No. 17-530

In the Supreme Court of the United States

WISCONSIN CENTRAL, LTD., ET AL.

v.

UNITED STATES OF AMERICA

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

BRIEF OF CSX CORPORATION AND UNION PACIFIC RAILROAD COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

CSX Corporation and Union Pacific Railroad Company are two of America's premier railroads. Same as the railroads in this case, CSX and Union Pacific are seeking refunds of RRTA taxes for themselves and their employees—CSX's case is pending in the Eleventh Circuit (No. 17-12961), and Union Pacific's case is pending in this Court (No. 17-1002). Both *amici* have a clear interest in defending their long-held view that corporate stock is not, and never has been, a form of money.[*]

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[*] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of CSX's and Union Pacific's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

SUMMARY OF ARGUMENT

In prior cases, the government has argued that giving the word "money" in Section 3231(e)(1) its original, ordinary meaning renders superfluous the exclusions in (e)(1)(i), (e)(5), (e)(9), and (e)(12). All of those exclusions were enacted decades after Congress defined "compensation" as a "form of money remuneration," and at the moment each was enacted, none was superfluous. They had meaning and purpose consistent with interpreting "money" as a "commonly accepted medium of exchange." Any superfluities that appear today are the result of post-enactment developments that do not change the original meaning of anything in Section 3231.

ARGUMENT

I. THE GOVERNMENT STRETCHES THE RULE AGAINST SUPERFLUITIES TOO FAR.

To get around the ordinary meaning of "money" in the RRTA, the government has argued that some exclusions in Section 3231(e) would do nothing and be unnecessary if "money" means "a commonly accepted medium of exchange." To varying degrees, lower courts have been persuaded by the government's argument. See *BNSF Railway Co.* v. *United States*, 775 F.3d 743, 754 (CA5 2015); *Wis. Central* v. *United States*, 856 F.3d 490 (CA7 2017). But the argument is wrong, for it is based on a mischaracterization of the rule against superfluities.

The rule against superfluities is simply a preference for statutory interpretations that give all of a statute's text meaning or purpose. The rule is not a command to eliminate technically unnecessary language from the law. Repetition, redundancy, and illustrations are all technically unnecessary, but they also are ordinary speaking and writing conventions. See *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 646 (1990). Congress has filled the U.S. Code generally, and the Tax Code in particular, with technically unnecessary words and phrases that are nevertheless useful and that nevertheless serve a purpose. See, *e.g.*, *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008). Section 61, the foundational definition of "gross income," defines it capaciously as "all income from whatever source derived," then lists a number of examples of things that count as "gross income." 26 U.S.C. § 61. The examples in Section 61 are not problematic superfluities because they emphasize and clarify congressional intent.

In recent cases, this Court has admonished parties that have elevated the rule against superfluities into something more than just a rule of thumb. In this case, the government is trying more of the same. Looking at Section 3231(e) as it stands today, the government contends that some exclusions appear to do nothing if the word "money" takes its ordinary meaning. And so, the government argues that "money" should not take its original, ordinary meaning ("a commonly accepted medium of exchange"), but instead should be ignored as a meaningless modifier.

The government's approach to the rule against superfluities commits a double fault. The first fault is this: the rule is not a license to ignore the plain meaning of statutory words. See *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004). If giving "money" its ordinary meaning meant that one or more exclusions in Section 3231 had no practical effect, so be it.

But that's not even an issue. For the second fault in the government's argument is in portraying some of Section 3231(e)'s exclusions as having no practical effect. Each does some work today, and each always has. Because the goal of statutory interpretation is to determine the *original* meaning of a statute, what a provision did *when enacted* is more important than what a provision does *today* for purposes of applying the rule against superfluities.

Below, we prove our points. When each exclusion the government attacks was enacted, it had meaning and purpose consistent with the original meaning of "money." Any superfluities that appear today are the byproducts of later legislation, which are not the kind of superfluities that violate the rule.

II. EVERY EXCLUSION FUNCTIONS WHEN "MONEY" TAKES ITS ORIGINAL, ORDINARY MEANING.

The Act now known as the RRTA became law in 1937. See Carriers Taxing Act of 1937, Pub. L. No. 174, 50 Stat. 435 (1937). In the RRTA's 1935 predecessor, Congress defined "compensation" as

> any form of money remuneration for active service, received by an employee from a carrier, including salaries and commissions, but shall not include free transportation nor any payment received on account of sickness, disability, or other form of personal relief.

Act of Aug. 20, 1935, Pub. L. No. 400, § 1, 49 Stat. 974 (1935). The government has pointed to the reference to "free transportation" as bolstering its position that "money" is a meaningless modifier, for why else would Congress exclude an in-kind, non-money benefit like "free transportation" from taxable "compensation" if "money" meant only "commonly accepted mediums of exchange"? See *BNSF*, 775 F.3d at 755. The answer is simple: free transportation was not always provided in kind. It was sometimes provided in a commonly accepted medium of exchange—reimbursements or "*refunds* issued to persons entitled to free transportation." 1 Fed. Reg. 1,576, 1,577 (Oct. 13, 1936) (emphasis added). This exclusion, therefore, was not superfluous before it was declared unconstitutional.[1]

In contrast to the 1935 legislation, the RRTA had only two exclusions when it was enacted in 1937—one for tips and one for an employer's payment of the employee's share of RRTA taxes:

> The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers * * *. Such term does not include tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of the tax imposed on such employee by section 2 of this Act.

50 Stat. 435, 436; accord 26 U.S.C. § 1532(e) (Supp. V 1939). For nearly forty years, those exclusions were the only two. See, *e.g.*, 26 U.S.C. § 1532(e) (1940); 26 U.S.C. § 3231(e)(1) (1976) (with newly added exclusions). And both, plainly, are consistent

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1 That's assuming the government is even right to call it an "exclusion." The reference to "free transportation" immediately followed a reference to "salaries and commissions." Read together, those references show that Congress was providing illustrations of what was, and was not, "money remuneration." "Salaries and commissions" would have been "money remuneration," and "free transportation" would not have, even if Congress had left them unmentioned.

with interpreting "money" as a commonly accepted medium of exchange.

The government has insisted that several exclusions added decades later by later Congresses are superfluous if the word "money" in Section 3231 takes its original, ordinary meaning. That is wrong. Below, we show how all of those exclusions—specifically, exclusions now codified in subsections (e)(1)(i), (e)(5), (e)(9), and (e)(12)—had meaning and purpose when they were enacted.

A. Subsection (e)(1)(i)

Current U.S. Code text

26 U.S.C. § 3231(e)(1)(i) excludes

> 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.

Enactment history

When this exclusion was added in 1976, its text ended after the term "accident disability." See Act to Amend the Railroad Retirement Act of 1974, Pub. L. No. 94-547, 90 Stat. 2523 (1976).

Congress added the underlined language in 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 10205(a), 103 Stat. 2106 (1989).

The exclusion is not superfluous

The government's superfluity arguments about (e)(1)(i) mischaracterize (e)(1)(i) as, simply, an exclusion for health and life insurance—meaning, an exclusion of an in-kind benefit. But that's not what the law says. Since 1976, (e)(1)(i) has excluded "*any payment* * * * made to, or on behalf of, an employee * * * on account of sickness or accident disability or medical or hospitalization expenses." 26 U.S.C. § 3231(e)(1)(i) (emphasis added). And since 1989, (e)(1)(i) has excluded most "*payments*" for death benefits. *Ibid.* (emphasis added). A "payment" is usually made using a medium of exchange, like cash, checks, or direct deposit. Thus, the (e)(1)(i) exclusion is not superfluous when "money" takes its original, ordinary meaning.[2]

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2 The Seventh Circuit suggested that subsections (e)(6), (e)(10), and (e)(11) would be superfluous if "money" meant "commonly accepted medium of exchange," see *Wis. Central*, 856 F.3d at 492, but just like (e)(1)(i), all three of those subsections exclude mediums of exchange because they exclude "payment[s]."

B. Subsection (e)(5)

Current U.S. Code text

26 U.S.C. § 3231(e)(5) excludes

> 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.

Enactment history

When Congress added this exclusion in 1984, it cross-referenced only Sections 117 and 132. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531(d)(2), 98 Stat. 494 (1984).

The cross-reference to Section 74(c) was added in 1986. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 122(e), 100 Stat. 2085 (1986).

The cross-reference to Section 108(f)(4) was added in 2004. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 320(b), 118 Stat. 1418 (2004).

None of the cross-references is superfluous

In the past, the government has challenged only two of (e)(5)'s four cross-references as superfluous—the cross-references to Sections 74(c) and 132. (The other two cross-references obviously encompass money.) Below, we show that neither is superfluous because both exclude mediums of exchange in some way. Yet, even if they did not, there would be no superfluity because (e)(5) does not exclude only the exact same items that the cross-referenced sections exclude; it excludes anything that "it is reasonable to believe" they exclude. It is, at the very least, reasonable to believe that Sections 74(c) and 132 exclude benefits paid in a medium of exchange, in no small part because those sections actually do exclude benefits paid in a medium of exchange.

Section 74(c): In 1986, (e)(5) was amended to cross-reference Section 74(c), in the exact same legislation that amended Section 74(c) to cross-reference the then-newly adopted Section 274(j). All were part of a comprehensive congressional effort to unify tax treatment of employee gifts and achievement awards. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 122, 100 Stat. 2085 (1986). Under regulations in effect before the 1986 enactment, *anything* could count as an achievement award if its value was below a threshold amount. See 28 Fed. Reg. 6,499, 6,505 (June 25 1963); see also Economic Recovery Tax Act of 1981, Pub. L. 97-34, § 265, 95 Stat. 172 (1981) (raising the threshold to $400). Gift certificates, accordingly, could count as achievement awards back then, and some gift certificates—those akin to credit cards usable at a variety of retailers—"fall within the medium-of-exchange definition of money." *Union Pacific R.R. Co.* v. *United States*, 865 F.3d 1045, 1051 (CA8 2017). As the rule against superfluities requires, the Eighth Circuit correctly analyzed (e)(5)'s cross-reference to Section 74(c) within its original context.

The government has made an anachronous attack on the idea that (e)(5) excluded gift certificates when the cross-reference to Section 74(c) was added in 1986. Specifically, the government has argued that gift certificates do not count as achievement awards because a single IRS regulation, 26 C.F.R. § 1.274-3, requires that achievement awards be personal property. But that regulation didn't exist in 1986. It was promulgated in 1988, and not even to implement Section 274(j), but to implement Section 274(b)(3)—a 1981 law that the 1986 law repealed. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 122(c), 100 Stat. 2110.[3] The 1988 regulation applied only retroactively to the 1982 through 1986 tax years, see 53 Fed. Reg. 36,450, 36,450–51 (Sept. 20, 1988), so it clearly has nothing to say about the meaning or purpose of (e)(5)'s cross-reference to Section 74(c).

The cross-reference to Section 74(c) cannot be understood outside its original context. Consider that the latest version of Section 274(j) explicitly carves out gift certificates from the class of employee achievement awards. See 26 U.S.C. § 274(j)(3)(A)(ii)(I). That carve-out has no effect on the *original* meaning of (e)(5), though, because it is the product of a law that was enacted a few months ago and that applies only prospectively. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13310, 131 Stat. 2054, 2132 (2017). The 2017 Congress that revised Section 274(j) clearly was not trying to change the meaning of "money" in the RRTA.

Section 132: Section 132 was added to the Code by the same law that added (e)(5). See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531, 98 Stat. 494 (1984). Both were part of a congressional effort to codify longstanding practices regarding fringe benefits. And so, the same legislation that added Section 132 to exclude specific fringe benefits also provided, for the first time ever, that all other fringe

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3 Regulations for Sections 74(c) and 274(j) were proposed in 1989, see 54 Fed. Reg. 627 (Jan. 9 1989), but never promulgated, see IRS Notice 92-12 (Mar. 26, 1992).

benefits must be included in individuals' gross income. See *id.* § 531(c); see also 26 U.S.C. § 61(a)(1).

Section 132 has grown over the years as Congress has increased the number of excludable fringe benefits. Originally, Section 132 excluded just four items: no-additional-cost services; qualified employee discounts; working condition fringes; and *de minimis* fringes. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531(a)(1), 98 Stat. 878. All can be paid in forms of money (advances or reimbursements) just like railroads have long provided free transportation in the same forms of money. See Staff of Joint Committee on Taxation, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 838 n.68, 856 (Comm. Print 1984); see also Gazur, *Assessing Internal Revenue Code Section 132 After Twenty Years*, 25 VA. TAX. REV. 977, 982–92 (2006) (examining fringe-benefit practices that Congress codified in Section 132 and comparing them with railroads' free-transportation reimbursement practices). The Section 132 cross-reference in (e)(5), then, has always excluded some fringe benefits paid in a medium of exchange.

The government has argued that (e)(5)'s cross-reference to Section 132 is superfluous unless *each and every* item excluded by Section 132 can be paid in a form of money. That argument is wrong. By cross-referencing Section 132, Congress used simple and clear language to exclude from RRTA taxation any fringe benefits that might be paid in money. The cross-reference functions even if some fringe benefits might not be paid in money.

The government misunderstands the purpose of legislating by cross-reference within the Tax Code. Cross-references ensure uniformity of result—an item excluded in one part of the Code will also be excluded in other parts. Because the Code is held together with such cross-references, future Congresses need only amend the ultimate, cross-referenced section to have a change ripple throughout the Code. Cross-references in a tax exclusion save current and future Congresses substantial time and attention.

The manifest purpose of (e)(5)'s cross-reference to Section 132 is to ensure that certain fringe benefits are not even *arguably* subject to RRTA taxation. That's why Congress wrote (e)(5) to exclude any fringe benefits that "it is reasonable to believe" are excluded under Section 132. That's why Congress inserted nearly verbatim exclusions in other taxing statutes simultaneously. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531(d)(1)–(4), 98 Stat. 884 (adding four exclusions that cross-reference Section 132). After thirty years of amendments to Section 132, some of which have added money items and some of which have not, (e)(5)'s cross-reference to Section 132 still functions as intended. See, *e.g.*, 26 U.S.C. § 132(g)(1) (excluding qualified moving expense reimbursements—a form of money—as a fringe benefit). The cross-reference to Section 132, therefore, is not superfluous.

C. Subsection (e)(9)

Current U.S. Code text

26 U.S.C. § 3231(e)(9) excludes

> 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.

Enactment history

This exclusion was added in 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 10207(a), 103 Stat. 2106 (1989); see also Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11704(a)(19), 104 Stat. 1388 (1990) (re-codifying this exclusion from (e)(10) to (e)(9)).

The exclusion is not superfluous

The meals-and-lodging exclusion cross-references Section 119's income-tax exclusions for employer-provided meals. One of those exclusions covers money: if an employee must pay an employer a fixed amount for meals even if the employee declines them, that fixed amount is excluded from the employee's income—as if the employer had never even paid the employee that money. See 26 U.S.C. § 119(b)(3). That exclusion existed before (e)(9) was added to Section 3231. See Act of Oct. 7, 1978, Pub. L. No. 95-427, § 4, 92 Stat. 996 (1978) (enacting Section 119(b)(3)).

D. Subsection (e)(12)

Current U.S. Code text

26 U.S.C. § 3231(e)(12) excludes

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.

Enactment history

This exclusion was added in 2004, in the same legislation that added nearly verbatim exclusions to three other tax statutes. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 251(a), 118 Stat. 1418 (2004).

The exclusion is not superfluous

Understanding (e)(12) requires understanding stock options. When an employee exercises an option, the employee *always* spends money and *always* receives stock from the employer. *Sometimes*, an employee receives more than stock at exercise. An employee might receive cash instead of fractional shares, and some qualified option programs pay employees bonuses or "additional compensation, in cash or property," at the time of exercise. 26 C.F.R. § 1.422-5(c). Finally, an employee *always* receives cash when he or she subsequently sells the stock that he or she had purchased from the employer at a discount.

How an option transaction is taxed *for income-tax purposes* depends on whether the option is qualified or non-qualified. For non-qualified options, everything is usually taxed at exercise. See 26 C.F.R. § 1.83-7. Qualified options are treated more favorably: any cash an employee receives at exercise is taxed at exercise, but the stock is taxed later, when the employee disposes of it, usually by selling it for cash. See 26 U.S.C. § 422(c)(2), 423(c); see also 26 C.F.R. § 1.422-5(c).

From their enactment, the two exclusions in the two subparagraphs of (e)(12) have ensured that any cash an employee receives in connection with a qualified stock option, whether at exercise or at sale, is not subject to RRTA taxation. The Fifth and Seventh

Circuits missed that purpose because they endorsed the government's mischaracterization of (e)(12) as, simply, "an exemption for qualified stock options." But by its plain language, (e)(12) excludes "*any remuneration on account of* (A) a transfer of stock to any individual [through qualified options] * * * or (B) any disposition * * * of such stock." 26 U.S.C. § 3231(e)(12) (emphasis added).

Thus, when (e)(12) was enacted in 2004, both parts of it had meaning and purpose consistent with the original, ordinary meaning of "money." The regulation making clear that cash bonuses may be paid at exercise of certain qualified options was promulgated before (e)(12) was enacted. See 69 Fed. Reg. 46,401 (Aug. 3, 2004). What's more, before (e)(12) was enacted, the IRS had taken the position that money an employee receives from a disqualifying disposition of qualified stock (*e.g.*, stock sold within a year of exercise) was subject to employment taxes. Basically, the IRS's view was that, because those proceeds count as "income" for income-tax purposes, those proceeds also should count as "wages" (FICA) and "compensation" (RRTA) for employment-tax purposes. See IRS Notice 2001-14 (Jan. 18, 2001). Employers disagreed and argued that employment taxes should not be assessed because employees alone control whether and when to sell their stock. See Wiggins, *Capital Gain v. Ordinary Income & the FICA Tax Treatment of Emp. Stock Purchase Plans*, 53 TAX LAWYER 703 (2000); Hevener & Batter, *Withholding on Stock Options after* Sun Microsystems, 24 TAX MGMT. COMPENSATION PLANNING J. 3 (1996). The IRS proposed regulations that rejected the employers' position. See 66 Fed. Reg. 57,023 (Nov. 14, 2001); see also IRS Notices 2001-72 & 2001-73 (Nov.

14, 2001). Amid the controversy that proposal generated, Congress rejected the IRS's position. The 2004 amendments vindicated employers by adding nearly verbatim exclusions to all relevant employment-tax statutes, including (e)(12)(B) in the RRTA.

From the employers' perspective, the new exclusions did not change the law because employers believed the IRS had been wrong to subject disqualifying dispositions to employment taxation. Still, the (e)(12) amendment served a purpose. It shielded disqualifying dispositions from the IRS's challenge and, at a minimum, "perform[ed] a significant function simply by clarifying" the law amid a debate about its reach. *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 137 (2007); see *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 385–86 (2013); *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 670 n.1 (2008). For this reason, at a minimum, (e)(12) was not superfluous upon enactment.

CONCLUSION

In the end, some of Section 3231(e)'s exclusions may cover only a few forms of money. But that's no problem. They need to cover only one form of money to defeat the government's contention that they cover none. The judgment of the Seventh Circuit should be reversed.

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