("FICA"), Congress exempted railroads from FICA

and instead made them subject to a railroad-specific statute—the Railroad Retirement Tax Act, 26 U.S.C. §§ 3201-3241. Enacted in 1937 during the Great Depression, the RRTA (named the "Carriers' Taxing Act" at the time) imposes a payroll tax on both the employer and employee, with the proceeds used to pay retirement and disability benefits under the Railroad Retirement Act, 45 U.S.C. §§ 231-231v.

The RRTA requires railroads to pay an excise tax equal to a specified percentage of its employees' "compensation," and also to withhold a specified percentage of that compensation as the employees' share of the tax. *See* 26 U.S.C. § 3201(a)-(b) (tax on railroad employees); *id*. § 3221(a)-(b) (tax on railroad employers). The RRTA defines "compensation" as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." *Id*. § 3231(e)(1) (emphasis added).

Congress enacted the RRTA to federalize the railroads' pension obligations, which were in jeopardy given the nation's severe economic turmoil. *See* Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. 41, 41 (2008) (noting that "more than 80 percent of railroad workers were employed by companies with existing pension plans," but "the Great Depression drove the already unstable railroad pension system into a state of crisis"). Because the planned Social Security system would not cover work performed before 1937, and was not scheduled to begin paying benefits for years in any event, Congress elected to create a separate and distinct system for railroad retirement. *Id*. That approach was consistent with Congress' historic practice of enacting railroad-specific statutes

reflecting the railroads' unique role and history in the life of our nation.[1]

Congress's decision to confine the RRTA tax to "money remuneration" reflects its intent to maintain the then-existing pension structure of the railroad industry. At the time, the railroads' pension plans were based on an employee's regular compensation only—that is, money remuneration (salary and bonus) rather than in-kind benefits. *See* 1 Murray Latimer, *Industrial Pension Systems in the United States and Canada*, at 20 (1933) (railroad pensions funded by percentage of "salaries"); *id*. at 21 (railroad pensions measured by "average annual pay"); *see also* The Atchison, Topeka and Santa Fe Pension System, *Railway Age*, at 15 (Jan. 4, 1907) (explaining that railroad pensions are calculated with respect to "average monthly pay"). The nation's railroads used this pension structure even though railroads, as far back as the nineteenth century, had also provided their employees with stock and other non-monetary benefits, such as food and lodging. Thus, in enacting the RRTA, Congress chose to take over the railroads' obligations while preserving the industry's familiar pension structure in which pensions were funded based on an employee's *salary*, rather than the employee's receipt of stock or in-kind benefits.

That Congress made a deliberate choice in restricting "compensation" under the RRTA to "money remuneration" is further illustrated by the language it used in FICA, 26 U.S.C. §§ 3101-3128. There are high-level similarities between the RRTA and FICA.

---

[1] Examples include the Federal Employers Liability Act, 45 U.S.C. § 51 et seq., which addresses injuries suffered by railroad workers, and the Railway Labor Act, 45 U.S.C. § 151 et seq., which governs labor relations in the industry.

Both impose payroll taxes on employers to ensure the funding of retirement and disability benefits. But even granting that the two statutes share a general purpose, they use very different language in setting the tax base. As noted above, the RRTA taxes "compensation," which it defines as "any form of *money* remuneration paid to an individual for services rendered." 26 U.S.C. § 3231(e)(1) (emphasis added). FICA, in contrast, taxes "wages," which it defines as "*all* remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Id.* § 3121(a) (emphasis added).

The difference in language was not happenstance. Congress adopted the "money remuneration" standard used in the RRTA the very same month—August 1935—that it adopted, as part of the Social Security Act, the "all remuneration" standard used in FICA.[2] The fact that in a single month, Congress created two retirement tax-law regimes—but used different language to describe the tax bases—underscores that its use of "money remuneration" was a conscious and purposeful choice. The difference results from the fact that the RRTA was designed as a replacement for the existing railroad pension plans that were based on salary rather than non-monetary compensation, whereas in FICA Congress was writing on a blank slate.

---

[2] In August 1935, Congress enacted the "money remuneration" standard in a version of the RRTA that was soon struck down. *See* Pub. L. No. 400, 74th Cong., 1st Sess. § 1(d), 49 Stat. 974 (1935); *Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936). Congress then used the same "money remuneration" standard in the version of the RRTA it passed in 1937—the version that stands today.

In the decades since its enactment, Congress has amended the RRTA on numerous occasions. Among other recent changes, Congress created various exemptions to RRTA "compensation." *See, e.g.*, 26 U.S.C. § 3231(e)(4)-(12). But the provision at issue in this case, the one that establishes the RRTA's tax base—"money remuneration"—remains unchanged.

B. Factual Background

The three petitioners—Wisconsin Central Ltd., Illinois Central Railroad Company, and Grand Trunk Western Railroad Company—are subsidiaries of Canadian National Railway Company ("CN") with significant operations in the midwestern United States and the Mississippi Valley. All are rail carriers subject to the RRTA. App. 17a.

Petitioners have issued stock options to their employees since the mid-1990s. SA 10.[3] Each option gave the employee the right to purchase one share of CN stock at a fixed exercise price—the "strike" price—equal to CN's publicly traded stock price as of the date the option was granted. SA 6. Thus, the value of an option—unlike the value of a cash salary—depends on the future performance of the company, as reflected in its publicly-traded share price. SA 11.

Petitioners issued stock options because stock options incentivize employees in a way that money payments do not. SA 10-11. Stock options "encourage[ ] employees to work harder for the company, because the better the company does the more valuable its stock is." App. 3a. Petitioners

[3] "SA" citations refer to the jointly-stipulated statement of facts the parties filed in the district court, which was then submitted as part of petitioners' Separate Appendix in the Seventh Circuit (ECF No. 13).

designed their stock option plans to align the economic interests of their employees with the growth of the CN business enterprise as a whole, as part of what it called the Canadian National Railway Company Management Long-Term Incentive Plan. SA 10-11.

The stock options generally had a ten-year term, terminable early if the employee ceased employment with a CN affiliate. SA 6, 11. Most of the options could be exercised at any time during the ten-year term, although some could be exercised only if CN achieved specified financial benchmarks. SA 8-10.

Employees could choose to receive their shares in different ways. SA 6-7. They could pay cash to cover the exercise price, tax withholdings and administrative costs, then have the shares transferred to their personal brokerage account to be held as a stock investment. SA 7. They could have a transfer agent sell enough shares to cover the exercise price, tax withholdings and broker and administrative costs, then have the remaining shares transferred to their personal brokerage account to be held as a stock investment. *Id*. Or they could have the shares sold and the cash proceeds wired to their bank account, less the exercise price, tax withholdings and broker and administrative costs. *Id*. Regardless of the method the employees chose, petitioners only transferred stock—not money—to their employees.

Petitioners issued options to many of their executives and managers, as well as to some of their rank-and-file employees. SA 12. Most recipients chose to hold their stock options for a lengthy period—on average, more than six years—and even when they exercised the options, they then held the stock itself for a lengthy period. *Id*.

Finally, the stock options at issue in this case were "nonqualified" options. In 2004, Congress amended the RRTA by adding a provision entitled "[q]ualified stock options." *See* 26 U.S.C. § 3231(e)(12). The new language provided that "[t]he term 'compensation' shall not include any remuneration on account of a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or any disposition by the individual of such stock." *Id*. (internal numbering omitted).

C. The Decision Below

In 2014, petitioners filed the instant action seeking refunds of approximately $13 million in taxes they had paid or withheld when nonqualified stock options were exercised between 2006 and 2013. App. 17a-20a. Petitioners claimed both the employer tax paid by themselves, as well as the amount they withheld from the employees and paid to the IRS.[4]

The parties cross-moved for summary judgment based on a stipulated factual record. App. 17a. The district court sided with the government, denying the refunds. The court held that the statute was ambiguous and that the government's interpretation was entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). App. 37a-38a.

---

[4] There is no dispute that the stock options, upon exercise, gave rise to taxable income to the employees subject to income tax withholding. This case presents the distinct question whether the stock also constitutes "money remuneration" subject to *RRTA* withholding. The income taxation of stock is not at issue in this case.

A split panel of the Seventh Circuit affirmed. Noting that the RRTA was enacted during the Great Depression, the court admitted that "[m]aybe stock then wasn't a form of money remuneration" and thus would not have been taxable under the original meaning of the statute. App. 3a-4a. However, the court reasoned, "there is no reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash even if, as was eventually to happen, stock became its practical equivalent." App. 4a. In short, the court explained, "sheep may have once been a form of money; now stock is." *Id*.

The court deemed the Internal Revenue Code of 1939—which it conceded "treats 'money' and 'stock' as different concepts"—to be "of limited help here." App. 4a. Instead, it looked to the provision concerning *qualified* stock options, which was enacted in 2004, nearly 70 years after the RRTA was enacted, as "signal[ing]" the "equivalence of stock to cash." *Id*. Finally, the court emphasized that, regardless of the statutory text, "[t]he government's position also makes good practical sense." *Id*.

Judge Manion dissented. He faulted the majority's "speculat[ion] about the intent of Depression-era legislators," explaining that "our job is to interpret the Act as it would have been understood by people at the time it was enacted." App. 6a. "If the stock options at issue wouldn't have been money remuneration in 1935," he stated, "neither should they be in 2017." App. 7a. Analyzing the words "money remuneration" in light of the meaning they carried when the statute was enacted, Judge Manion concluded that "the plain language of the statute's

definition of 'compensation' does not cover stock or stock options." App. 6a.

Petitioners timely sought rehearing, which was denied over a dissent by Judge Manion. App. 14a-15a.

REASONS FOR GRANTING THE PETITION

The circuits have split on the question whether stock is "money remuneration"—and hence taxable "compensation"—under 26 U.S.C. § 3231(e)(1). The Eighth Circuit has expressly acknowledged the split, *see Union Pac. R.R. Co. v. United States*, 865 F.3d 1045, 1052 (8th Cir. 2017), as has the United States itself. *See* U.S. Pet. for Reh'g at 1, 865 F.3d 1045 (No. 16-3574) ("The [Eighth Circuit's] ruling . . . conflicts with *Wisconsin Central* and *BNSF*, which reached the opposite conclusion on the same issue.") (citations omitted).

This Court should grant review to resolve this significant and recurring question of federal tax law. In the balance are millions of dollars in potential tax liability for railroads and the thousands of their employees who own employer-issued stock options. This Court has long underscored the importance of a nationally uniform tax system. *See, e.g.*, *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). The current state of affairs—in which stock is taxable in some circuits but not in others—is untenable.

I. The Circuits Are Split On An Important Question Of Federal Tax Law.

A. The Seventh And Fifth Circuits Hold That Stock *Is* Taxable Compensation.

The Seventh Circuit, as discussed above, held that stock is "money remuneration" within the meaning of 26 U.S.C. § 3231(e)(1). The court reasoned that

because stock has become the "practical equivalent" of money, stock acquired through the exercise of nonqualified stock options is taxable "compensation" under the RRTA. App. 4a.

The Fifth Circuit has reached the same conclusion, although through different reasoning. In *BNSF Railway Co. v. United States*, 775 F.3d 743, 757 (5th Cir. 2015), the court held that stock acquired through the exercise of nonqualified stock options is "properly taxed as compensation under the RRTA." The court deemed the phrase "money remuneration" to be ambiguous, stating that it "does not appear to us to have an ordinary, common-sense definition." *Id*. at 751-52. The court acknowledged that "most dictionaries offer narrow definitions that confine 'money' to 'a medium of exchange,' and define 'medium of exchange' as 'anything generally accepted as payment in a transaction and recognized as a standard of value.'" *Id*. at 752 (footnotes omitted). The court further acknowledged that "the modifier 'money' must narrow [the word 'remuneration'] to some degree," and that the RRTA and FICA "use somewhat different formulations of the word 'compensation.'" *Id*. at 752, 755-56. But it nonetheless concluded that Congress had not spoken clearly and that the government's interpretation was entitled to deference under *Chevron*. *Id*. at 757.[5]

[5] A district court has also adopted the position taken by the Fifth and Seventh Circuits. In *CSX Corp. v. United States*, No. 3:15-cv-427 (M.D. Fla. March 14, 2017), the court held that whereas "the term compensation as used in the RRTA is unclear in scope," the government's interpretation "does not contradict the clear intent of Congress." *Id*. at 11-12.

B. The Eighth Circuit, In Contrast, Holds That Stock Is *Not* Taxable Compensation.

The Eighth Circuit has expressly rejected the conclusion reached by the Fifth and Seventh Circuits, and has held that stock is not "money remuneration," and therefore is not taxable compensation under 26 U.S.C. § 3231(e)(1).

In *Union Pacific*, 865 F.3d at 1053, the Eighth Circuit held that "the RRTA unambiguously does not require payment of RRTA taxes on remuneration in stock." The court focused on the critical textual difference between FICA and the RRTA, observing that "FICA sweeps more broadly than the RRTA: The FICA expressly mentions the cash value of remuneration not paid in cash, such as payments in property, whereas the RRTA does not." *Id*. at 1048. Looking to dictionaries, as well as to 1930s-era caselaw and regulations, the court explained that the word "money" typically meant currency or a generally accepted medium of exchange. *Id*. at 1049.

The court rejected the government's argument that "various non-cash exemptions from the general definition of 'compensation' show that 'money remuneration' means something broader than just mediums of exchange or else the exemptions would be superfluous." 865 F.3d at 1050. The court pointed out that the exemptions post-dated the statutory definition of "money remuneration" by decades. *Id*. at 1052. Moreover, because each of the exemptions could include money payments, none of them would become superfluous even if "money remuneration" was limited to cash or medium-of-exchange payments. *Id*. at 1050.

Finally, the Eighth Circuit acknowledged its disagreement with the Seventh Circuit. "We recognize that one of our sister circuits recently held that payments in stock are a form of money remuneration because stock has become practically equivalent to cash," the court stated, but "[w]e respectfully disagree." 865 F.3d at 1052. "Even stocks with readily ascertainable share prices are not 'money' because they are not mediums of exchange." *Id*. Thus, the court concluded "we decline to follow the Seventh Circuit's lead." *Id*.

II. The Court Below Disregarded The RRTA's Text, Structure, Purpose And History In Order To Reach A Result It Thought Made "Good Practical Sense."

The panel majority below did not engage in close analysis of the statutory text and did not adhere to the meaning of the words at the time they were written. Instead, it adopted the outcome it thought made "good practical sense." App. 5a. That is not how this Court reads statutes. To the contrary, this Court has held that statutory text must be given its plain meaning as of the time it was written. "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp*., 134 S. Ct. 870, 876 (2014) (quotation marks omitted); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[W]e look to the ordinary meaning of the [relevant words] at the time Congress enacted the statute.").

The plain meaning of "money" is cash, or a recognized medium of exchange. Investment property, such as stock or real estate, can be bought and sold for money, but is not itself money, even when

that property has a readily-ascertainable market value. That was so in 1937—and it remains so today. Stock is not used as currency or as a medium of exchange.

That the word "money" in the RRTA excludes stock is confirmed by dictionaries of the era, as well as by contemporaneous legal usage. Dictionaries from the 1930s define "money" as a common and recognized medium of exchange. *See, e.g.*, WEBSTER'S NEW INT'L DICTIONARY 1583 (2d ed. 1934) ("money" is "anything having a conventional use as a medium of exchange"); BOUVIER'S LAW DICTIONARY 814 (1934) ("money" includes "coins" and other "common medium[s] of exchange in a civilized nation"). Likewise, caselaw from that era establishes that "[t]here is no doubt that the word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks." *In re Boyle's Estate*, 37 P.2d 841, 842 (Cal. Ct. App. 1934).

The 1939 version of the Internal Revenue Code—which contains the codified versions of the RRTA's and FICA's tax provisions—repeatedly distinguishes between "money" (which has a fixed value) and other "property" (which has a fluctuating value). *See, e.g.*, I.R.C. §§ 111(b), 112(c) (1939). Even the original IRS regulation implementing the RRTA's tax provisions indicated that "money" refers to mediums of exchange; it defined "compensation" to include "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 2 Fed. Reg. 2198, 2202 (Oct. 15, 1937).

Moreover, the difference between the RRTA and FICA—"money remuneration" versus "all remuneration"—highlights the significance of the

word "money," and demonstrates that its inclusion in the statute was a deliberate choice. "[I]t is axiomatic that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning." *United States v. Smith*, 756 F.3d 1179, 1186 (10th Cir. 2014) (Gorsuch, J.). Here, the notable linguistic difference shows that Congress intended to establish a narrower tax base for the RRTA, and conform the new federal pension structure to the longstanding salary-based railroad pension structure, by excluding all forms of remuneration other than "money."

The interpretation advanced by the government—in which *anything* could be "money," even a birthday cake (App. 3a)—has no limiting principle and reads the word "money" out of the statute. Indeed, the government urged the court below simply to treat the word "money" as surplusage and effectively delete it. *See* U.S. CA7 Br. at 35 ("the phrase 'money remuneration' is reasonably construed as meaning merely remuneration"). Although the Seventh Circuit rejected the government's interpretation as "go[ing] too far," App. 3a, the court offered no limiting principle for its own broad reading of "money remuneration."

The Seventh Circuit also relied on the list of exemptions to "compensation," including the exemption that refers to "[q]ualified stock options," 26 U.S.C. § 3231(e)(12). In the court's view, those exemptions show that "money remuneration" cannot be limited to cash or medium-of-exchange remuneration because otherwise the exemptions would be superfluous. The court's analysis is erroneous. The "qualified" stock option provision was added in 2004, *70 years* after Congress enacted the

RRTA, so it cannot shed light on the original meaning of "money remuneration." As the dissent pointed out, if the statutory text before 2004 did not make stock taxable—and it did not—then the mere addition of the later exceptions would not impliedly repeal the original meaning of "money remuneration." App. 10a-12a; *see also Union Pacific*, 865 F.3d at 1052 (rejecting the argument that "these later-adopted exemptions would impliedly repeal our reading of the original definition of 'money remuneration'"). Congress would not dramatically alter tax obligations in such an indirect, roundabout way. And looking to later enactments as a way of shedding light on original meaning only is permissible when the original meaning is ambiguous, which is not the case here. *See* App. 12a.

Moreover, as the Eighth Circuit has explained, all of the exemptions address situations where cash payments *could* be included. For example, with regard to the qualified stock option exemption, "cash payments sometimes accompany the exercise of a stock option, as, for instance, when the number of shares an employee can acquire at exercise is not a whole number, or if the remunerative program under which the option was transferred gives employees bonuses or additional compensation, in cash or other property, at the time of exercise." *Union Pacific*, 865 F.3d at 1050. So too with the exemption for health and disability insurance. That exemption excludes "any *payment*" made to, or on behalf of, an employee on account of sickness, accident, or hospitalization or any related insurance. 26 U.S.C. § 3231(e)(1)(i) (emphasis added). Thus, interpreting the words "money remuneration" as meaning cash or its equivalent does not render the exemptions superfluous.

The government cannot support its reading by relying on Treasury Department regulations. The Department has defined "compensation" for purposes of the RRTA as having "the same meaning as the term wages in [FICA] . . . *except as specifically limited by the [RRTA].*" 26 C.F.R. § 31.3231(e)-1 (emphasis added). As shown above, the RRTA contains a "specific[ ] limit[ation]"—unlike FICA, which applies to "all" remuneration, the RRTA applies only to "money" remuneration. Thus, stock is not "compensation" under the regulation.

Even if the regulation could be read the way the government claims—as making RRTA "compensation" and FICA "wages" essentially identical—it would not be entitled to deference. It fails *Chevron* step one because it is contrary to the unambiguous language of the statute. And it fails *Chevron* step two because it is not a permissible interpretation in any event. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (even under *Chevron*, "agencies must operate within the bounds of reasonable interpretation") (quotation marks omitted). The RRTA's text, structure, purpose and history all establish that stock is *not* "money remuneration"—a conclusion reinforced by the original IRS regulation that interpreted the phrase for more than 50 years after the statute was enacted. *See* 2 Fed. Reg. at 2202.

III. The Question Presented Is Exceptionally Important.

Whether stock is "money remuneration" under the RRTA is an exceptionally important and recurring question of federal tax law over which there is an acknowledged circuit split. Resolving the question will determine whether the railroads—and the

thousands of railroad employees who hold stock options—are subject to millions of dollars in tax liability. Absent further review by this Court, taxpayers in different states will be subject to different IRS enforcement regimes.

Because the question is squarely presented, and because the Seventh Circuit's decision was based on a jointly-stipulated factual record, this case is the ideal vehicle for resolving what the United States has deemed an issue of "exceptional importance." U.S. Pet. for Reh'g at 1, 865 F.3d 1045 (No. 16-3574).

A. Resolving This Important And Recurring Question Is Necessary To Ensure A Nationally Uniform Tax Law.

This Court has long emphasized the importance of a nationally uniform tax law and avoiding arbitrary and disparate treatment in the application of the Internal Revenue Code. In *Sunnen*, 333 U.S. at 599, the Court explained that when one taxpayer "is accorded a tax treatment different from that given to other taxpayers of the same class," the result is "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion."

For those reasons, the circuit split over whether stock is taxable "compensation" under the RRTA cannot be allowed to stand. Under the current state of affairs, railroads in the Eighth Circuit (such as Union Pacific, based in Nebraska) will face *no* tax liability under the RRTA when their employees' stock options are exercised, whereas railroads in the Fifth or Seventh Circuits (such as BNSF, based in Texas; or petitioners, based in Illinois) face millions of dollars in tax liability for the same transaction.

Compounding the confusion and unfairness is the fact that, separate and apart from the RRTA taxes paid by the railroad employers, their *employees* residing in different circuits will have different tax liability. Many railroads operate in multiple states and their employees are scattered throughout the network. In petitioners' case, an employee who resides in Chicago will be required to pay tax when exercising stock options, whereas an employee who resides in Minneapolis will not.

Resolution of the question presented will have broad consequences for railroad employers, their employees, and the government. Many railroads issue significant volumes of stock options to their employees. This case, for example, involves approximately $13 million in potential tax liability to petitioners and more than 600 of their employees at all levels of the company. Indeed, the United States has deemed this issue "one of exceptional importance" given "the volume of railroad compensation paid in stock" and hence the "significant tax revenue" at issue. U.S. Pet. for Reh'g at 1, 865 F.3d 1045 (No. 16-3574).

Finally, this case raises important questions about the method of statutory interpretation used by the Seventh Circuit. The panel majority acknowledged that stock was not "money remuneration" at the time the RRTA was enacted, but declined to give those words their original meaning at the time the statute was written. App. 4a. Whether a court may jettison the original meaning of statutory text in favor of an interpretation the court believes "makes good practical sense," App. 5a, is a serious question that itself warrants this Court's review.

B. This Case Is The Ideal Vehicle For Deciding The Question Presented.

This case is a perfect vehicle for resolving the circuit split over whether stock is "money remuneration" under the RRTA. Petitioners have pressed the question presented at all stages of this case and it was fully briefed by the parties. The Seventh Circuit squarely decided the question—indeed, it was the *sole* issue on appeal and the *sole* basis for decision—and the majority opinion and dissent lay out the competing interpretations of the statute, as does the lengthy district court opinion. *See* App. 1a-5a, 5a-13a, 16a-42a. The Seventh Circuit entered a final judgment and there are no further proceedings to be had in the district court, as petitioners' refund request was denied in its entirety.

This case is an ideal vehicle for the additional reason that the district court and the court of appeals decided it on a jointly-stipulated set of relevant facts. *See* App. 17a. Consequently, the record is clean and there are no factual disputes that could cloud the legal issues. Because the factual record is not just fully developed but *undisputed*, the legal question is squarely presented for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RICHARD F. RILEY JR.
WILLIAM J. MCKENNA
JONATHAN W. GARLOUGH
FOLEY & LARDNER LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654-5313
(312) 832-4500

THOMAS H. DUPREE JR.
Counsel of Record
RAJIV MOHAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioners

October 6, 2017

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 16-3300, -3303, -3304

WISCONSIN CENTRAL LTD.,
ILLINOIS CENTRAL R.R. CO., AND
GRAND TRUNK WESTERN R.R. CO.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 14 C 10243, 10246, 10244 — **Gary Feinerman**, *Judge*.

ARGUED MARCH 30, 2017 — DECIDED MAY 8, 2017

Before POSNER, MANION, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. Beginning in 1996, the plaintiff-appellants, subsidiaries of the Canadian National Railway Company (to simplify we'll refer to the subsidiaries as "the railway"), began including stock options in the compensation plans of a number of employees. In this suit against the government, the railway argues that income from the exercise of stock options that a railroad gives its employees is not a form of "money remuneration" to them and is therefore not taxable to the railway as compensation under the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), which defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." See also *BNSF Railway Co. v. United States*, 775 F.3d 743 (5th Cir. 2015).

As explained in *Standard Office Building Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987), "the Railroad Retirement Tax Act, passed in 1937, is to the railroad industry what the Social Security Act is to other industries: the imposition of an employment or payroll tax on both the employer and the employee, with the proceeds used to pay pensions and other benefits. ... The Act requires the railroad to pay an excise tax equal to a specified percentage of its employees' wages, and also to withhold a specified percentage of its employees' wages as their share of the tax. The railroad retirement tax rates are much higher than the social security tax rates."

The question presented by this case is whether the excise tax should be levied not only on employees' wages but also on the value of stock options exercised by employees who, having received the options from their employer, exercise them when the market price

exceeds the "strike price" (the price at which the employee has a right to buy the stock) and thus obtain the stock at a favorable price. The Internal Revenue Service answers yes, see 26 C.F.R. § 31.3231(e)-1, and the district court agreed, precipitating this appeal.

The lawyer for the IRS told us at oral argument that anything that has a market value is a "form of money remuneration." That goes too far; it would impose a tax liability on an employer who bought an employee a birthday cake, even though the employee could do nothing with his cake except eat it or give it away. But if instead he exercises a stock option, he now owns stock, and stock has so well-defined a monetary value in our society that there is no significant economic difference between receiving a $1000 salary bonus and a share or shares of stock having a market value of $1000.

By compensating an employee with stock options rather than cash the employer encourages the employee to work harder for the company, because the better the company does the more valuable its stock is. The value of a company's stock is a function of the company's profitability, whereas the size of a cash bonus, once it is given, is unaffected by the company's future business successes or failures. Underscoring the point, we note that the railway's stock-option plans are performance-based: they can be exercised only if the company achieves specified goals.

As the discussion in the preceding paragraphs implies, the fact that cash and stock are not the same things doesn't make a stock-option plan any less a "form of money remuneration" than cash. Indeed the railway offers its employees a choice to have an agent

exercise an employee's stock option, sell the shares of stock obtained by that exercise of the option, reserve part of the money received in the sale for taxes and administrative costs, and deposit the balance in the employee's bank account. An employee who uses this method will thus experience the stock option as a cash deposit.

It's true that the Railroad Retirement Tax Act, in which the term "money remuneration" appears, dates back to 1935, when the nation was mired in the Great Depression of the 1930s which had driven down the value of corporate stock. Maybe stock then wasn't a form of money remuneration, but there is no reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash even if, as was eventually to happen, stock became its practical equivalent, just as today 100 dimes is the exact monetary equivalent of a $10 bill. A $10 bill is paper; so is a stock certificate that can be sold for $10. The dictionary definition of money may remain constant while the instruments that comprise it change over time: sheep may have once been a form of money; now stock is. The Internal Revenue Code of 1939 is of limited help here; it treats "money" and "stock" as different concepts, but that's not inconsistent with stock options' falling within "any form of money remuneration."

The equivalence of stock to cash is actually signaled in the statutory exception for *qualified* stock options, explicitly divorced from "money remuneration" by 26 U.S.C. § 3231(e)(12). That exception, by virtue of its narrowness, supports an inference that *non-qualified* stock options, which are the options at issue in this case, are covered by the

term "money remuneration" and are therefore taxable. There are moreover other statutory exceptions for other forms of non-cash employee benefits, and their existence reinforces the inference that non-qualified stock options are "money remuneration" and therefore taxable. See, e.g., § 3231(e)(1) (excluding payments for health insurance or health care and travel expenses); (e)(5) (excluding non-cash employee achievement awards); (e)(6) (excluding educational benefits); (e)(9) (excluding value of meals and lodging provided to employees); and (e)(10) & (11) (excluding contributions for medical and health savings plans).

The government's position also makes good practical sense by avoiding the creation of a tax incentive that might distort the ways in which employers structure compensation packages for their managers. And finally we are not alone in equating non-qualified stock options to money remuneration in the Railroad Retirement Tax Act. See *BNSF Railway Co. v. United States*, *supra*, 775 F.3d at 757; *CSX Corp., et al. v. United States*, No. 3:15-cv-427-BJD-JRK (M.D. Fla. March 14, 2017).

AFFIRMED.

MANION, *Circuit Judge*, dissenting. The railroad plaintiffs have sought a tax refund on the ground that stock options they provided to their employees aren't taxable as "compensation" under the Railroad Retirement Tax Act. Compensation under the Act is defined as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1). The railroads argue that stock options aren't "money

remuneration," so they are not taxable as "compensation" under the Act.

The court disagrees. Although it admits that "[m]aybe stock ... wasn't a form of money remuneration" when the RRTA was enacted, the court posits that "there is no reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash" in the event of future economic changes. Maj. Op. at 4. Even if that were true, our job is to interpret the Act as it would have been understood by people at the time it was enacted, not to speculate about the intent of Depression-era legislators. Because the plain language of the statute's definition of "compensation" does not cover stock or stock options, I respectfully dissent.

"It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "That means we look to the meaning of the word at the time the statute was enacted, often by referring to dictionaries." *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016) (citations omitted). There are some "common law statutes" whose meaning may evolve over time, such as the Sherman Antitrust Act. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). But neither party has argued that the RRTA falls into that category, and the specific contrast Congress drew between it and the Federal Insurance Contributions

Act (FICA) belies this contention. Thus, we must interpret the RRTA using normal principles of statutory interpretation, giving effect to the words Congress chose. If the stock options at issue wouldn't have been money remuneration in 1935, neither should they be in 2017.

As the statute is written, it is clear that "money remuneration" does not include stock options. For one, as I alluded to above, "it is well established that RRTA and FICA are parallel statutes." *BNSF Ry. Co. v. United States*, 775 F.3d 743, 754 (5th Cir. 2015). But they are not identical; they contain different definitions of what is taxable. The RRTA subjects to taxation "compensation," defined as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis added). FICA, on the other hand, taxes "wages," which are "*all remuneration* for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Id.* § 3121(a) (emphasis added).

We must give effect to Congress's distinction between "money remuneration" and "all remuneration." "After all, it is axiomatic that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning." *United States v. Smith*, 756 F.3d 1179, 1186 (10th Cir. 2014) (Gorsuch, J.); see also *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982) ("[A]lthough two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."). The court's result

effectively reads this contrast out of the statutes, rendering the words "money" and "all," as well as the two references to "cash" in the FICA definition, mere surplusage. That is "always a disfavored result in the business of statutory interpretation." *Smith*, 756 F.3d at 1186. "While it is possible that [these differences were] inadvertent, that possibility seems remote given the stark difference that was thereby introduced into the otherwise similar texts." *United States v. Ressam*, 553 U.S. 272, 277 (2008).

The difference in the statutes reveals that "money," when contrasted with "all," is a word of limitation. Further, its original meaning would not have encompassed company stock or stock options. The contemporary Webster's Second Dictionary defined "money" principally as "[m]etal, as gold, silver, or copper, coined, or stamped, and issued by recognized authority as a medium of exchange." Webster's New International Dictionary of the English Language 1583 (2d ed. 1934). More generally, money was "[a]nything customarily used as a medium of exchange and measure of value, as sheep, wampum, copper rings, quills of salt or of gold dust, shovel blades, etc." *Id.* Its synonyms were "cash," "currency," and "legal tender." *Id.* In other words, media of exchange issued by a recognized authority. Simply put (and as the court somewhat

acknowledges), money remuneration meant remuneration in cash or cash equivalents.[1]

Furthermore, the Internal Revenue Code of 1939, which included for the first time the definitions of "compensation" and "wages" under the RRTA and FICA, consistently treated money and stocks separately. One example is Section 115, which governed distributions by corporations. It said that when a distribution is payable "either (A) in its stock

---

[1] The court concedes that "money" isn't everything with a monetary value. Maj. Op. at 2-3. The value of this concession is limited. There is a market for everything, even the birthday cake that the court points to as the quintessential non-money item. The only difference between the birthday cake (and personal property, for that matter) and a share of stock is that the latter's value is more easily discoverable (because it's listed on a public exchange). But what about stock in a closely-held corporation, the value of which is not so obvious to the public? The court's result requires drawing a distinction on this non-textual basis. Interpreting the statute as it was originally understood avoids this problem.

Moreover, although it's true that the stock options are not taxed until they are exercised (meaning that the employee purchases the stock at the strike price), it seems strange to call a stock option "money remuneration" when its value is so contingent on future performance. While a share of stock in a publicly traded company has a well-known value, a stock option's value isn't quite the same thing. If an employee receives an option to purchase one share of Canadian National stock at $50 per share, but the stock plunges to $40 per share the next day and remains there during the length of the option, the option would be worthless. Although it would never be taxed in that instance, it would also not be of much value to the employee, who would have preferred "money remuneration."

or in rights to acquire its stock ... or (B) in money or any other property (including its stock or in rights to acquire its stock)," then the distribution shall be considered a taxable dividend "regardless of the medium in which paid." 1939 Code, § 115(f)(2). Section 115(h)(1) said that such a distribution would not be considered a "distribution of earnings or profits of any corporation" if "no gain to such distributee from the receipt of such stock or securities, property or money, was recognized by law." See also *Helverling v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942) (Section 115(h) was inapplicable "because the distribution here was in *property and money* and *not in stock or securities*" (emphases added)). And Section 1857 defined a safe deposit box as "any vault, safe, box, or other receptacle, of not more than 40 cubic feet capacity, used for the safe-keeping or storage of jewelry, plate, *money*, specie, bullion, *stocks*, bonds, *securities*, valuable papers of any kind, or other valuable personal property." (emphases added). Examples are plentiful throughout the Code. This supports the conclusion that the original meaning of "money" did not encompass either stocks or stock options.[2]

The court relies on later-enacted statutory exceptions—principally a 2004 exception for qualified

---

[2] Furthermore, the RRTA was enacted during the Great Depression, when corporate stock would not have been understood to be as liquid as it is today. Employees in the 1930s would not have taken it kindly had they been asked to accept company stock options in lieu of money remuneration. That lends credence to the conclusion that stock and stock options were not money remuneration.

stock options added to both the RRTA and FICA—to draw an inference that "money remuneration" is broader than its original meaning suggests. However, "absent a clearly established congressional intention, repeals by implication are not favored." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (citations and internal quotation marks omitted). Implied repeal can occur only: "(1) [w]here provisions in the two acts are in irreconcilable conflict;" and "(2) if the later act covers the whole of the subject of the earlier one and is clearly intended as a substitute." *Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

Neither exception to the presumption against implied repeal is applicable. First, there is no conflict between a general definition and an exception that might cover things the general definition doesn't cover. In *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1402 (2014), the Supreme Court explained that, under the broad FICA "wages" definition, a statutory "command that all severance payments be treated 'as if' they were wages for income-tax withholding is in all respects consistent with the proposition that at least some severance payments are wages." After all, "the statement that 'all men shall be treated as if they were six feet tall does not imply that no men are six feet tall.'" *Id.* (quoting *CSX Corp. v. United States*, 518 F.3d 1328, 1342 (Fed. Cir. 2008)). The converse of this is that an exception might exclude, for whatever reason, something the general definition already omits. There might be any number of explanations for this. Congress might have wanted to fill a potential gap without revisiting the general definition. In any event, there is no conflict between

the general provisions and the exceptions, as both are consistent with the excepted forms of remuneration not being "money remuneration." Moreover, there can be no serious contention that an exception to a definitional statute "covers the whole subject" of the original definition, so the second exception to the presumption against implied repeal is also inapplicable.

To be sure, "the implication of a later enactment ... will often change the meaning that would otherwise be given to an *earlier provision that is ambiguous*." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 330 (2012) (emphasis added). However, the definition of "compensation" in the RRTA is not ambiguous with respect to the question presented here. As I have demonstrated, the original meaning of "money remuneration" was limited to cash and cash equivalents and did not include stock or stock options. Because the definitional statute is unambiguous, the later enacted exceptions cannot alter its meaning.

In sum, Congress has long treated railroads differently than other industries. See, e.g., Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.*; Railway Labor Act, 45 U.S.C. § 151 *et seq*. In the labor relations context, the Supreme Court has cautioned that "parallels between the [National Labor Relations Act] and the [Railway Labor Act] ... should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chic. & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). For whatever reason, the RRTA is another example of this. Given the increased liquidity of corporate stock, it may be long past time to remove

the word "money" from the definition of compensation under the RRTA, but we lack the power to do so where Congress has declined.[3] Therefore, I would hold that the non-qualified stock options provided to employees of these railroads are not taxable as compensation under the RRTA.

I respectfully dissent.

---

[3] I must point out that, although I would hold the non-qualified stock options non-taxable under the RRTA, the proceeds from the sale of stock are of course taxable under generally applicable laws when the employee makes a profit. From the railroads' perspective, of course, they would avoid paying the tax on their end of the transaction.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 12, 2017

Before

RICHARD A. POSNER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 16-3300, 16-3303, 16-3304

WISCONSIN CENTRAL LTD., ILLINOIS CENTRAL R.R. CO., and GRAND TRUNK WESTERN R.R. CO.,	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	Nos. 14 C 10243, 10246, 10244
v.	Gary Feinerman, *Judge*.
UNITED STATES OF AMERICA,	
Defendant-Appellee.	

O R D E R

On June 22, 2017, plaintiffs-appellants filed a petition for rehearing and rehearing *en banc*. A

majority of the judges on the original panel have voted to deny the petition and none of the active judges has requested a vote on whether to rehear the case *en banc*.* The petition is therefore **DENIED**.

* Circuit Judge Daniel A. Manion voted to grant the petition for rehearing. For the reasons stated in my dissent from the panel opinion and in the Railroads' petition for rehearing, I would grant the petition. In my opinion, the panel's majority opinion creates an intra-circuit conflict over the proper method of statutory interpretation. This case is thus worthy of another look.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WISCONSIN CENTRAL LTD.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

14 C 10243

Judge Gary Feinerman

GRAND TRUNK WESTERN RAILROAD COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

14 C 10244

Judge Gary Feinerman

ILLINOIS CENTRAL RAILROAD COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

14 C 10246

Judge Gary Feinerman

MEMORANDUM OPINION AND ORDER

In these consolidated and materially identical suits, Plaintiffs Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company seek refunds for allegedly overpaid federal employment taxes under the Railroad Retirement Tax Act ("RRTA"), 26 U.S.C. §§ 3201-3241. Doc. 1. (Unless indicated otherwise, all docket numbers refer to *Wisconsin Central Ltd. v. United States of America*, No. 14 C 10243). The parties filed cross-motions for summary judgment on a set of stipulated facts. Docs. 23, 25. Plaintiffs' motions are denied and the Government's motions are granted.

Background

The parties agree that the court should rely on a jointly submitted set of stipulated facts in deciding the summary judgment motions. Doc. 22 at 2; *see Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 573 (7th Cir. 2014); *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001); *Mkt. Street Assocs. L.P. v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991). Plaintiffs are rail carriers as defined by the RRTA, 26 U.S.C. § 3231(g). Doc. 22 at ¶ 6. Plaintiffs have significant railroad operations in the Midwest and Mississippi Valley, and are indirect wholly owned subsidiaries of Canadian National Railway Company. *Id*. at ¶¶ 8-9.

This case concerns the tax years 2006 through 2013. *Id*. at ¶¶ 3, 22. During that time, pursuant to Canadian National's Management Long-Term Incentive Plan and Illinois Central's Executive Performance Compensation Program, Plaintiffs granted options of Canadian National stock to certain

employees. Id. at ¶¶ 22, 26(a), 29(c). The options were "nonqualified" stock options, meaning that they were not incentive stock options as defined in 26 U.S.C. § 422(b) or part of an employee stock purchase plan as defined in 26 U.S.C. § 423(b), which in turn means that they were not "qualified stock options" as defined in the RRTA, 26 U.S.C. § 3231(e)(12). *Id*. at ¶ 22. Each option gave the employee the right to purchase one share of Canadian National stock at a fixed price equal to the stock's publicly traded price on the date of the option grant ("exercise price"). *Id*. at ¶ 23(a). If an option was not exercised within a ten-year term, or possibly earlier if an employee retired or died, it expired. *Id*. at ¶¶ 23(a), 26(f). (The options of any employee dismissed for cause or who voluntarily left Plaintiffs expired immediately. *Id*. at ¶ 26(f).) Twenty-seven percent of the options exercised from 2006-2013 were "performance" options, exercisable only if Canadian National attained certain financial performance benchmarks in a given year, while the remaining seventy-three percent were exercisable without regard to corporate financial performance or other constraints. *Id*. at ¶ 25.

In lieu of the Social Security taxes paid by non-rail employers and employees under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. §§ 3101 *et seq.*, railroad employers and employees pay taxes under the RRTA. Doc. 22 at ¶ 7. Unlike FICA, the RRTA imposes two tiers of taxes, with Tier 1 providing benefits and taxes in a manner almost identical to FICA, and Tier II functioning like a private pension plan, tying its benefits to any individual employee's "earnings and career service."

26 U.S.C. § 3201. Tier 1 taxes are statutorily linked to FICA:

> In addition to other taxes, there is hereby imposed on the income of each [rail carrier] employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under [FICA].

26 U.S.C. § 3201(a). The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1). Much as RRTA tax rates are statutorily linked to FICA, Treasury Department regulations define RRTA compensation by reference to FICA, providing that under the RRTA, "[t]he term compensation has the same meaning as the term wages in section 3121(a) [FICA] ... except as specifically limited by the" RRTA. 26 C.F.R. § 31.3231(e)-1. FICA in turn defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," subject to several inapplicable exceptions. 26 U.S.C. § 3121(a).

The dispositive issue here is whether the non-qualified stock options that Plaintiffs awarded to their employees are a "form of money remuneration" and thus "compensation" under the RRTA. Doc. 22 at ¶ 2.

In their initial tax payments for the years at issue, Plaintiffs treated each exercised option as income for federal income tax purposes and compensation for the purposes of the RRTA, in the amount by which the publicly traded share price of Canadian National on the exercise date exceeded the exercise price for each option exercised. *Id*. at ¶ 23(c). Plaintiffs now believe that was a mistake. Wisconsin Central seeks refunds for the 2007-2011 and 2013 tax years in the amount of $205,327.49, Doc. 1 at ¶ 1; Doc. 22 at ¶ 3; Grand Trunk Western seeks refunds for the 2006-2012 tax years in the amount of $515,589.58, Doc. 22 at ¶ 3; Doc. 1 (14 C 10244) at ¶ 1; and Illinois Central seeks refunds for the 2006-2013 tax years in the amount of $12,600,958.82, Doc. 22 at ¶ 3; Doc. 1 (14 C 10246) at ¶ 1.

Similar suits have been filed in recent years. *See BNSF Ry. Co. v. United States*, 775 F.3d 743 (5th Cir. 2015); *Union Pac. R.R. Co. v. United States*, No. 8:14-cv-00237, slip op. (D. Neb. Jul. 1, 2016) (reproduced at Doc. 35-1); *CSX Corp. v. United States*, No. 3:15-cv-00427 (M.D. Fla. filed Apr. 3, 2015). In the two judgments issued thus far, the Fifth Circuit in *BNSF Railway* and the District of Nebraska in *Union Pacific* both upheld the Treasury Department's interpretation of "any form of money remuneration" to include non-qualified stock options. For the following reasons, this court reaches the same result.

Discussion

The parties agree that this case is governed by the framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Doc. 24 at 13; Doc. 26 at 10; Doc. 27 at

7; Doc. 28 at 4. Plaintiffs therefore have forfeited, if not waived, any argument that *Skidmore*, *Auer*, or some other deference regime applies. *See G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court."); *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 386 (7th Cir. 2012) ("[T]he forfeiture doctrine applies not only to a litigant's failure to raise a general argument ... but also to a litigant's failure to advance a specific point in support of a general argument."); *Costello v. Grundon*, 651 F.3d 614, 635 (7th Cir. 2011) ("As the moving party, the [defendant] had the initial burden of identifying the basis for seeking summary judgment."); *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007) ("[A] party forfeits any argument it fails to raise in a brief opposing summary judgment.").

"At *Chevron*'s first step, [the court] determine[s]—using ordinary principles of statutory interpretation—whether Congress has directly spoken to the precise question at issue." *Coyomani-Cielo v. Holder*, 758 F.3d 908, 912 (7th Cir. 2014). If "Congress has directly spoken to the precise question at issue ... the court ... must give effect to the unambiguously expressed intent of Congress," *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015) (quoting *Chevron*, 467 U.S. at 842-43) (ellipses original) (internal quotation marks omitted), and end the inquiry there, *see Coyomani-Cielo*, 758 F.3d at 912. "If, however, 'the statute is silent or ambiguous with respect to the specific issue,'" *Chevron*'s second step, at which "a reviewing court must defer to the agency's interpretation if it is reasonable," comes into

play. *Indiana v. EPA*, 796 F.3d at 811 (quoting *Chevron*, 467 U.S. at 843-44). Significantly, "there is a difference—which may be important in some *Chevron* cases—between clear meaning and the best of several interpretive choices." *Coyomani-Cielo*, 758 F.3d at 914. If Congress has not directly spoken to the issue, it "has left the administrative agency with discretion to resolve a statutory ambiguity," and so the court must defer to an agency's reasonable interpretation of the statute. *Ibid*. (internal quotation marks omitted); *see also Indiana v. EPA*, 796 F.3d at 811.

I. *Chevron* Step One

"The cardinal canon of statutory interpretation is that" a court "look[s] first to the text of the statute." *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 622 (7th Cir. 2015) (quoting *Conn. Nat'l Bank v. German*, 503 U.S. 249, 253 (1992)). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Turley v. Gaetz*, 625 F.3d 1005, 1008 (7th Cir. 2010) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)) (internal quotation marks omitted); *see also United States v. Titan Int'l, Inc.*, 811 F.3d 950, 952 (7th Cir. 2016). "In the absence of statutory definitions," the court "accord[s] words and phrases their ordinary and natural meaning and avoid[s] rendering them meaningless, redundant, or superfluous." *CFTC v. Worth Bullion Grp., Inc.*, 717 F.3d 545, 550 (7th Cir. 2013) (internal quotation marks omitted). "Statutory interpretation is guided not just by a single sentence or sentence fragment, but

by the language of the whole law, and its object and policy." *Ibid*. (internal quotation marks omitted). "Indeed, statutory interpretation is a holistic endeavor and, at a minimum, must account for the statute's full text, language as well as punctuation, structure, and subject matter." *Trs. of Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 (7th Cir. 1996); *see also Estate of Moreland v. Dieter*, 576 F.3d 691, 699 (7th Cir 2009).

The RRTA does not define the term "any form of money remuneration." The question here is whether that term is limited to money itself—meaning fiat currency like dollars or pounds, or even virtual currency like Bitcoin—or whether it also includes other items of value and, if so, whether those items include non-qualified stock options.

The Seventh Circuit has held that dictionary definitions are of only limited use in statutory interpretation. *See Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 643 (7th Cir. 2014) (en banc) ("Dictionaries can be useful in interpreting statutes, but judges and lawyers must take care not to 'overread' what dictionaries tell us.") (citing *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014)) (citation omitted); *United States v. Costello*, 666 F.3d 1040, 1043-44 (7th Cir. 2012) ("[D]ictionaries must be used as sources of statutory meaning only with great caution. ... Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context."). Still, both parties cite dictionary definitions to support their competing readings of the statute. Plaintiffs cite definitions of "money" as "something generally accepted as a

medium of exchange, a measure of value, or a means of payment," or "a current medium of exchange in the form of coins and banknotes; coins and banknotes collectively," and argue that those definitions clearly exclude property, such as the Canadian National stock options, "without a fixed pecuniary value, whose monetary value fluctuates over time ... and which is not accepted as a medium of exchange or payment." Doc. 24 at 17; *see* "Money," *Merriam-Webster* (2016), https://perma.cc/452T-2GPS; "Money," *Oxford Dictionaries* (2016), https://perma.cc/EZX3-2PJG. The Government responds by citing the *Oxford English Dictionary*, which defines "money" as a "means of payment considered as representing value or purchasing power; ... [h]ence: property, possessions, resources, etc., viewed as having exchangeable value or a value expressible in terms of monetary units," and therefore that money does not "always or only mean 'cash money.'" Doc. 26 at 11 (quoting "Money," *Oxford English Dictionary* (2016), https://perma.cc/Z5TG-2KKF). *Black's Law Dictionary* provides various definitions, narrow and broad, including a "medium of exchange authorized or adopted by a government as part of its currency"; "[a]ssets that can be easily converted to cash"; and "[c]apital that is invested or traded as a commodity." *Black's Law Dictionary* 1096 (9th ed. 2009).

At common law, "money" was defined largely in the negative, as goods and instruments that were by legal fiction not subject to the principle of *nemo dat qui non habet*, Latin for "he who has not cannot give." James Steven Rogers, "Policy Perspectives on Revised U.C.C. Article 8," 43 *UCLA L. Rev.* 1431, 1461-62 (1996). Because applying that principle strictly would

interfere with the smooth functioning of the economy, Lord Mansfield held that once a financial instrument is "treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes," it effectively *is* money and is therefore not subject to principles that applied to non-money property, such as repossession by a former owner. *Miller v. Race* (1758) 97 Eng. Rep. 398, 401 (KB); *see also Murray v. Lardner*, 69 U.S. (2 Wall.) 110, 118-19 (1864) (discussing *Miller v. Race*); James Steven Rogers, "The New Old Law of Electronic Money," 58 *SMU L. Rev.* 1253, 1256 (2015) ("*Miller* held that Bank of England notes, which were not at the time formally legal tender, were governed by the same rules as money itself.").

As the Fifth Circuit noted in *BNSF Railway*, these disparate "definitions of 'money' are less than helpful" in determining the meaning of the statutory term "any form of money remuneration." 775 F.3d at 752. Because *Chevron*'s first step directs attention to the "unambiguously expressed intent of Congress," the fact that the word "money" has several reasonable definitions—and that the statute itself provides that "money remuneration" has multiple "form[s]"—strongly suggests that the term "any form of money remuneration" is subject to multiple reasonable interpretations as well. At the very least, dictionary and common law definitions do not on their own provide an unambiguous statutory meaning.

The same holds for the RRTA's structure; indeed, if anything, the statutory structure favors the Government's reading over Plaintiffs'. The "commonsense canon of *noscitur a sociis* ... counsels

that a word is given more precise content by the neighboring words with which it is associated." *Worth*, 717 F.3d at 550 (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)). Under that canon, "the fact that several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Id*. at 550-51 (internal quotation marks omitted). Statutory language is thus given meaning "with an eye toward 'the company it keeps.'" *Id*. at 551 (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995)). "While not an inescapable rule, this canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *McDonnell v. United States*, 136 S. Ct. ___, 2016 WL 3461561, at *13 (U.S. June 27, 2016) (internal quotation marks omitted).

After defining "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers," § 3231(e)(1) specifically excludes four forms of payment from the meaning of "compensation":

> Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their

> dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if [FICA] applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5).

26 U.S.C. § 3231(e)(1). These exceptions do not apply here, but the fact that Congress felt it necessary to include the first exception—which covers employer-provided health and disability insurance—suggests a relatively broad scope of the term "money remuneration." Congress would have had no need to carve that exception if it did not consider such insurance to otherwise be a "form of money

remuneration." *See United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014) (holding that an express "exemption" for severance payments in FICA "would be unnecessary were severance payments in general not within FICA's definition of 'wages.'"). Yet employer-provided insurance is not a medium of exchange or a means of payment, and thus falls outside the narrow definition of "money remuneration" urged by Plaintiffs. "The specificity of th[is] exemption[]" thus "reinforces the broad nature of" the RRTA's definition of "money remuneration." *Ibid.*; *see also Univ. of Chi. v. United States*, 547 F.3d 773, 775 (7th Cir. 2008) (noting that that the FICA term "'wages' ... is broadly defined but followed by specific exceptions").

Section 3231(e)(12) contains an additional exclusion for qualified stock options from the definition of "compensation." *See* 26 U.S.C. § 3231(e)(12). Like health and accident disability insurance, a qualified stock option is neither a medium of exchange nor commonly understood as synonymous with "cash money." It follows that interpreting "any form of money remuneration" to be limited to fiat or virtual currency, as Plaintiffs urge, would improperly render the exclusion of qualified stock options "meaningless, redundant, or superfluous." *Worth*, 717 F.3d at 550 (internal quotation marks omitted); *see also In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 710 (7th Cir. 2015) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") (quoting *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013)) (internal quotation marks omitted); *River Rd. Hotel Partners,*

LLC v. Amalgamated Bank, 651 F.3d 642, 651 (7th Cir. 2011) ("In general, canons of statutory construction urge courts to interpret statutes in ways that make every part of the statute meaningful. Interpretations that result in provisions being superfluous are highly disfavored.") (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (citation omitted). Moreover, "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." *United States v. France*, 782 F.3d 820, 825 (7th Cir. 2015) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)), *vacated on other grounds*, 136 S. Ct. 582 (2015). Thus, the explicit exclusion of *qualified* stock options strongly suggests not only that the term "any form of money remuneration" includes stock options in general, but also that only qualified stock options and not *non-qualified* stock options are to be excluded.

Plaintiffs contend that construing "any form of money remuneration" to refer to anything other than cash money would render the term "money" superfluous. Doc. 24 at 15. The Government responds that understanding the term to refer only to cash money would improperly read "any form of" out of the statute, and that the words "any form of" would themselves be unnecessary if "money remuneration" referred only to actual cash. Doc. 26 at 11. Plaintiffs retort that "any form of" refers to different forms by which Plaintiffs may convey money to their employees, including hourly wages, overtime pay, per-mile or piecework pay, weekly or monthly salaries, bonuses, or commissions. Doc. 27 at 11. The court

need not resolve this dispute, because both positions are plausible—providing further support for the notion that the statutory meaning is not clear. *See Coyomani-Cielo*, 758 F.3d at 912-13 (holding that a statute is ambiguous for *Chevron* purposes when "neither [party's] interpretation is obviously required by the statute and both interpretations arguably read words out of the statute").

Considering the RRTA's subject matter likewise does not point decisively in favor of Plaintiffs' interpretation. "[D]ifferent acts which address the same subject matter, which is to say are *in pari materia*, should be read together such that the ambiguities in one may be resolved by reference to the other." *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 990 (7th Cir. 2001); *see also United States v. Sanders*, 708 F.3d 976, 993 (7th Cir. 2013) (noting that "another 'longstanding' canon of statutory interpretation is 'construing statutes *in pari materia*'") (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). Often, the "tricky issue when applying this canon is determining when different statutes should be regarded as addressing the same topic," *Firstar Bank*, 253 F.3d at 990, but the Seventh Circuit has expressly noted that the "Railroad Retirement Tax Act ... is to the railroad industry what the Social Security Act is to other industries: the imposition of an employment or payroll tax on both the employer and the employee, with the proceeds used to pay pensions and other benefits." *Std. Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987); *see also Herzog Transit Servs., Inc. v. U.S. R.R. Ret. Bd.*, 624 F.3d 467, 471 (7th Cir. 2010) ("Employers and employees subject to the [the

railroad] Acts must pay a payroll tax akin to the social security tax requirement of other employers and employees. These taxes [are] established by the Railroad Retirement Tax Act."). Other circuits have reached the same conclusion. *See BNSF Ry.*, 775 F.3d at 749-50, 754 & n.81 (citing *Standard Office Building*, 819 F.2d at 1373, collecting cases, and noting that "it is well-established that the RRTA and FICA are parallel statutes, and courts often look to FICA when interpreting the RRTA"); *N.D. State Univ. v. United States,* 255 F.3d 599, 604 (8th Cir. 2001) (calling the RRTA "the equivalent of FICA for railroad employees"); *Mont. Rail Link, Inc. v. United States,* 76 F.3d 991, 993 (9th Cir. 1996) ("The RRTA serves as the functional equivalent of the Social Security Act for railroad employers."); *Chi. Milwaukee Corp. v. United States*, 40 F.3d 373, 374 (Fed. Cir. 1994) ("RRTA tax is similar to the tax imposed by the Federal Insurance Contributions Act.").

Plaintiffs respond that the "conceptual similarity between the Social Security and Railroad Retirement *systems*, important as it is in many contexts, does not assist in the resolution of the instant case that turns on enforcement of specific statutory language in the RRTA." Doc. 27 at 8-9. But that is precisely the point of the *in pari materia* canon: "statutes addressing the same subject matter *generally* should be read as if they were one law," with the traditional tools of statutory interpretation applied accordingly. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) (emphasis added). Thus, although FICA does not by completely define the RRTA's various contours, examining the former to elucidate related provisions of the latter is an acceptable mode of statutory

interpretation given the close linkages between the statutes.

As noted, FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," subject to several exceptions. 26 U.S.C. § 3121(a). That is broad language, and the Supreme Court recently reiterated "the term 'wages' in the Social Security statutory context to have substantial breadth." *Quality Stores*, 134 S. Ct. at 1400; *see also Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 48 (2011) (noting that "Congress has defined 'wages' broadly" under FICA). Applying the *in pari materia* canon supports the proposition that just as courts construe FICA "wages" broadly, so, too, should they broadly construe RRTA "compensation."

Plaintiffs contend that because, "taking Tier 1 and Tier 2 taxes together," RRTA tax rates significantly exceed FICA tax rates, "it is completely understandable that Congress would be more comfortable with a more restricted [RRTA] tax base ... to help moderate the higher overall tax." Doc. 27 at 9 n.1. This argument fails for two reasons. First, Congress itself sets the tax rates. If Congress wanted to ensure a roughly equal tax burden for employers and employees in railroad and non-railroad jobs, "there was a much simpler, clearer, and more direct way for Congress to convey" that: by imposing equal tax rates, not by employing ambiguous statutory language that leaves open to reasonable debate the RRTA tax base. *Coyomani-Cielo*, 758 F.3d at 913. Second, given that only RRTA Tier 1 "provides benefits and taxes in a manner almost identical to

FICA," *BNSF Ry.*, 775 F.3d at 750, Plaintiffs' inclusion of the RRTA Tier 2 taxes in their calculation results in a comparison of apples to oranges.

To be clear, the *in pari materia* canon does not establish that the term "any form of money remuneration" *unambiguously* encompasses the non-qualified stock options at issue here. As the Government acknowledges, Doc. 26 at 16, the RRTA and FICA, *in pari materia* or not, are not identical. They do use distinct terms to refer to the funds that provide the basis for their employer and employee taxes, and "the choice of substantially different words to address analogous issues signifies a different approach." *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996). It therefore may be, as Plaintiffs argue, that the different phrasing "is one of the key differences" between the RRTA and FICA and their respective retirement tax systems. Doc. 27 at 7 (emphasis omitted). Yet this also does not provide for *Chevron* purposes an unambiguous meaning of the term. Rather, as with the contrasting dictionary definitions, the very fact that applying different canons, or even the same canon, can support different outcomes refutes the notion that Congress's "unambiguously expressed intent" aligns with Plaintiffs' interpretation of the term. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (holding that a statute did "not itself provide clear guidance" under *Chevron* because reading the statute's words in context dictated a different result than reading them "in light of the canon against implied repeals"); *Coyomani-Cielo*, 758 F.3d at 913 ("In light of the foregoing analysis—which suggests some confusion, potential contradictions,

and a much clearer way to make the point that Congress may have been trying to make—we cannot say that [the statute] is 'clear' at *Chevron*'s first step."); *Arobelidze v. Holder*, 653 F.3d 513, 518-19 (7th Cir. 2011) ("When, as here, there are two plausible but different interpretations of statutory language, there is ambiguity.") (internal quotation marks omitted).

Plaintiffs contend that the absence of a statutory definition for "money" in the RRTA and the Internal Revenue Code ("IRC") implies that the word must have "a commonly understood meaning outside the context of the Internal Revenue Code, and that its common definition and usage should apply throughout the Code, in the absence of any specific modification for a particular provision." Doc. 24 at 15-16. That argument elides the crucial issue. True enough, "[i]n evaluating statutory language, a court ... 'giv[es] the words used their ordinary meaning.'" *Lewis v. Epic Sys. Corp.*, ___ F.3d ___, 2016 WL 3029464, at *2 (7th Cir. May 26, 2016) (quoting *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014)) (alteration in original); *see also Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) ("[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (internal quotation marks omitted). But as demonstrated above, the "ordinary understanding" of "any form of money remuneration" in the context of the RRTA is elusive. Moreover, although Plaintiffs cite several unrelated IRC provisions that appear to refer to "money" as a type of property, Doc. 24 at 16, 22; Doc. 27 at 12-13, the IRC definitional section, 26 U.S.C. § 7701, does not define the term, and nor does the IRC elsewhere refer to "money remuneration." Doc. 28 at

7. More important, none of the IRC provisions cited by Plaintiffs define the boundaries of the money subtype of property, and so regardless of whether those provisions could be useful in interpreting the RRTA, they do not provide a clear definition for "any form of money remuneration." *See* 26 U.S.C. §§ 118(c) ("money or other property"), 317(a) ("property" includes "money, securities, and any other property"), 461(f) ("money or other property"), 465(b)(1)(A) ("the amount of money and the adjusted basis of other property contributed by the taxpayer to the activity"), 1038(b) ("money and the fair market value of other property").

Plaintiffs also argue that the "common understanding" of money is that it "has a constant amount or denomination representing a specific stored value that can be applied to a future transaction." Doc. 24 at 16. They contrast this with non-money property, which "has no fixed value but is susceptible to varying valuations over time and subjectively in the hands of different holders." *Ibid*. That distinction lacks a statutory basis, as shown above, and it also fails as a matter of internal logic. Money, even assuming it is limited to fiat currency, is itself subject to varying valuations over time, through cycles of inflation or deflation or its fluctuation relative to foreign currencies. Monetary transactions are by their nature bilateral. For example, when a table—or a stock option—experiences a change in value, money does as well: if a formerly $100 table now costs $200, then $200, which was formerly valued at two tables, is now valued at one.

Or consider that, at the close of business on June 23, 2016, one British pound was worth $1.49, while

the following day, after the Brexit vote, one pound was worth $1.37. *See* "Historical Rates for the GBP/USD Currency Conversion on 23 June 2016," *PoundSterling Live* (2016), https://perma.cc/ED2R-LAER; "Historical Rates for the GBP/USD Currency Conversion on 24 June 2016," *PoundSterling Live* (2016), https://perma.cc/K478-3PKU. In other words, on June 23, one dollar was valued at £0.67; the following day, it was valued at £0.73. The dollar's "specific stored value" had changed in all ways other than the number printed the banknote or coin—which is to say, it had changed in all ways meaningful to the bearer, or to the employee receiving it as compensation. This is at the very least similar to the value of a stock option: it may fluctuate in value prior to exercise, but at the time of exercise it has a fixed monetary value, which provides the base on which Plaintiffs allegedly overpaid RRTA taxes.

To that point, it bears noting that railroads around the country, including Plaintiffs, until recently held the view that the non-qualified stock options *were* "money remuneration" under the RRTA and accordingly paid RRTA tax on them. Doc. 22 at ¶ 23(c); *BNSF Railway*, 775 F.3d at 746-47; Complaint at ¶¶ 2, 24, *CSX Corp.*, No. 3:15-cv-00427 (M.D. Fla.); Complaint at ¶¶ 2, 17, *Union Pac. R.R. Co.*, No. 8:14-cv-00237 (D. Neb.). The fact that highly interested parties with undoubtedly sophisticated tax counsel held this view against their own interests confirms, though no further confirmation is necessary, that, at a minimum, the statute is ambiguous.

Finally, Plaintiffs contend that the history of the Economic Growth Act of 1992, S. 2217 102d Cong. (1992), an ultimately unadopted amendment to the

RRTA, provides support for their position that "any form of money remuneration" refers unambiguously to cash money. Doc. 27 at 10. In the Seventh Circuit, however, legislative history is not considered until the second step of the *Chevron* analysis. *See Coyomani-Cielo*, 758 F.3d at 914 ("[W]e realize that some of our sister circuits consider legislative history at [*Chevron* step one], but we prefer to save that inquiry for *Chevron*'s second step.") (citation omitted); *Emergency Servs. Billing Corp., Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 465 (7th Cir. 2012) ("In this Circuit, we seem to lean toward reserving consideration of legislative history and other appropriate factors until the second *Chevron* step.") (internal quotation marks omitted).

To summarize, the meaning of "any form of money remuneration" in 26 U.S.C. § 3231(e)(1) is not clear and unambiguous under *Chevron*.

II. *Chevron* Step Two

"At the second stage of the *Chevron* analysis, [the court] determine[s] whether the agency's interpretation is reasonable." *Coyomani-Cielo*, 758 F.3d at 914. The court's "review at this stage is deferential; [the court] will uphold the agency's interpretation so long as it is 'a permissible construction of the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843). "If that [agency] interpretation is reasonable, it must be followed, regardless of whether or not the reviewing court would have come to the same conclusion." *Emergency Servs. Billing*, 668 F.3d at 466 (citing *Chevron*, 467 U.S. at 843 n.11).

The Treasury Department has the "general authority under 26 U.S.C. § 7805(a) to 'prescribe all needful rules and regulations for the enforcement' of

the Internal Revenue Code." *Mayo Found.*, 562 U.S. at 56. Treasury Regulation § 31.3231(e)-(1) provides that under the RRTA, "[t]he term compensation has the same meaning as the term *wages* in section 3121(a) [FICA] ... except as specifically limited by the" RRTA. 26 C.F.R. § 31.3231(e)-1. As noted, § 3121 defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). The Treasury's interpretation of the statute is reasonable. As discussed at length above, the term "any form of money remuneration" in the RRTA is susceptible to a broad reading analogous to that of "wages" in FICA. The structure of the RRTA, particularly the specific exclusions in 26 U.S.C. § 3231(e)(1) & (12), supports (but does not necessarily compel) a broad interpretation, as does the close relationship of the RRTA with FICA. And recent Supreme Court decisions emphasize and reaffirm the broad reading of FICA's definition of "wages." *See Quality Stores*, 134 S. Ct. at 1399-1400; *Mayo Found.*, 562 U.S. at 48.

Common sense also supports the reasonableness of Treasury's interpretation. Stock options are financial instruments. Unlike a car or home, they have very little, if any, intrinsic value to their holders beyond their monetary value. They are readily and regularly convertible into cash, distinguishing them from most non-money property. Although Plaintiffs accurately note that "[a]ny property, cash or non-cash, has a monetary value that can be estimated at any given point," Doc. 27 at 14 n.5, stock options, unlike many forms of non-money property, exist almost exclusively to be converted into cash. Further, the fact that

reading "any form of money remuneration" to include non-qualified stock options eliminates the possibility that railroads could structure their compensation packages in such a way as to substantially reduce their RRTA tax burden provides further justification for finding that Treasury's interpretation is reasonable and permissible.

The legislative history cited by Plaintiffs does not render Treasury's reading unreasonable. The Economic Growth Act of 1992 was a bill that proposed to "conform the definition of compensation under the Railroad Retirement Act to that under the Federal Insurance Contributions Act." S. 2217 102d Cong. tit. XLI (1992). The bill did not progress beyond the Finance Committee and was not subject to a vote. *See* "S.2217 – Economic Growth Act of 1992," *Congress.gov* (2016), https://perma.cc/ZG2K-ZFVK. Plaintiffs contend that the bill's failure indicates that Congress "did not intend for the RRTA to be interpreted coextensively with FICA" and that if the Government's "interpretation of the RRTA were correct, this proposed amendment would have been unnecessary." Doc. 27 at 10.

As the Government correctly observes, however, "congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *United States v. Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted); *see also Lawson*, 134 S. Ct. at 1173 n.16 ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.") (internal quotation marks omitted).

Further, "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 348-49 (1963)). The Economic Growth Act of 1992 was proposed fifty-seven years after the term "any form of money remuneration" was first incorporated into RRTA. *See* 49 Stat. 974 § 1(d) (1935); *BNSF Ry.*, 775 F.3d at 755 & nn. 88-91 (reviewing the RRTA's legislative history). Its mere existence as an unenacted legislative proposal is certainly not enough to overcome the deference owed to Treasury's interpretation of the RRTA.

Plaintiffs retort that even if Treasury's interpretation of the RRTA is reasonable, the particular non-qualified stock options at issue here are not compensation under the RRTA because the phrase "money remuneration" is a "specific limit[ation]" in the RRTA that distinguishes RRTA compensation from FICA wages, 26 C.F.R. § 31.3231(e)-1. Doc. 24 at 18-20; Doc. 27 at 14-17. But Treasury does not interpret that phrase as a specific limitation, and its interpretation is reasonable. As discussed above, 26 U.S.C. § 3231 contains several enumerated exclusions, including one for qualified stock options, § 3231(e)(12). Plaintiffs protest that this "'rifle shot' option exclusion[]" was "designed to resolve specific treatment of those types of options, not others." Doc. 27 at 16 & n.6. That may be right as a historical matter, but it does not follow that Treasury's interpretation is unreasonable, and Plaintiffs err in seeking comfort from the Supreme Court's observation that "the statement that all men

shall be treated as if they were six feet tall does not imply that no men are six feet tall." *Id*. at 16 (quoting *Quality Stores*, 134 S. Ct. at 1402). A more appropriate analogy would be a statute that explicitly excludes men who were six feet tall; an agency interpretation that the statute did not exclude men who were 6'1" would be reasonable.

Plaintiffs make two additional arguments. First, they contend that the Government's position that non-qualified stock options are "money remuneration" is an impermissible "post hoc rationalization" that the IRS had never offered until this case and others like it were filed. Doc. 24 at 19. But that interpretation certainly cannot be a post-hoc rationalization when the need to apply it had not presented itself before, in large part because Plaintiffs and other railroads themselves believed that the stock options fell within the RRTA's compensation provision and paid taxes in accordance with that belief.

Second, Plaintiffs and the Government dispute the relevance of IRS Revenue Ruling 69-391, 1969-2 C.B. 191, which held that railroad-furnished housing for certain foremen that had a fixed value was taxable compensation under the RRTA. While Plaintiffs' reliance on this ruling has several weaknesses, including that it does not deal with stock options and was issued by the IRS rather than the Treasury Department, the biggest problem is that, under Seventh Circuit precedent, IRS revenue rulings are "entitled to respectful consideration, but not to the deference that the *Chevron* doctrine requires in its domain." *First Chi. NBD Corp. v. Comm'r*, 135 F.3d 457, 459 (7th Cir. 1998) (citations omitted); *see also Wetzler v. Ill. CPA Soc'y & Found. Ret. Inc. Plan*, 586

F.3d 1053, 1058 (7th Cir. 2009) ("Revenue rulings are not binding on this Court and we give them the lowest degree of deference[,] which equates to some deference or respectful consideration.") (internal quotation marks omitted). By contrast, Treasury's interpretation "is given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation'" or statute. *United States ex rel. Garbe v. Kmart Corp.*, ___ F.3d ___, 2016 WL 3031099, at *9 (7th Cir. May 27, 2016) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). Treasury's interpretation is not plainly erroneous or inconsistent with the regulation, and so it controls here.

Conclusion

Plaintiffs' summary judgment motions are denied, and the Government's motions are granted. Judgment in these consolidated cases will be entered in favor of the Government and against Plaintiffs.

July 8, 2016

/s/ Gary Feinerman
United States District Judge

APPENDIX D

26 U.S.C. § 3231(e)

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by

specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under

section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act), clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as

they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)

(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by

reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[**(7)** Repealed. Pub. L. 113-295, div. A, title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040.]

(8) Treatment of certain deferred compensation and salary reduction arrangements

(A) Certain employer contributions treated as compensation

Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation

The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging

The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options

The term "compensation" shall not include any remuneration on account of—

> **(A)** a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or
>
> **(B)** any disposition by the individual of such stock.