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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 12-1408, United States v. Quality
5 Stores.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE PETITIONER

9 MR. FEIGIN: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The payments in this case fall squarely
12 within FICA's definition of wages, which includes all
13 remuneration for employment. Consistent with the
14 purpose of FICA to fund the Social Security and Medicare
15 programs, this Court has construed the term "employment"
16 broadly to encompass the entire employer-employee
17 relationship.

18 The payments here, which were paid only to
19 Respondent's employees and were keyed to the employees'
20 positions, salary levels, and length of service, clearly
21 were part of the employer-employee relationship.

22 Two particular features of the statute, I
23 think, make especially clear that separation-related
24 payments like this are covered. First, the basic
25 definition of wages, both historically and currently,

1 has been subject to specific exclusions for certain
2 types of separation-related pay such as retirement pay.
3 Those exclusions would be unnecessary if the basic
4 definition of wages didn't cover separation-related
5 payments.

6 Second, one of the historical exclusions,
7 which was in the statute from 1939 to 1950, was for
8 certain types of dismissal payments. When Congress
9 eliminated the exception for certain types of dismissal
10 payments in 1950, the accompanying House report made
11 clear what would already have been in any event implicit
12 in the repeal itself, which is that from that point
13 forward, all dismissal payments, which were -- Congress
14 understood in the House report to include any payment on
15 account of an employee's involuntary separation, would
16 be considered wages under FICA.

17 Respondent's reliance in this case on
18 Section 3402(o) is misplaced. Section 3402(o) is a
19 substantive rule of income tax withholding, but is
20 expressly limited in its effect to Chapter 24, which is
21 the income tax withholding chapter, and related
22 procedural provisions. It has no bearing on the
23 definition of wages for purposes of FICA. In any
24 event --

25 JUSTICE GINSBURG: Well, don't we have a

1 decision that says that the -- the term "wages" should
2 be interpreted the same way for FICA purposes and income
3 tax?

4 MR. FEIGIN: Well, two points about that,
5 Your Honor. First of all, nothing in this Court's
6 decision in Rowan suggests that this Court or any court
7 needs to look to substantive rules of income tax
8 withholding to determine the basic definition of wages
9 for purposes of FICA.

10 I think it's clear from the preamble to
11 Section 3402(o) that Congress was focused on Chapter 24
12 and was trying to solve a specific problem within
13 Chapter 24, the income tax withholding chapter, and it
14 didn't intend to send essentially shock waves through
15 the Internal Revenue Code that would affect the
16 definition of wages in other chapters.

17 Second, Respondent's view, I think, would
18 undercut the basic principle animating Rowan, which is
19 the idea that the definitions of wages should be
20 congruent for purposes of administrability.
21 Respondent's reading, which would say that none of the
22 payments specified in Section 3402(o)(2)(a) can possibly
23 be considered wages for FICA purposes, but nevertheless
24 must be treated as wages for withholding purposes, would
25 require employers to keep separate track of wages for

1 the two different purposes and report them separately
2 when they do W-2 forms for the employees or their own
3 941 tax returns.

4 Now, Respondents have conceded that Section
5 3402(o) did not modify the preexisting definition of
6 "wages" under either FICA or the income tax withholding
7 chapter. Instead, their argument seems to be that the
8 definition of "wages" in FICA, even before Section
9 3402(o) was enacted, contained a hole precisely the size
10 and shape of the definition of supplemental unemployment
11 compensation benefits that Congress later codified in
12 Section 3402(o) (2) (a).

13 Now, they haven't pointed to a single
14 statutory provision, regulation, or revenue ruling that
15 would have given Congress that view. There is simply no
16 reason to believe that that hole existed before the
17 enactment of Section 3402(o) and its common ground that
18 it doesn't exist after Section 3402(o).

19 It's also important to understand why
20 Congress enacted Section 3402(o). Congress enacted
21 Section 3402(o) in response to a suggestion by the
22 Treasury Department in 1969 that there was a problem
23 with supplemental unemployment benefit payments.
24 "Supplemental unemployment benefit payments" was a term
25 that the IRS itself had used in a series of revenue

1 rulings that considered certain payments by employers
2 that were intended to supplement State unemployment
3 compensation benefits, and the IRS in those rulings had
4 determined that those benefits were not wages.

5 Now, the IRS in 1969 informed Congress that
6 because these benefits were considered non-wages, it was
7 creating a problem, namely, that income taxes weren't
8 being withheld and the recipients of the payments were
9 receiving large income tax bills at the end of the year.

10 Congress enacted Section 3402(o) to address
11 that specific problem. It did not intend to modify the
12 definition of wages. It -- nothing in the Section
13 3402(o) can be taken as a commentary on the definition
14 of wages that was enacted --

15 JUSTICE KENNEDY: Either then or now, were
16 the supplemental unemployment benefit payments subject
17 to FICA withholding or are they now exempt under the
18 present --

19 MR. FEIGIN: So supplemental unemployment
20 benefits, as defined by the IRS in its revenue rulings,
21 were subject neither to withholding nor to taxation
22 under FICA.

23 JUSTICE KENNEDY: And after (o) was passed?

24 MR. FEIGIN: After (o) was passed, those
25 wages --

1 JUSTICE KENNEDY: It's obviously subject to
2 Federal income tax withholding. What about FICA?

3 MR. FEIGIN: They still were not subject to
4 FICA tax.

5 JUSTICE KENNEDY: Okay. And is that still
6 true now?

7 MR. FEIGIN: That's still true now under the
8 current revenue ruling, Your Honor.

9 CHIEF JUSTICE ROBERTS: Why -- I might have
10 missed a step here. Why were they getting big tax bills
11 if they're not wages?

12 MR. FEIGIN: Well, they were still
13 considered to be income under the revenue rulings. So
14 the effect of that was that they were receiving
15 pavements during the year that were considered income
16 and as to which they would owe income tax, but the
17 income tax wasn't being regularly withheld as -- as it
18 is supposed to be on wages, and therefore at the end of
19 the year, they'd receive a large income tax bill for
20 those payments.

21 If the Court has no further questions, I'll
22 reserve the balance --

23 JUSTICE GINSBURG: I have a question about
24 the effect of the government's position.

25 In the States, if these -- if we say these

1 benefits qualify as wages for FICA purposes, then what
2 about the States that say we will supply unemployment
3 compensation only if there is not another source of
4 unemployment compensation?

5 MR. FEIGIN: Your Honor, if the Court adopts
6 the government's position in this case, there's not
7 going to be any change in the States because the
8 government's position is the status quo.

9 Now, there are certain States that do look
10 to the Federal definition of "wages" in order to
11 determine whether an individual qualifies for
12 unemployment benefits under State law. And if the Court
13 were to reach some other conclusion in this case than
14 the one the -- the government is urging, it is possible
15 that there could be some effect in those States on
16 qualification for State unemployment benefits.

17 But since State unemployment benefit
18 qualification is largely a matter of State law, the
19 States could adjust to that however they saw fit.

20 JUSTICE KENNEDY: Is it ever to the
21 long-term advantage to the employee to have FICA
22 withholding, so that the employee's account is greater
23 and the benefits are greater?

24 MR. FEIGIN: So for -- certain employees may
25 want that -- certain payments to count as wages because

1 the definition of "wages" for FICA purposes is identical
2 to the definition of "wages" under the Social Security
3 Act. And under the Social Security Act, the accrual of
4 benefits is based on -- on wages. So some employees may
5 want to have earned more wages.

6 However, in this case, they're not making
7 that argument. They're simply arguing that they
8 shouldn't have to pay taxes on these payments which were
9 made, again, only to employees, were keyed to the
10 employees' positions, salaries and length of service and
11 clearly meet FICA's definition of "wages."

12 If the Court has no further questions,
13 I'll --

14 JUSTICE ALITO: What if the payments were
15 not keyed to the length of service and to salary? It
16 was just a flat severance payment.

17 MR. FEIGIN: We still think that would meet
18 the basic definition of "wages" under FICA, Your Honor,
19 and would still count as wages and be taxable under
20 FICA. I think this case is even easier than that
21 because the payments were clearly keyed to critical
22 aspects of the employment relationship.

23 Indeed, in the case of the post-petition
24 payments, the payments were expressly conditioned on the
25 employee's willingness to remain performing services for

1 Respondents during the pendency of the bankruptcy
2 proceedings.

3 JUSTICE ALITO: Well, in the Coffy case, the
4 Court drew a distinction between compensation for
5 services and payments that are contingent on the
6 employee's being thrown out of work. But that -- why
7 doesn't that apply here?

8 MR. FEIGIN: So Coffy was addressing not
9 FICA, but a statute that dealt with veterans' rights
10 returning to work after a period of military service.
11 As construed by this Court, that statute drew a
12 distinction between a reward for length of service, to
13 which the returning veteran was entitled, and short-term
14 compensation for services rendered to which the
15 returning benefit -- returning veteran -- excuse me --
16 was not entitled.

17 Now, that distinction doesn't exist under
18 FICA. Even if a particular payment is considered a
19 reward for length of service, as this Court held that
20 the payments in Coffy were, it would still be
21 remuneration for services under FICA's definition of
22 wages.

23 For example, if you were to give an employee
24 an award after 20 years of service, that would clearly
25 be a reward for length of service and would qualify as

1 such under Coffy, but would not be remuneration for
2 employment.

3 Now, the specific question you asked,
4 Justice Alito, about the difference between payments
5 that are part of the continuing employment and payments
6 that occur at the end of the employment relationship, is
7 also not a distinction that FICA draws.

8 As I said earlier, there are a number of
9 historical and current exclusions for certain types of
10 payments that are triggered by the end of the employment
11 relationship. For example, from 1954 to 1983 the
12 statute expressly excluded retirement pay. I don't
13 think there is a reasonable reading of the basic
14 definition of "wages" under FICA that would include
15 retirement pay but exclude severance payments.

16 And again, I think it's very pertinent here,
17 and probably the best piece of evidence we have in this
18 case about congressional intent, that Congress from 1939
19 to 1950 excluded from the basic definition of "wages" in
20 FICA certain types of dismissal payments, by which it
21 meant payments on account of involuntary separation; and
22 then it eliminated that exclusion in 1950, making clear
23 both as a statutory matter and it's clear in the
24 legislative history that such payments, that is payments
25 on account of involuntary separation, would from that

1 point forward be covered as wages under FICA.

2 If the Court has no further questions, I
3 will reserve my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Hertzberg.

6 ORAL ARGUMENT OF ROBERT S. HERTZBERG

7 ON BEHALF OF THE RESPONDENTS

8 MR. HERTZBERG: Mr. Chief Justice, and may
9 it please the Court:

10 The Government -- the Government agrees that
11 some SUB payments are not wages. Where the dispute lies
12 is what SUB payments are covered by FICA and which are
13 not. If the payments meet the definition of SUB payment
14 under the statute, then they are not wages and not
15 subject to FICA. The Government's --

16 JUSTICE SCALIA: What are you saying, "SUB
17 payments"?

18 MR. HERTZBERG: Supplemental unemployment
19 benefits.

20 JUSTICE SCALIA: I'm not hip.

21 MR. HERTZBERG: The Government says they are
22 now wages if they meet the definition as they
23 particularly see it in a particular revenue ruling that
24 they issue at some point in time; and that's where the
25 dispute lies.

1 It is our position that SUB payments is not
2 remuneration for services because it is contingent, as
3 indicated previously on the Coffy case, upon losing your
4 job.

5 There is a problem on the public policy
6 issue that the Government is telling the Court today,
7 and the problem is if what they say is SUB pay is tied
8 to State unemployment benefits, then it is not wages and
9 subject to FICA. They say if it's -- if you receive
10 supplemental unemployment benefits but you do not
11 receive State unemployment, then it is subject to FICA
12 taxes and is wages.

13 So, what they are saying to the Court is if
14 you have the ability to receive both the supplemental
15 unemployment benefits and the State unemployment
16 benefits, then we are not going to tax you with FICA
17 taxes, but if you only receive less, being just the
18 supplemental unemployment benefits, then it is going to
19 be wages and then it's going to be subject to FICA
20 taxes.

21 JUSTICE SOTOMAYOR: Can you win at all if I
22 think their regulation is irrational and contrary to the
23 statute?

24 MR. HERTZBERG: Yes.

25 JUSTICE SOTOMAYOR: I know that's not before

1 us, but --

2 MR. HERTZBERG: Yes.

3 JUSTICE SOTOMAYOR: -- how do you win,
4 assuming I just say I don't pay any attention to the
5 regulation?

6 MR. HERTZBERG: Your Honor, it's our
7 position that the statute is clear. When you look at
8 the definition of "wages" under the FICA statute and the
9 withholding statute, they are almost identical. And if
10 you look at the Rowan case, the Rowan case says that you
11 should read the statutes consistently for ease of
12 administration. It is clear --

13 JUSTICE SOTOMAYOR: Isn't it easier to
14 withhold taxes on both?

15 MR. HERTZBERG: Pardon me?

16 JUSTICE SOTOMAYOR: Isn't it easier to
17 withhold taxes on both?

18 MR. HERTZBERG: Well, what they are
19 withholding on the withholding is income taxes. They
20 are not withholding wages. And that's why -- because it
21 doesn't fit the definition of wages. If you look at
22 3121, which is the FICA statute, supplemental
23 unemployment benefit is not remuneration for services.
24 They're only --

25 JUSTICE GINSBURG: If it is treated for

1 income tax purposes as wages, why shouldn't it be
2 treated for FICA tax purposes?

3 MR. HERTZBERG: Your Honor --

4 JUSTICE GINSBURG: What you are saying is
5 on the income side they are treated as wages; on the
6 FICA side they're not treated as wages.

7 MR. HERTZBERG: Your Honor, supplemental
8 unemployment benefits are provided to an individual to
9 provide a safety net when they lose their job, to cover
10 them during the period while they seek new employment.
11 To then tax the individual with FICA taxes doesn't make
12 sense, because you are taking away the money that the
13 individual needs as a safety net; and to take money away
14 in order to provide for the funding of Medicare or
15 Social Security doesn't make sense.

16 JUSTICE SCALIA: Why are they giving them
17 the money, just out of love? I mean, they don't give it
18 to me when I retire. They only give it to their
19 employees when they retire. What -- what are they
20 paying them for? Aren't they paying them for faithful
21 and good past services?

22 MR. HERTZBERG: No, what they're doing is
23 they're --

24 JUSTICE SCALIA: No, they are -- they are
25 just being generous?

1 MR. HERTZBERG: They are putting in place a
2 plan in order to protect the employee in the event of a
3 layoff or a plant closing.

4 JUSTICE SCALIA: Why don't they do that for
5 me?

6 MR. HERTZBERG: I don't know, Your Honor.

7 JUSTICE GINSBURG: There are some severance
8 payments that do count for FICA purposes, isn't that so?

9 MR. HERTZBERG: Your Honor, "severance" is a
10 generic term, but payments such as dismissal payments,
11 some are treated as wages for FICA purposes; but we
12 believe the definition is different for supplemental
13 unemployment benefits. Under -- dismissal payments are
14 for involuntary termination.

15 It can be because of a firing or a
16 cancellation of an employment contract, where
17 supplemental unemployment benefits are based upon a plan
18 and are given to an individual because of a plant
19 closing or a layoff.

20 JUSTICE ALITO: What if Section 3402(o) did
21 not exist? Would these severance payments fall within
22 FICA's definition of wages then?

23 MR. HERTZBERG: No. And the --

24 JUSTICE ALITO: And why not?

25 MR. HERTZBERG: The reason is that because,

1 if you look at how they are treated, even the Government
2 acknowledges that some supplemental unemployment
3 benefits are not wages. And if you look as far back as
4 1960, when 501(c)(17) was enacted dealing with trusts
5 and their exemption from the taxes, the definition of
6 "supplemental unemployment benefits" has always had its
7 own definition.

8 And it's always been treated -- in 1977, for
9 example, the revenue ruling that the Government issued
10 said that supplemental unemployment benefits of any kind
11 are not -- are not -- wages and subject to FICA.

12 In 1986 Congress reenacted the withholding
13 statute and the FICA statute with the knowledge that
14 1977 revenue ruling was in place; and therefore, it's
15 presumed that FICA taxes are not -- or that supplemental
16 unemployment benefits are not subject to FICA taxes.

17 The Government has stipulated that the
18 payments made in this case to the Quality Stores
19 employees met the definition of supplemental
20 unemployment benefits. And as I began to indicate, the
21 Rowan case said that you should read statutes
22 consistently and for ease of administration.

23 When you look at 3121, being the FICA
24 statute, along with 3401, the definition of "wages" is
25 almost identical.

1 JUSTICE BREYER: It is, but it -- really, if
2 you have anything -- the definition is very broad. I
3 mean, it says "'wages' means all remuneration for
4 employment." All remuneration -- wages means all
5 remuneration for employment paid basically for any
6 service of whatever nature performed by an employee.

7 Now, I agree with you that it's the same
8 definition for the withholding. But Congress, it passes
9 the withholding change with conflicting interpretations.
10 So it wouldn't be the first time that Congress passed a
11 statute to say: We don't care what the conflicting
12 interpretations are; ignoring that, you are going to
13 withhold this money, period. And it said, whether it's
14 other than wages or not.

15 I grant you, they might have thought they
16 had to pass it, but so?

17 MR. HERTZBERG: Well, if SUB --

18 JUSTICE BREYER: We could also look at it as
19 they didn't have to pass it. It was subject to
20 withholding anyway.

21 MR. HERTZBERG: If SUB pay was wages, there
22 would have been no need to pass 3402.

23 JUSTICE BREYER: Well, no, there would have
24 been a need, if different people think different things.
25 So you want to be sure.

1 MR. HERTZBERG: Well --

2 JUSTICE BREYER: I mean, Congress does that
3 quite a lot. It -- it -- on certain, different people
4 tell them different things. They say, we don't care; do
5 it anyway. And that's what this statute basically says:
6 Withhold anyway.

7 MR. HERTZBERG: Well --

8 JUSTICE BREYER: And maybe -- could we say
9 that? Could we say, well, in our opinion you are right.
10 Both statutes cover supplemental unemployment benefits.
11 It's never come up in the other context since this
12 because Congress wanted to be sure it was withheld.

13 MR. HERTZBERG: I don't think you can, based
14 upon when you look at what the statute says, 3402(o).
15 It says that they should be treated as if they are
16 wages.

17 If they were already wages, there would have
18 been no necessity of treating them if they were wages.
19 If you also look at the title of the section, it says
20 "other than wages." It's clear that if it was wages,
21 they wouldn't use the word "other than wages."

22 And if you look at the legislative history
23 also, it says in three different places that they're not
24 wages and also indicates it's not remuneration for
25 services.

1 So the reason that 3402(o) was enacted was
2 because of the 1968 Treasury regulation that had the
3 reporting of supplemental unemployment benefits on a
4 1099 form. That's clearly not a wage form. If it's
5 wages, you report on a W-2. So there would have been no
6 need for enactment of 3402(o) if they were already
7 wages.

8 JUSTICE GINSBURG: Could you review again,
9 what is -- what is the relevant distinction between
10 dismissal payments that are subject to FICA and payments
11 that are not?

12 MR. HERTZBERG: Your Honor, dismissal
13 payments are involuntary termination.

14 JUSTICE GINSBURG: It has to be involuntary?

15 MR. HERTZBERG: Yes. And there -- and that
16 also is the beginning part of when you look at SUB
17 payments.

18 JUSTICE GINSBURG: And SUB payments are all
19 voluntary?

20 MR. HERTZBERG: All involuntary
21 terminations. But that's where they differ at that
22 point.

23 JUSTICE GINSBURG: You -- well, you told me
24 that the dismissal payments are involuntary. How about
25 the supplemental? Are they ever and always voluntary?

1 MR. HERTZBERG: No, they're -- they're
2 involuntary payments, also, or based upon involuntary
3 termination. The difference is supplemental
4 unemployment benefits are paid pursuant to a plan, and
5 they are also based upon a layoff or a plant closing.

6 And a dismissal payment, for example, which
7 is a separate category, and treated separately in the
8 Treasury regulations, is an involuntary termination.
9 And that's where it ends. And it can be based upon a
10 loss of employment through a firing or a cancellation of
11 a contract.

12 JUSTICE BREYER: I'll take it that you're
13 right, that the Congress that passed the withholding statute
14 thought it fell outside of the definition of wages, but
15 they were wrong.

16 Now, that wouldn't be the first time either.
17 So -- but Congress did think it. So what weight am I
18 supposed to give to what Congress thought then about
19 what an earlier Congress, namely, the Congress that
20 passed the wage definition in the withholding statute
21 thought?

22 MR. HERTZBERG: You should give it, Your
23 Honor, a lot of weight. And the reason you should is
24 because in 1986, the withholding and the FICA statutes
25 were reenacted in full, including 3402(o). And at that

1 point in time, there was a revenue ruling in place that
2 said that all supplemental unemployment benefits are not
3 wages and not subject to FICA.

4 And under the legislative reenactment,
5 Congress would have been presumed to have been aware of
6 that revenue ruling that was in place.

7 JUSTICE BREYER: Well, yes. But that was so
8 much the more so, you see? They had authority saying it
9 wasn't wages. That doesn't mean that authority was
10 correct. And -- and so that's why they passed the
11 statute.

12 MR. HERTZBERG: But what the important
13 aspect is, is that it's not remuneration for services.
14 In the Coffy case, which was not directly dealing with
15 whether it was remuneration or not, indicated that
16 supplemental unemployment benefits are given to an
17 individual because of the loss of a job.

18 And as I indicated in the -- even the
19 government has indicated that some supplemental
20 unemployment benefits are not wages and subject to FICA.

21 Where we differ is, is that we say all of
22 them are not wages and not subject to FICA. What the
23 government says is, no, we'll issue a revenue ruling and
24 we flip flopped our position several times on the
25 different revenue rulings, but whatever revenue ruling

1 we happen to issue at this point in time will determine
2 whether the supplemental unemployment benefits qualify
3 as wages for FICA purposes or are not wages.

4 It's our position that the statute is clear.
5 When you look at it, especially in light of 3402(o),
6 and -- because there would have been no reason for
7 enactment of that section if supplemental unemployment
8 benefits were wages already, because they would have
9 been subject to FICA.

10 JUSTICE ALITO: Well, the government
11 explains 3402(o) on the ground that there had been prior
12 admin -- IRS administrative decisions exempting certain
13 types of SUB payments from the definition of wages. And
14 that -- that can explain that language. The language
15 that they are -- that SUB payments are to be treated as
16 if they were wages doesn't necessarily mean that all of
17 those SUB payments are not wages.

18 It does necessarily mean that at least some
19 of them -- or suggests at least some of them are not
20 wages. So what's wrong with the government's
21 explanation of the language along those lines.

22 MR. HERTZBERG: Because I think the language
23 is clear. And the language is clear because it says --
24 in the title, it says "other than wages." If any of
25 them were wages, they wouldn't have used the word "other

1 than wages." But looking at the statute itself and
2 using the traditional tools of statutory interpretation,
3 it says in the statute that they are to be treated as if
4 they were wages. If they were already wages, there'd
5 have been no need for the statute.

6 And the legislative history shows us what
7 Congress was thinking at that point in time, because it
8 says in three different places, these are not wages and
9 also it indicates it's not remuneration for services.

10 JUSTICE SCALIA: Was the earlier statute
11 definition of wages for tax purposes, was that reenacted
12 at the same time?

13 MR. HERTZBERG: Yes, in 1986.

14 JUSTICE SCALIA: So you really have -- you
15 call into play the principle that you should interpret a
16 statute to make sense and not interpret any provision to
17 be superfluous, right?

18 MR. HERTZBERG: Correct, Your Honor.

19 JUSTICE SCALIA: And you say that the
20 government's interpretation renders (o) superfluous.

21 MR. HERTZBERG: Absolutely, Your Honor.

22 JUSTICE SCALIA: We'll ask him about that.

23 MR. HERTZBERG: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Feigin, 18 minutes.

1 REBUTTAL ARGUMENT OF ERIC J. FEIGIN

2 ON BEHALF OF THE PETITIONER

3 MR. FEIGIN: Thank you, Mr. Chief Justice,
4 and may it please the Court:

5 I first want to address Justice Sotomayor's
6 question. Justice Sotomayor, if you believe that the
7 revenue rulings that the IRS has issued are irrational
8 or invalid, the only colorable reason for believing that
9 is because the payments that those revenue rulings
10 classify as non-wages are clearly wages under FICA's
11 basic definition.

12 And if you believe the revenue rulings are
13 invalid for that reason, then that is all the more
14 reason to rule for the government here, because
15 Respondent's position would create an even bigger hole
16 in the statute that would classify even more payments as
17 non-wages and is even less consistent with the statute.

18 JUSTICE SOTOMAYOR: You were touching at
19 what I was thinking. Why don't you answer
20 Justice Scalia's point. Why is (o) not superfluous?

21 MR. FEIGIN: So, Your Honor, we acknowledge
22 that the revenue rulings are not consistent with the
23 statutory text of FICA. The revenue rulings accept
24 certain payments from classification as wages that the
25 plain text of FICA unambiguously classify as wages. The

1 revenue rulings are a continuation of a practice that
2 began in the 1950s and '60s, which was a somewhat more
3 freewheeling time in the history of statutory
4 interpretation.

5 And to the extent the IRS would defend these
6 in a case in which they're challenged in court, it would
7 not be because they're consistent with the text of the
8 statute, but simply because Congress has taken the
9 revenue rulings as a given and passed statutes that
10 effectively assumed that the revenue rulings are being
11 effective, as Justice Breyer pointed out.

12 JUSTICE SCALIA: You have to acknowledge,
13 though, that if you read -- if you read the two sections
14 of the statute together, the one seems to be
15 unnecessary.

16 MR. FEIGIN: Well, a couple points on that,
17 Your Honor.

18 JUSTICE SCALIA: "Wages" means all
19 remuneration, including cash value of all remuneration,
20 including benefits. And then (o) says "extension of
21 withholding of certain payments other than wages. For
22 purposes of this chapter, any supplemental and
23 unemployment compensation benefit paid to an individual
24 shall be treated as if it were a payment of wages,"
25 suggesting that it really isn't.

1 MR. FEIGIN: Well, first, just to pick up on
2 the textual point --

3 JUSTICE SCALIA: I mean, there would have
4 been a way to fix the revenue rulings without doing it
5 this way. Couldn't they have done it some other way
6 without enacting a statute that contradicted itself?

7 MR. FEIGIN: Well, first of all, Your Honor,
8 just to pick up on the textual point that Justice Alito,
9 I think, was adverting to earlier. Saying that
10 particular types of payments shall be treated as if they
11 were wages made during a payroll period doesn't mean
12 that it's categorically impossible for such payments to
13 have qualified as wages to begin with.

14 As Judge Bryson pointed out in the -- his
15 opinion to the Federal Circuit in the CSX case, which is
16 cited in our briefs, if you were to say to treat all men
17 as if they were 6 feet tall, that wouldn't mean that no
18 man could possibly be 6 feet tall.

19 JUSTICE SCALIA: Yes, unless it was in a
20 section that said how to treat men who are not 6 feet
21 tall. The title of this section (o), "extension of
22 withholding to certain payments other than wages."

23 MR. FEIGIN: Well, your Honor, it says --

24 JUSTICE SCALIA: I mean, it -- it clearly
25 suggests that these are not wages.

1 MR. FEIGIN: Well, first of all, Your Honor,
2 it says, "certain payments other than wages." Second, I
3 would point you to the part where it says, "treated as
4 wages for a payroll period."

5 JUSTICE SCALIA: Right.

6 MR. FEIGIN: And that actually has some
7 significance in that it allows the employer to treat
8 these as wages paid during the employer's normal payroll
9 period, so the withholding can be performed in the same
10 way that the employee would have withheld for normal
11 payroll period payment and avoids the need to apply the
12 rules that would govern in circumstances where payments
13 are made outside of a payroll period.

14 And these are payments that could well have
15 been made outside a normal payroll period, but this
16 directs that they be treated as payments within a
17 payroll period.

18 I would again point the Court back to the
19 historical reason why 3402(o) exists. It was enacted,
20 as I discussed earlier, following a suggestion by the
21 Treasury Department that there was a particular problem
22 with withholding that needed to be solved.

23 Now, Justice Scalia, I suppose Congress
24 might have solved that problem in different ways, but I
25 think what Congress did here is it simply tried to solve

1 the problem once and for all. It just declared that
2 these payments should be treated as if they were wages
3 so that withholding would occur, thereby solving the
4 problem that the IRS identified.

5 And it enacted a definition of supplemental
6 unemployment compensation benefits that everyone agrees
7 is broader than the set of payments that the revenue
8 rulings up to that point had accepted. And there are a
9 couple of very good reasons Congress would have done it
10 that way.

11 One is that, because of the IRS's
12 case-specific approach to each of its revenue rulings,
13 it would have been difficult, if not impossible, for
14 Congress to craft statutory language that precisely
15 captured the contours of the payments that the IRS
16 either was treating or might later treat as non-wages.

17 Second, again, the supplemental unemployment
18 benefit plans that had evolved in the 1950s continued to
19 evolve and take different forms. And I think the IRS
20 just wanted to hedge against the possibility -- excuse
21 me. Congress wanted to hedge against the possibility
22 that the IRS might later decide that a plan structured
23 slightly differently from any plan that it had
24 considered before should also be considered nonwages.

25 And there was absolutely no downside to

1 Congress writing the definition in 3402(o)(ii)(a) more
2 broadly than the IRS rulings had thus far had an
3 opportunity to construe.

4 That's because, again as the Federal Circuit
5 pointed out, there is no practical harm done if you
6 treat -- if you are instructed to treat a particular
7 payment as wages and that payment already is wages.

8 Now, Your Honor, to your point about
9 surplusage, first of all, I don't think the canon
10 against surplusage would help you construe FICA here
11 because I think FICA is unambiguous.

12 I do not think there is any way to read the
13 definition, "remuneration for employment," considering
14 that it clearly includes separation-related payments, as
15 somehow again having a hole that is precisely the size
16 and shape of Section 3402(o)(2)(a).

17 In any event, the only way this would be
18 superfluous is if some court were to hold, on an issue
19 that is not presented to the Court in this case, that
20 the IRS has absolutely no administrative authority to
21 craft administrative exceptions to the definition of
22 wages for policy reasons, as it did in the revenue
23 rulings that underlie the enactment of Section 3402(o)
24 here.

25 If a court were to reach that conclusion,

1 then Section 3402(o) might not have any operative
2 effect. But Congress in 1969 clearly could not have
3 believed that the revenue rulings were ineffective or it
4 never would have enacted Section 3402(o) in the first
5 place. There's no other reason Congress could have
6 thought that certain types of supplemental unemployment
7 benefits were excepted from the definition of "wages."

8 My friend on the other side mentioned these
9 1968 regulations. Those regulations only applied to
10 payments from trusts. They didn't apply to payments,
11 like the payments at issue in this case, that come
12 directly from the employer. Those regulations did not
13 purport to construe the definition of "wages" in either
14 FICA or the income tax withholding statutes. And in
15 fact, since 1957 there has been an income tax
16 withholding regulation that specifically says that any
17 payment on account of an employee's involuntary
18 separation does constitute wages for withholding
19 purposes. And Congress was presumably aware of that
20 regulation.

21 And again, I would just like to address one
22 final point. I think opposing counsel's argument about
23 this 1986 reenactment doesn't make a great deal of
24 sense. I think the argument is that when Congress
25 reenacted the statute in 1986 it was somehow adopting

1 the then-current interpretation of the IRS in a 1977
2 revenue ruling.

3 I don't think that the enactment of Section
4 3402(o) originally in 1969 can be taken to have left the
5 IRS with sufficient flexibility to change its practices
6 during the 1970s, but that the reenactment of that very
7 same language in 1986 would be taken to freeze for all
8 time and -- the current IRS practices and foreclose the
9 IRS from ever modifying those practices in the future.

10 Finally, Respondents point to the
11 legislative history of 3402(o), which does contain some
12 statements that supplemental unemployment compensation
13 benefits aren't wages. I think some of the reason for
14 that legislative history is confusion about the
15 nomenclature.

16 There were "supplemental unemployment
17 compensation benefits," which was a statutory term, and
18 "supplemental unemployment benefits," which was the term
19 the IRS used. I think it is clear that Congress must
20 have been looking at the IRS revenue rulings, again
21 because there is simply nothing else that could have
22 possibly given the IRS the impression that any of these
23 types of payments weren't wages to begin with.

24 And I think it's very important that the
25 Court not just look at the legislative history

1 piecemeal, but look at the entire historical backdrop if
2 it decides to get into any of that at all. But we think
3 this case is very easily resolved on the plain text of
4 FICA, which clearly includes these payments.

5 We don't even think there is a need to look
6 at Section 3402(o), which is limited in effect to the
7 income tax withholding provisions and was enacted to
8 solve a specific income tax withholding-related problem
9 and not to affect FICA's basic definition of wages.

10 JUSTICE GINSBURG: How about that we should
11 just ignore their revenue rulings, including the current
12 one, and just deal with the statute? Is that what you
13 are suggesting?

14 MR. FEIGIN: Well, the revenue rulings
15 aren't directly at issue in this case, Your Honor,
16 because all the revenue rulings do is specify that
17 certain payments -- not the type of payments that are
18 issued in this case -- are not wages.

19 And nobody contends that the revenue rulings
20 have any effect or any special bearing on this case,
21 because this is a case about payments that both the IRS
22 in its revenue rulings and Congress under the plain text
23 of FICA would classify as wages.

24 CHIEF JUSTICE ROBERTS: Well, I think part
25 of the -- the point is that the broad, capacious

1 definition of "wages" at least doesn't seem as broad to
2 the IRS since they are carving things out, maybe not
3 willy-nilly, but at least they don't seem that it's as
4 broad as you do -- they don't seem to think that it's as
5 broad as you do.

6 MR. FEIGIN: Well, two points to that, Your
7 Honor. First, again, these exceptions first came into
8 existence in the 1950s and 1960s, and I quite candidly
9 don't think the IRS was as careful about fidelity to
10 text as a modern legal observer would be.

11 Second, if this Court were to believe that,
12 notwithstanding the fact that the IRS's revenue rulings
13 aren't directly at issue in this case for the reasons I
14 said to Justice Ginsburg, if this Court believes that it
15 cannot rule for the Government in this case on the
16 statutory question without concluding that the revenue
17 rulings are invalid, we still think the Court should
18 rule for the Government on the statutory question.

19 We think the statutory text is clear, and
20 that is the IRS's position notwithstanding the revenue
21 rulings.

22 JUSTICE GINSBURG: And then what happens to
23 the State compensation schemes which the revenue rulings
24 seem to have been trying to accommodate?

25 MR. FEIGIN: So if this Court were to

1 conclude that the Government is correct on a -- as a
2 statutory matter, but we're to make clear that
3 revenue -- the current revenue ruling, Revenue Ruling
4 90-72 was invalid, that might have some effect on
5 individuals' eligibility for unemployment benefits under
6 State law in those States that incorporate the Federal
7 definition of wages as part of the calculation for
8 eligibility for State unemployment benefits.

9 If that creates any bad results, States will
10 be able to fix them, and I don't think that it should
11 preclude this Court from holding what the plain text of
12 FICA I think in this case requires.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 1:38 p.m., the case in the
17 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>ability 14:14 able 36:10 aboveentitled 1:11 36:17 absolutely 25:21 30:25 31:20 accept 26:23 accepted 30:8 accommodate 35:24 accompanying 4:10 account 4:15 9:22 12:21,25 32:17 accrual 10:3 acknowledge 26:21 27:12 acknowledges 18:2 act 10:3,3 address 7:10 26:5 32:21 addressing 11:8 adjust 9:19 admin 24:12 administrability 5:20 administration 15:12 18:22 administrative 24:12 31:20,21 adopting 32:25 adopts 9:5 advantage 9:21 adverting 28:9 affect 5:15 34:9 agree 19:7 agrees 13:10 30:6 al 1:6 alito 10:14 11:3 12:4 17:20,24 24:10 28:8 allows 29:7 animating 5:18 answer 26:19 anyway 19:20 20:5</p>	<p>20:6 appearances 1:14 applied 32:9 apply 11:7 29:11 32:10 approach 30:12 aren 35:13 arent 16:20 33:13 34:15 arguing 10:7 argument 1:12 2:2 2:5,8 3:4,7 6:7 10:7 13:6 26:1 32:22,24 asked 12:3 aspect 23:13 aspects 10:22 assistant 1:15 assumed 27:10 assuming 15:4 attention 15:4 authority 23:8,9 31:20 avoids 29:11 award 11:24 aware 23:5 32:19</p> <hr/> <p style="text-align: center;">B</p> <p>back 18:3 29:18 backdrop 34:1 bad 36:9 balance 8:22 bankruptcy 11:1 based 10:4 17:17 20:13 22:2,5,9 basic 3:24 4:3 5:8 5:18 10:18 12:13 12:19 26:11 34:9 basically 19:5 20:5 bearing 4:22 34:20 began 18:20 27:2 beginning 21:16 behalf 1:17,19 2:4 2:7,10 3:8 13:7 26:2 believe 6:16 17:12</p>	<p>26:6,12 35:11 believed 32:3 believes 35:14 believing 26:8 benefit 6:23,24 7:16 9:17 11:15 15:23 27:23 30:18 benefits 6:11 7:3,4 7:6,20 9:1,12,16 9:23 10:4 13:19 14:8,10,15,16,18 16:8 17:13,17 18:3,6,10,16,20 20:10 21:3 22:4 23:2,16,20 24:2,8 27:20 30:6 32:7 33:13,17,18 36:5 36:8 best 12:17 big 8:10 bigger 26:15 bill 8:19 bills 7:9 8:10 breyer 19:1,18,23 20:2,8 22:12 23:7 27:11 briefs 28:16 broad 19:2 34:25 35:1,4,5 broader 30:7 broadly 3:16 31:2 bryson 28:14</p> <hr/> <p style="text-align: center;">C</p> <p>c 1:8,16 2:1 3:1 18:4 calculation 36:7 call 25:15 cancellation 17:16 22:10 candidly 35:8 canon 31:9 capacious 34:25 captured 30:15 care 19:11 20:4 careful 35:9</p>	<p>carving 35:2 case 3:4,11 4:17 9:6 9:13 10:6,20,23 11:3 12:18 14:3 15:10,10 18:18,21 23:14 27:6 28:15 31:19 32:11 34:3 34:15,18,20,21 35:13,15 36:12,15 36:16 casespecific 30:12 cash 27:19 categorically 28:12 category 22:7 certain 4:1,8,9 7:1 9:9,24,25 12:9,20 20:3 24:12 26:24 27:21 28:22 29:2 32:6 34:17 challenged 27:6 change 9:7 19:9 33:5 chapter 4:20,21 5:11,13,13 6:7 27:22 chapters 5:16 chief 3:3,9 8:9 13:4 13:8 25:24 26:3 34:24 36:14 circuit 28:15 31:4 circumstances 29:12 cited 28:16 classification 26:24 classify 26:10,16,25 34:23 clear 3:23 4:11 5:10 12:22,23 15:7,12 20:20 24:4,23,23 33:19 35:19 36:2 clearly 3:20 10:11 10:21 11:24 21:4 26:10 28:24 31:14 32:2 34:4 closing 17:3,19</p>	<p>22:5 code 5:15 codified 6:11 coffy 11:3,8,20 12:1 14:3 23:14 colorable 26:8 come 20:11 32:11 commentary 7:13 common 6:17 compensation 6:11 7:3 9:3,4 11:4,14 27:23 30:6 33:12 33:17 35:23 conceded 6:4 conclude 36:1 concluding 35:16 conclusion 9:13 31:25 conditioned 10:24 conflicting 19:9,11 confusion 33:14 congress 4:8,13 5:11 6:11,15,20 6:20 7:5,10 12:18 18:12 19:8,10 20:2,12 22:13,17 22:18,19,19 23:5 25:7 27:8 29:23 29:25 30:9,14,21 31:1 32:2,5,19,24 33:19 34:22 congressional 12:18 congruent 5:20 considered 4:16 5:23 7:1,6 8:13,15 11:18 30:24,24 considering 31:13 consistent 3:13 26:17,22 27:7 consistently 15:11 18:22 constitute 32:18 construe 31:3,10 32:13 construed 3:15</p>
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