No. 12-1448

In the Supreme Court of the United States

NORFOLK SOUTHERN CORPORATION,
Petitioner,

v.

ROBERT ZIMMERMAN,
Respondent.

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

BRIEF IN OPPOSITION

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A. Statement of Facts

Diller Avenue, in the Borough of New Holland, is a two lane road that intersects with two sets of railroad tracks owned and operated by the Petitioner, Norfolk Southern Corporation ("Norfolk Southern"). *Zimmerman v. Norfolk Southern Corporation*, 706 F.3d 170, 174-75 (3d Cir. 2013). Because of a tavern located at the Northwest corner of the crossing, southbound motorists have a difficult time seeing approaching trains. *Id.* at 175. In fact, a motorist who is a mere seventy-six feet from the crossing can only see sixty-five feet down the tracks. *Id.* The speed limit for trains at the crossing was disputed. *Id.* For decades, Petitioner and its predecessor, Consolidated Rail Corporation ("Conrail"), had filed documents with the Federal Railroad Administration ("FRA") asserting that the speed limit for trains at the crossing was ten miles per hour; however, during a deposition, Petitioner's track foreman testified that the speed limit for trains at the crossing was actually forty miles per hour. *See id.* at 175, 180. On June 12, 2008, Norfolk Southern' s train was actually travelling twenty-four miles per hour. *Zimmerman*, 706 F.3d at 175.

The Diller Avenue crossing has been the scene of numerous train/vehicle accidents since the 1970's. *Id.* In fact, railroad locomotives struck five vehicles in the 1970's. *Id.* After that series of accidents, Conrail installed two white railroad cross bucks at the crossing. *Id.* Even so, accidents and injuries have continued to pile up at the crossing. *Id.* Since the cross bucks installation, Conrail and Norfolk Southern have struck

at least five more vehicles. In fact, at least one accident has occurred since the accident that is the subject of this case. *Id.* By June 12, 2008, the cross bucks at issue in this case had fallen into disrepair. *Zimmerman*, 706 F.3d at 175. The painted warning marks on the road had likewise been allowed to fade, and a warning sign located along the road was obscured by tree branches. *Id.*

It was on this date that the Respondent, Robert Zimmerman, celebrated his thirty-eighth birthday. *Id.* After a church softball game and a visit with his mother, he got on his motorcycle and headed home. *Id.* His route took him through the Borough of New Holland. *Id.* It was dark. *Id.* Mr. Zimmerman was wearing a helmet. *Zimmerman*, 706 F.3d at 175. He was operating his motorcycle within the posted speed limit of thirty-five miles per hour. *Id.* Because Norfolk Southern had not maintained the warning devices at the crossing, Mr. Zimmerman believed the crossing was no longer active. *Id.*

As Norfolk Southern's train approached the crossing, it was not visible to Mr. Zimmerman until Mr. Zimmerman was within seventy-six feet of the crossing. *Id.* The available evidence indicates that Mr. Zimmerman immediately applied his brakes, causing his front wheel to lock. *Id.* He was catapulted over his handle bars, and his head struck the fuel tank on the lead locomotive. *Id.* As a result of the accident, Mr. Zimmerman now suffers from partial quadriplegia. *Zimmerman*, 706 F.3d at 175.

B. Evidence of Speed

A central issue in the case was the speed limit applicable to trains at the Diller Avenue crossing.[1] *Id.* at 178. For decades, Norfolk Southern and its predecessor railroads had filed documents with the FRA identifying the speed limit at the crossing as being only ten miles per hour. *See id.* at 180. In addition, in several of the accident reports, Norfolk Southern reported that speed limit as being ten miles per hour. *See id.* at 185, 186. During the discovery phase of this case, however, Norfolk Southern asserted that the speed was actually forty miles per hour. *See id.* at 175. Thus, there was evidence of at least two different speed limits for trains at the Diller Avenue crossing. *See id.* at 186.

Discovery in this case revealed that Norfolk Southern actually decides what its own speed limit is by manipulating the track classification along its railroad lines. The FRA sets speed limitations for each

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[1] There were actually three causes of action which were the subject of the appeal. *Zimmerman*, 706 F.3d at 175. As the Third Circuit noted, all of the issues raised on appeal raised issues of preemption. *Id.* at 176. The first involved the Railroad's duty to provide a safe crossing under Pennsylvania law. *Id.* at 175. On appeal, the Third Circuit found that this cause of action was not preempted. *Id.* at 188. Another involved the adequacy of the warning devices at the crossing. *Id.* at 191-92. The Third Circuit found that the claim that the warning devices were insufficient was preempted but that the claim that the devices had not been maintained was not. *Id.* at 193. Petitioner has not sought review of either of these determinations. There is therefore no issue of preemption before this Court.

classification of track.[2] However, the FRA does not determine what the track classification should be at any point in or along a railroad line. *See generally* 49 C.F.R. § 213 (setting minimum safety standards for railroads). The railroad decides its own speed limit by adjusting the track classification as it deems fit. In fact, at oral argument before the Third Circuit, counsel for Norfolk Southern addressed this issue by stating: "We [meaning Norfolk Southern] can go as fast as we want, and we don't have to tell anyone."

Against the well documented evidence of a ten mile speed limit, Norfolk Southern presented the testimony of its track supervisor, who testified that the track classification at the Diller Avenue crossing was a Class 3 track, allowing a forty mile per hour speed limit.[3] *See Zimmerman*, 706 F.3d at 175. He was not able to answer how or by whom the track classification was determined. He also was unsure as to whether sight distances were taken into account in determining track classifications. His testimony was equivocal and conclusory at best.

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[2] Fed. Highway Admin., U.S. Dep't of Transp., Railroad-Highway Grade Crossing Handbook, § 2.B.2 (2d ed. 2007) (Components of a Highway-Rail Grade Crossing), *available at* http://safety.fhwa.dot.gov/xings/com_roaduser/07010/sec02.htm#b.

[3] Norfolk Southern also presented the testimony of the train master responsible for train operations at the Diller Avenue crossing who testified that the track was actually Class 2, meaning the speed limit would have been twenty-five miles per hour. *See* 49 C.F.R. § 213.9.

Circumstantial evidence also supports a ten mile per hour speed limit. The U.S. Department of Transportation publishes a *Railroad-Highway Grade Crossing Handbook* which provides design criteria, including sight distance requirements for railroad-highway crossings.[4] At a crossing where the highway speed is thirty miles per hour, the required sight distance for a train traveling at ten miles per hour is ninety-nine feet.[5] If the train speed limit is ten miles per hour, as Norfolk Southern and its predecessor railroads have claimed for decades, then the crossing comes close to meeting the federal design standards for sight distances at a crossing.[6] On the other hand, if the speed limit were actually forty miles per hour, the required sight distance would be three hundred and ninety-six feet, six times the actual available sight distance.[7] Norfolk Southern would not intentionally create such a dangerous crossing by setting its train speed limit at forty miles per hour. The reasonable conclusion is that the speed limit for the train was actually ten miles per hour.

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[4] Fed. Highway Admin., U.S. Dep't of Transp., Railroad-Highway Grade Crossing Handbook, § 3.C.1 (2d ed. 2007) (Assessment of Crossing Safety and Maintenance), *available at* http://safety.fhwa.dot.gov/xings/com_roaduser/07010/sec03.htm.

[5] *Id.* § 3.C.1, Table 32.

[6] *See Id.*

[7] *See Id.*

By even Petitioner's account, the train was traveling at twice the authorized speed of ten miles per hour.

C. Application of Evidentiary Privileges.

After decades of filing reports with a falsified train speed limit at the Diller Avenue crossing, Petitioner now intimates that an evidentiary privilege allows it to mislead the FRA with impunity.[8] Petitioner argues that the privileges are needed to "promote public safety by encouraging candor," but, if its legal position is believed, Petitioner merely seeks to perpetuate its ability to mislead the FRA while placing the public in greater danger. Neither of the privileges Norfolk Southern relies upon actually prevent the introduction of the documents into evidence. A fair reading of the privileges demonstrates that they do not apply to the documents in question.

The first privilege that Norfolk Southern relies upon is contained in 23 U.S.C. § 409. That privilege states, in pertinent part[9]:

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[8] In fact, even since the institution of this case and the testimony of its track supervisor, Norfolk Southern continues to report the speed limit at the crossing as ten miles per hour. See website for FRA Crossing Safety Reports for Crossing No. 517759D <http://safetydata.fra.dot.gov/OfficeofSafety/PublicSite/Crossing/Crossing.aspx>.

[9] As the Third Circuit noted, the privilege actually contains two parts, the second part privileging information collected "for the purpose of developing any highway construction improvement project which may be implemented utilizing Federal-aid highway funds." *Zimmerman*, 706 F.3d at 181; 23 U.S.C. § 409. The Third Circuit found this part of the privilege inapplicable to the case.

> Notwithstanding any other provision of the law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accidents sites, hazardous roadway crossings, or railway-highway crossings, pursuant to sections 130, 144 or 148 of this title. . .shall not be subject to discovery or admitted into evidence in a Federal or State court. . .

Of the three sections specified in § 409, Norfolk Southern contends that only § 130 has application to this case. As originally enacted, § 130 did not impose any obligation upon any railroads to collect any information. *See Zimmerman*, 706 F.3d at 181-82. It was directed only to the states: "each State shall conduct and systematically maintain a survey of highways to identify those railroad crossings which may require separation, relocation, or protection devices, and establish a schedule of projects for this purpose." 23 U.S.C. § 130(d). Neither Congress nor the FRA imposed any obligations upon railroads to report anything.

In 2008, Congress amended 23 U.S.C. § 130 to make it clear that states must submit reports under 23 U.S.C. § 130 whereas railroad reports are submitted pursuant to 49 U.S.C. § 20160. *See* 23 U.S.C. § 130(l). Significantly, § 20160 does not contain an evidentiary privilege. This Amendment makes it clear that

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Zimmerman, 706 F.3d at 185. Petitioner has not sought review of that determination.

railroads do not report matters pursuant to § 130. Since railroads do not report under § 130, the evidentiary privilege of § 409 has no application to documents prepared by the railroad. All of the documents the Third Circuit found to be admissible were prepared by Norfolk Southern or its predecessor.

Petitioner raised an aspect of § 409 below that was not addressed by either the District Court or the Third Circuit. It concerns the meaning of the phrase "for the purpose of." The privilege only applies to information collected for the purpose of "identifying, evaluating or planning safety enhancements of potential accidents sites, hazardous roadway crossings." 23 U.S.C. § 409. Since Norfolk Southern contends that it supplied information which was false, its purpose was not to enhance railroad safety; rather, it sought just the opposite. For this additional reason, the privilege should not apply.[10]

Likewise, Title 49 provides a privilege applicable to accident reports. 49 U.S.C. § 20901. It states: "No part of an accident report or incident report filed by a railroad carrier under section 20901 of [Title 49] . . . may be used in a civil action for damages resulting in the admission of the reports in civil actions for

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[10] An alternative argument, and the position the Respondent believes to be true, is the documents supplied to the FRA were in fact true and that the speed limit was actually ten miles per hour. This conclusion is consistent with Federal crossing design standards as well as the physical characteristics of the crossing. It therefore would be Petitioner's position at trial that it is actually the track supervisor who is providing false testimony if his trial testimony remains the same as his deposition testimony.

damages where the damages arise from a matter mentioned in the report." 49 U.S.C. § 20903. Applying this straightforward standard, the report concerning Mr. Zimmerman's accident would not be admissible; other accident reports, however, which are not the subject of the June 12, 2008, accident would be admissible.

D. The Decision of the Third Circuit.

The Third Circuit issued a much more nuanced opinion than Petitioner suggests.[11] The Third Circuit began its analysis by recognizing the existence and purpose of the National Crossing Inventory, noting that for many years the railroad's participation in the program was voluntary and the method for submitting information changed over the decades. *Zimmerman*, 706 F.3d at 180-83. It noted that Congress eventually passed the Rail Safety Improvement Act of 2008 requiring states and railroads independently to submit reports to the FRA. *Id.* at 182. Applying that Act to the two post-2008 reports submitted by Respondents, the Third Circuit found one report submitted by the Commonwealth of Pennsylvania to be inadmissible under the plain language of § 130. *Id.* at 182-83. Since the railroad's reporting requirement was placed in another section, 49 U.S.C. § 20160, which § 409 does not reference, the Third Circuit found that the report

[11] In addition to the analysis discussed here, the Third Circuit analyzed the second part of § 409 and the privilege that arises thereunder. Norfolk Southern does not take issue with that analysis, and the issue is therefore not discussed in this brief.

prepared by the railroad after 2008 was not excluded under § 409. *Id.*

With respect to the seven reports prepared by the railroad prior to 2008, the Third Circuit initially indicated that since neither 23 U.S.C. § 130(l) nor 49 U.S.C. § 20160 existed prior to 2008 and the fact that states and railroads participated in the National Inventory System voluntarily, "they [the railroads] did not submit reports pursuant to § 130 or any other statute." *Id.* at 183. However, the Court did not end its analysis there. It allowed for the possibility that even though § 130(l) did not exist prior to 2008, the seven reports in question still could have been submitted pursuant to § 130. Relying upon language from the Court's decision in *Pierce County v. Guillen*, 537 U.S. 129, 144-46 (2003), the Third Circuit found the possibility existed that the reports could have been created pursuant to § 130(d). *Id.* at 183-84. However, in reviewing the record, the Third Circuit found that Norfolk Southern "has offered no evidence" to support its contention that the reports were created pursuant to § 130. *Zimmerman*, 706 F.3d at 184. Applying the customary summary judgment standard, the Third Circuit concluded "that the District Court improperly excluded seven pre-2008 reports at the summary judgment stage."[12] *Id.*

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[12] Although the Third Circuit appears to leave open the possibility of a more developed record, the fact remains that after an extended discovery period, Norfolk Southern was not able to offer any information indicating that these reports were prepared pursuant to § 130, the likely conclusion being that no such information exists.

With respect to the 49 U.S.C. § 20903 privilege, the Third Circuit merely applied the plain language of the statute. *Id.* at 185-86. Norfolk Southern had argued that the term "matter" related to everything contained in the report. *Id.* at 186. The Third Circuit found that argument unpersuasive "because Norfolk Southern takes the word 'matter' completely out of context. The phrase 'damages resulting from' appears directly before the word 'matter', indicating that a 'matter' is the event that caused the harm discussed in the report." *Id.* In fact, if the privilege were as broad as Norfolk Southern suggests, the qualifying language added by Congress would have no meaning. Therefore, the Third Circuit found that nine of the ten reports were admissible.[13] *Zimmerman*, 706 F.3d at 186.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Norfolk Southern makes substantial public policy arguments to support its contention that documents it submits to the states or to the FRA should not be useable in Court proceedings. Congress, of course, establishes the public policy of the United States and determines the nature and extent of statutory privileges. Congress may or may not decide to include the railroad in a particular privilege for any number of reasons. In this case, Norfolk Southern's practices actually undermine the public policy argument it seeks

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[13] The Third Circuit also rejected Norfolk Southern's argument that the reports were privileged under § 409 since the reports were prepared pursuant to 49 U.S.C. § 20901 and not pursuant to any provision of Title 23. *Zimmerman*, 706 F.3d at 186.

to make. The FRA as well as the States need accurate information to make decisions that protect the public. The information supplied, however, must be accurate for the agency to perform its job. In this case, Norfolk Southern argues that it was supplying false information to the FRA.

In supplying false information to the FRA, Norfolk Southern turns this policy argument on its head. According to Norfolk Southern, it understated the speed at which its trains were authorized to travel creating the appearance of a safe crossing where trains slowly pass through the crossing at a speed of a human runner. By providing this false information to the FRA, Norfolk Southern avoids the scrutiny of the FRA and saves the costs associated with the installation of gates and lights at the crossing. In the meantime, ten motorists have been hit by Norfolk Southern trains at this intersection. *See id.* at 175. Rather than enhancing safety for the motoring public, Norfolk Southern actually endangers the motoring public.

In any event, public policy arguments alone should not serve as a basis for the granting of certiorari. *See* U.S. Sup. Ct. R. 10 (explaining that certiorari will be granted for compelling reasons only and thereafter listing some factors indicating the "character of the reasons the Court considers"). Supreme Court Rule 10 sets forth several non-exclusive factors to be considered in determining whether certiorari should be granted, none of which include public policy and none of which apply here.

A. There is neither a Circuit Split nor "Confusion before the lower courts".

Rule 10(a) indicates that certiorari may be granted when "a United States court of appeals had entered a decision in conflict with the decision of another United States court of appeals." U.S. Sup. Ct. R. 10(a). In fact the principal purpose of certiorari is to allow the Supreme Court to resolve conflicts among circuit courts of appeals. *Braxton v. United States*, 500 U.S. 344, 348 (1991). In this case, it is readily apparent that there is no split between the circuit courts of appeals. Even in the only possibly contrary case, a district court opinion from New Mexico, it is unclear what type of report the district court was referring to, and, in any event, that court simply ordered the railroad "to file a motion identifying the documents they assert are covered by 23 U.S.C. § 409 or 49 U.S.C. § 20903." Therefore, no split exists among the circuit courts of appeals that justifies a grant of certiorari.

B. The Decision of the Third Circuit does not Conflict with decisions of this Court.

Petitioner asserts that the decision of the Third Circuit is in conflict with the Court's decision in *Guillen*; however, it is difficult from a reading of the Petition to understand why this is so. Far from being the sweeping decision that Norfolk Southern desires, the decision in *Guillen* is quite narrow and supports the conclusion that the documents in question in this case should be admissible as evidence. Following this Court, the Third Circuit narrowly construed the § 409 privilege. "[S]tatutes establishing evidentiary privileges must be narrowly construed because

privileges impede the search for truth." *Guillen*, 537 U.S. at 144-45.

In accordance with *Guillen*, the Third Circuit looked to the initial creator of the report to determine if the report was prepared for a § 130 purpose.[14] *Zimmerman*, 706 F.3d at 180. In *Guillen*, this Court held that § 409 was "inapplicable to information compiled or collected for purposes unrelated to Section 152." *Guillen*, 537 U.S. at 145-46. However, in applying the dictates of *Guillen*, the Third Circuit simply found no evidence in the record indicating the purpose for which the reports in question were created. *Zimmerman*, 706 F.3d at 184. Since Norfolk Southern failed to meet its burden for establishing the privilege, the Third Circuit's analysis ended. *Id.* In essence, the Third Circuit found that the purpose for which the information was gathered was unrelated to § 130 or, at least, no evidence supported such a conclusion.

If anything, the Third Circuit gave Norfolk Southern a generous reading of the privilege. As this Court explained in *Guillen*, Congress passed the Highway Safety Act of 1966 for the purpose of improving highway safety. *Guillen*, 537 U.S. at 133. A key component of the Act was the Hazardous Elimination Program. *Id.* "The Secretary of Transportation reported to Congress that States objected to the absence of confidentiality measures

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[14] *Guillen* actually dealt with a different Section than the current case. *See Guillen*, 537 U.S. at 138. *Guillen* actually addressed § 152, concerning surveys at hazardous crossings. *Id.*; 23 U.S.C. § 152.

under 23 U.S.C. Section 15". *Id.* The States feared an increased risk of liability for accidents at locations their surveys identified. *Id.* at 134. In response, Congress enacted 23 U.S.C. § 409 in order to protect information gathered by the States from being used against the States.[15] In fact, the party asserting the privilege in *Guillen* was the State. *Id.* at 136.

Other issues would have precluded the application of the § 409 privilege as well. Unlike § 152, which was the subject of this Court's analysis in *Guillen*, neither 23 U.S.C. § 130(l) nor 49 U.S.C. § 20160 existed prior to 2008. *Zimmerman*, 706 F.3d at 183. Suggesting that reports written prior to a statute's existence were created "pursuant to" that statute strains logic. However, the Third Circuit gave Norfolk Southern the benefit of the doubt when it came to this issue. As it existed prior to 2008, § 130 imposed no duty or reporting requirements upon any railroad, so any railroad participation could not have been pursuant to statute. The Third Circuit nevertheless examined the record to see if there was any evidence from which the purpose of the report could be determined. It was only because no evidence existed that the Third Circuit found the privilege not to apply.

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[15] In Footnote 13 of its Petition, Petitioner criticizes the Third Circuit for stating that "Congress may well have had a stronger interest in protecting states, rather than railroads from litigation" apparently failing to note that it was actually this Court that stated § 409 was actually passed to protect the States. *Guillen*, 537 U.S. at 147. It also makes an Eleventh Amendment argument that makes little sense. The Eleventh Amendment only prevents suits against States in federal courts. States can be sued and are sued daily in state courts throughout the country.

Norfolk Southern attempts to insert itself into § 409 and § 130 as a protected party. Despite this contention, a cursory review of the statutes reveals that railroads are not even mentioned. In fact, in 2008 when Congress amended § 130, it could have explicitly placed railroads in that section requiring reporting and therefore privileging information supplied by the railroads. It did not. Instead, it placed the railroad's reporting requirement in 49 U.S.C. § 20160, and it did not amend 23 U.S.C. § 409 to privilege information submitted under 49 U.S.C. § 20160. The only reasonable conclusion is that Congress, neither prior to 2008 nor since 2008, intended to privilege the documents in question. In any event, no conflict exists between this Court's decision in *Guillen* and the Third Circuit's decision in the present case.

C. **There is no Compelling Reason to Grant Certiorari.**

Finally, Norfolk Southern alludes to the potential calamity associated with the potential admissibility of "hundreds of thousands of reports." The central issue in this case, however, involved a train's speed limit at a single crossing. No evidentiary privilege protects the disclosure of a train's speed limit at a railroad crossing. Contrary to the comments of Norfolk Southern's counsel at oral argument, railroads cannot go as fast as they want, and they do have to tell at least some people. In this case, Norfolk Southern created different evidence concerning speed limits. This discrepancy should be an extremely rare event, unless Norfolk Southern and the other Class 1 railroads have adopted policies of identifying one speed limit to the FRA and another to litigants in civil cases. If, as should be the

case, the railroad has a single speed limit that it reports both to the FRA and in civil cases, then the use of these documents would be unnecessary. Rather than affecting hundreds of thousands of reports, as Norfolk Southern suggests, only the reports at this crossing in this case should ever be relevant. Therefore, no compelling argument exists justifying review by this Court.

D. The Third Circuit's Interpretation of the § 409 and the § 20901Privilege is Correct.

Norfolk Southern primarily criticizes the Third Circuit's statutory construction of § 409 because the court violated the "last antecedent" rule. Raised for the first time in the Petition, neither the Third Circuit nor the District Court heard argument or ruled on this grammatical argument. When an issue is not raised in prior proceedings, it cannot be raised in a Petition for Writ of Certiorari for the first time. *Ellis v. Dixon*, 349 U.S. 458 (1955), *rehearing denied*, 350 U.S. 85 (Petition dismissed as improvidently granted, in part, because claims of constitutional vagueness had not been raised below).

Even if the Court considers this new theory, the meaning of § 409 advanced by Petitioner makes little sense. The last antecedent rule provides that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see also* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.33 at 369 (6th ed. 2000). The rule, however, is not absolute and can be "overcome by other indicia of meaning." *Barnhart*, 540

U.S. at 26. An "antecedent" is a noun or a noun phrase. Nouns and noun phrases are modified by adjectives.

Petitioner's reliance upon *Barnhart* is misplaced. In *Barnhart*, this Court considered the meaning of the phrase "substantial gainful employment which exists in the national economy." At issue was whether "exists in the national economy" modified "substantial gainful employment" or a previous phrase or clause. Recognizing "substantial gainful employment" as an antecedent, this Court applied the last antecedent rule and held that the limiting phrase ("which exists in the national economy") modified the previous noun phrase ("substantial gainful employment").

By contrast, the phrase "pursuant to" in § 403 is a prepositional phrase. That prepositional phrase functions as an adverb. Consequently, it modifies a verb or verbs and not nouns or noun phrases. Therefore, in this case, the phrase "pursuant to" modifies the previous verbs "compiled or collected." In fact, no other verbs appear in the sentence. The Third Circuit, therefore, gave § 409 the only reasonable construction. The "last antecedent" rule, even if applicable, which Respondent doubts, results in a strained construction giving little or no meaning to the "pursuant to" phrase.

Norfolk Southern then attempts to support its grammatical argument by stating that the phrase "pursuant to" does not mean "collected under the compulsion of Section 130" or "mandated by that section." Rather, based upon a twenty year old edition of Webster's Third New International Dictionary 1848 (1993), it argues that the definition should be "in the

course of carrying out." Even the authority cited by Norfolk Southern contains the phrase "in conformance to or agreement with," which, in common sense terms, means "in compliance with" § 130. If Congress had intended as open-ended an interpretation as Norfolk Southern urges, it could simply have omitted the phrase "pursuant to" and the reference to § 130. It did not.

More to the point, no jurisprudence from this Court or any other court supports the fungible interpretation urged by Norfolk Southern. While the interpretation of the phrase "pursuant to" does not appear to have even been addressed, this Court has consistently read the phrase "pursuant to" when referencing a statute to mean as required by the statute. *See Demarest v. Manspeak*, 498 U.S. 184, 190 (1991) ("pursuant to" read to mean as required by statute); *Carcetti v. Cebullo*, 547 U.S. 410, 421 (1991) ("pursuant to" official duties synonymous with "as required by official duties").

The Third Circuit's interpretation of 49 U.S.C. § 20901 is equally reasonable. By citing a different dictionary *Webster's New World College Dictionary I* (3d. ed. 1996), Norfolk Southern attempts to create a false distinction between the indefinite article "a" and the definite article "the." The argument asserts that "a" refers to multiple matters whereas "the" would have referenced only one. As with the first statutory construction argument, this argument was not raised by Norfolk Southern in its argument before the Third Circuit and thus is improper to raise now. *Dixon*, 349 U.S. at 458.

Nevertheless, this argument is nonsensical. If a motorist approaching a crossing sees "a" train as he approaches the crossing, it would be generally understood that there was only one train. If a motorist sees "the" train, it would again be generally understood that there was only one train. Norfolk Southern's interpretation may be plausible, but it is not reasonable. As the Third Circuit indicated, "Norfolk Southern takes the word 'matter' completely out of context. The phrase 'damages resulting from' appears directly before the word 'matter', indicating that a 'matter' is the event that caused the harm discussed in the report." *Zimmerman*, 706 F.3d at 186.

In any event, Norfolk Southern's statutory construction arguments are too thin to support a Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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