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IN THE SUPREME COURT OF THE UNITED STATES
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WISCONSIN CENTRAL LTD., ET AL.,)
Petitioners,)
v.) No. 17-530
UNITED STATES,)
Respondent.)

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Washington, D.C.
Monday, April 16, 2018

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:05 a.m.

APPEARANCES:
THOMAS H. DUPREE, JR., ESQ., Washington, D.C.; on
behalf of the Petitioners.
RACHEL P. KOVNER, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Respondent.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-530,
5 Wisconsin Central versus the United States.

6 Mr. Dupree.

7 ORAL ARGUMENT OF THOMAS H. DUPREE, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. DUPREE: Mr. Chief Justice, and
10 may it please the Court:

11 The Railroad Retirement Tax Act levies
12 a payroll tax on railroad employees' money
13 remuneration. The question presented in this
14 case is whether remuneration in shares of stock
15 is remuneration in money.

16 We believe it is not for a simple
17 reason. Stock is not money. The plain meaning
18 of "money" is a generally accepted medium of
19 exchange. And stock is not that. You can't
20 buy --

21 JUSTICE KENNEDY: How about -- how
22 about a check?

23 MR. DUPREE: We think a check would
24 constitute a medium of exchange, Justice
25 Kennedy. It -- it essentially transfers

1 currency. There is a legal right to obtain
2 currency on a bank draft, so we do think that a
3 check would constitute money remuneration.

4 JUSTICE KENNEDY: So you end the
5 slippery slope about that at that point?

6 MR. DUPREE: Well --

7 JUSTICE KENNEDY: What about a bond, a
8 U.S. savings bond?

9 MR. DUPREE: That would not be, Your
10 Honor. We don't think a bond would constitute
11 money remuneration. Typically, the things that
12 would constitute money remuneration obviously
13 would be cash, paper notes, coins, but it would
14 also encompass more modern ways of transferring
15 currency, such as direct deposit or a check.

16 We think that the plain meaning of
17 money remuneration is also confirmed when this
18 tax provision is viewed in the larger context
19 of the tax code as a whole, and that's true
20 both for the tax code as it existed during the
21 Great Depression, when this railroad statute
22 was enacted, and also the code as it exists
23 today. The code --

24 JUSTICE GINSBURG: Mr. Dupree, wasn't
25 it -- wasn't it so that when the Act was

1 enacted, compensation was in money, but over
2 time, compensation in the form of stock has
3 become more frequent. And it serves the same
4 purpose.

5 So why can't one read "any form of
6 monetary compensation" to include any form of
7 compensation readily convertible into cash?

8 MR. DUPREE: Well, Justice Ginsburg,
9 what the historical record shows is that at the
10 time of the Great Depression, when the statute
11 was enacted, railroad employees were actually
12 compensated through a variety of means, both
13 cash-based and also non-cash-based. Railroads
14 gave their employees everything from in-kind
15 benefits, free transportation, property. And
16 so that same issue that presents itself today,
17 where railroad employees get a variety of
18 different types and forms of remuneration, also
19 existed back in the Great Depression.

20 And what Congress did was it said we
21 recognize that railroad employees get a variety
22 of types of remuneration, including stock, by
23 the way, at that time, and yet it drew the line
24 in such --

25 JUSTICE GINSBURG: How common was

1 stock at that time?

2 MR. DUPREE: How common was it? It --
3 it was sufficiently common. There was a report
4 cited in our papers in the National Industrial
5 Conference that talked about how, going back to
6 the 19th century, many railroads offered stock
7 purchase plans to their employees. So it
8 certainly was a well-recognized form of
9 remuneration back when the statute was enacted.

10 And I think if this Court were to
11 compare the language that Congress chose to put
12 in the railroad statute compared to what it put
13 in FICA, which was enacted virtually
14 simultaneously in the Great Depression, that
15 underscores our interpretation of money
16 remuneration.

17 FICA sweeps broadly. As this Court
18 has noted, it encompasses all, remuneration,
19 including -- and this is critical text --
20 including any remuneration that is not in cash
21 but that can be valued in cash. So --

22 JUSTICE KAGAN: Mr. Dupree, in the way
23 you talked about it, it's not just that we have
24 to give meaning to the term "money." I think
25 you're quite right to say that the term we have

1 to look at is "money remuneration."

2 Is that correct?

3 MR. DUPREE: That's the key term, yes,
4 Your Honor.

5 JUSTICE KAGAN: And so that's really
6 money in a -- in a compensation scheme, right?
7 I mean, that's what that means. Remuneration.

8 MR. DUPREE: Money remuneration.
9 That's right.

10 JUSTICE KAGAN: So let's even take
11 your own definition, which I think that there's
12 a lot to be said for. Your definition tends --
13 of money tends to be the one that's first in
14 the dictionaries. So you said a generally
15 accepted medium of exchange.

16 But now you put that with the word
17 "remuneration"; in other words, in a
18 compensation scheme, and then the question
19 becomes: Is stock a generally accepted medium
20 of exchange in a compensation scheme?

21 And I would think that the answer to
22 that is yes. I mean, we see this all over the
23 place, that companies give stock as well as
24 cash in a compensation scheme, that it is a
25 generally accepted medium of exchange for

1 compensation.

2 MR. DUPREE: Well, I'm not sure it --
3 it quite works out that way, Justice Kagan. In
4 other words, if a company remunerates its
5 employees through some form, say, for example,
6 free lunches, I don't think it would be right
7 to say, well, therefore, food has now become a
8 medium of exchange.

9 I think a medium of exchange --

10 JUSTICE KAGAN: Well, I think partly
11 it's because, you know, some companies might
12 give free lunches and other companies might not
13 give free lunches, and -- and you -- I mean,
14 this is -- this is a kind -- instead of getting
15 a check, you're getting stock. Isn't that
16 right?

17 MR. DUPREE: Well, you're getting a
18 stock option, which then needs to percolate for
19 many years --

20 JUSTICE KAGAN: Well -- right.

21 MR. DUPREE: -- before it turns into a
22 butterfly and becomes stock. But, yes.

23 JUSTICE KAGAN: But you can -- you can
24 take it in stock. You can take it in cash.
25 Ninety-three percent of -- of some of these

1 companies' employees just take it in cash;
2 forget about the stock.

3 So why isn't it just, you know, you
4 can get it in cash, you can get it as a stock
5 option or in stock when that matures; it's a
6 generally accepted medium of exchange?

7 MR. DUPREE: Well, I think a generally
8 accepted medium of exchange refers to something
9 that, number one, has a fixed value. In other
10 words, it's a measure of value. And it's
11 something that any citizen could use to obtain
12 goods or services in an economy.

13 In other words, cash certainly
14 fulfills that function. I can obtain goods and
15 services with cash. If my employer --

16 JUSTICE KAGAN: But that's why -- I
17 mean, in your briefs, you keep on saying you
18 can't take a stock option to a grocery store.
19 But I think -- and that's obviously right.

20 But I think what I'm saying is that
21 would be a relevant question if all we were
22 asking is what's the definition of money. But
23 that's not what we're asking. We're asking
24 what's the definition of money remuneration.

25 So the fact that you can't take a

1 stock option to a grocery store is irrelevant
2 to that question. The question is that when it
3 comes to compensation is a stock option used
4 interchangeably with money? And, I think in
5 this company and many others, it is. Isn't it?

6 MR. DUPREE: Well, I -- I don't think
7 so. Certainly, in this company, the record
8 shows that fewer than half the options at issue
9 were actually promptly exchanged for cash. So
10 the record in this case shows that these
11 employees -- again, the majority of options at
12 issue were retained as stock. They were not
13 sold for cash.

14 And -- and I think under Your Honor's
15 question, pretty much anything that could be
16 sold for cash would be swept into the
17 definition of money. Anything that an employer
18 gives to an employee can be valued and could be
19 sold. Granted, there are some things that are
20 more liquid than others.

21 JUSTICE KAGAN: Well, let me ask you
22 another question, Mr. Dupree, just to test this
23 a little bit. So let's say a company has two
24 employees, and one employee makes \$200,000 in
25 cash and is granted \$5 million in stock-based

1 compensation. Two hundred thousand plus \$5
2 million. And the other employee is just given
3 \$250,000 in cash.

4 Now who makes more money?

5 MR. DUPREE: Well, the -- in Your
6 Honor's -- context of Your Honor's question, I
7 think money is essentially synonymous with
8 overall wealth or assets. And that is a
9 definition of money.

10 JUSTICE KAGAN: Right. So the answer
11 to my question is, of course, the guy who gets
12 the \$5 million in stock makes more money.

13 MR. DUPREE: But in the context of
14 that question, I think that's fair. But I
15 think in the context of this tax statute, I
16 don't think it's right to say that when the
17 1937 Congress put the word "money" into this
18 tax statute, it meant it in that capacious
19 sense to include the value of everyone's assets
20 or their wealth generally. That wouldn't make
21 sense.

22 JUSTICE SOTOMAYOR: Why do we have to
23 go that far? Why go that far? Why don't we
24 just take what the Seventh Circuit said, which
25 is this form of compensation is money?

1 MR. DUPREE: Well --

2 JUSTICE SOTOMAYOR: I agree with you,
3 a bottle of wine at Christmas is not. I don't
4 think going to a baseball game occasionally
5 would be, because those are not -- I don't
6 think of who's richer or not or who's getting
7 paid more or not by those items.

8 But why do we have to go as far as
9 you're going?

10 MR. DUPREE: Well, I think, to answer
11 Your Honor's question about the Seventh
12 Circuit's analysis, the Seventh Circuit and
13 Judge Posner actually agreed with our
14 definition of money as a commonly accepted
15 medium of exchange.

16 Where he went awry in our view is
17 concluding that in the year 2018 stock has
18 become a medium of exchange. We don't think
19 that's right. He certainly cited no legal or
20 economic authority for that proposition.

21 His point, I --

22 JUSTICE GINSBURG: I thought Judge
23 Posner's main point was that there's no
24 economic difference to the recipient, whether
25 he gets \$1,000 in cash in hand or a share of

1 stock that he can easily convert to \$1,000.

2 MR. DUPREE: Right. And our response
3 to that, Justice Ginsburg, is that, again,
4 taken to its logical conclusion, it would mean
5 that anything an employee gets is money. If an
6 employee is given a car worth \$10,000, in an
7 economic sense, there may be no difference
8 between getting a car that is worth \$10,000 and
9 getting \$10,000 in cash.

10 But when Congress put the word "money"
11 in the statute, it did not mean to sweep in
12 anything, as the government says, that can be
13 valued or that can be sold. That goes way too
14 far. But --

15 JUSTICE GINSBURG: But if you're
16 right, then Congress did a -- an idle thing
17 when it specifically excluded from
18 compensation, subject to the tax, a qualified
19 stock option. If stock options were not money,
20 then there was no need for that.

21 MR. DUPREE: Well, a few points on
22 that, Justice Ginsburg.

23 The first is that the government
24 argues that that exemption is relevant to this
25 case because, in the government's view, it

1 essentially renders our definitions or would
2 render the provision surplusage under our
3 definition of money remuneration.

4 We think that's wrong, and the reason
5 why that's wrong is because, when an employee
6 exercises a qualified stock option, they always
7 get stock, but -- and this is the critical
8 point and one the government concedes -- they
9 often get cash as well.

10 That is why that E-12 exemption is not
11 surplusage under our reading. It does work.

12 I think it also bears mention that
13 that exemption was enacted in 2004, about 70
14 years after the original money remuneration
15 statute was enacted. And I think it would be a
16 little peculiar to say that in 2004 Congress
17 intended to change or to tamper with the
18 definition of money remuneration that, by the
19 way, has remained in that statute unaltered for
20 almost 70 years now.

21 JUSTICE GORSUCH: Mr. Dupree, if we're
22 going to look back, as you're encouraging us to
23 do, further than 2004, why not look at 1938 and
24 the regulations that were promulgated then that
25 suggest that money remuneration is broader than

1 you're arguing?

2 MR. DUPREE: Well, Justice Gorsuch, I
3 think actually that that original regulation
4 strongly supports our point. What that
5 regulation says, and this is the original IRS
6 regulation interpreting the statute, is it says
7 that the IRS is going to construe "money" to
8 include money or anything -- and this is the
9 critical language -- anything that can be used
10 in lieu of money.

11 And then they provide a host of
12 examples, most of which are salary, bonuses,
13 commissions, cash payments. So we think that
14 that original regulation strongly supports our
15 view because it underscores the IRS's original
16 understanding of the medium of exchange
17 requirement. That's what the words, "used in
18 lieu of." Stock has never been used in lieu of
19 money.

20 JUSTICE GORSUCH: Well, what if we
21 read it more broadly? Would you have any
22 further response?

23 MR. DUPREE: Well, if you read it more
24 broadly, I don't think you could read it more
25 broadly to encompass stock.

1 JUSTICE GORSUCH: I'm sure you don't,
2 but let's just suppose we did. Then what?

3 MR. DUPREE: Well, then I would say
4 that that regulation was impermissible,
5 conflicts with the statute.

6 JUSTICE SOTOMAYOR: So what do we do
7 with history? I -- I wasn't talking about the
8 tax regulation. I was talking about the U.S.
9 Railroad Retirement Board, their opinion that
10 says stock options are likely to be
11 remuneration, money remuneration.

12 You have the 1994 regulation by
13 Treasury, and you have your company and many
14 others paying this tax without saying anything
15 until very recently.

16 At what point do we say that history
17 supports one reading as opposed to another?

18 As the government points out, yes, you
19 can't perhaps change meaning with later
20 regulation, but later regulation can be a
21 reflection of what everyone has understood the
22 meaning to be.

23 MR. DUPREE: Right. And, Justice
24 Sotomayor, I think it's fairly clear -- and I
25 don't think the government disputes this point

1 -- that for the vast majority of this railroad
2 statute's existence, the railroads were not, in
3 fact, paying tax on stock.

4 The government certainly hasn't said
5 we have evidence from the 1950s and 1960s that
6 this was being done. And, in fact, under the
7 regulation that Justice Gorsuch mentioned, it
8 would not be included.

9 What the government has identified,
10 and Your Honor alluded to this, is that
11 Railroad Retirement Board regulation that
12 actually first was issued by way of a decision
13 in 1938, and we think that's very telling,
14 because what the Railroad Retirement Board says
15 is it says, under the statutory language, we
16 will only treat stock as remuneration if the
17 party, the employer and the employee agree to
18 do so, and that they can value it in advance.

19 None of that happened here. So, if
20 the government is right that this Court should
21 look to the Railroad Retirement Board's
22 historic treatment of stock, we think that
23 strongly supports our position.

24 In fact, under a plain,
25 straightforward application of that regulation,

1 we win this case.

2 JUSTICE GINSBURG: Was the government
3 wrong in saying that at least for the last --
4 for 20 years, railroads have been paying tax,
5 treating the stock option as equivalent to
6 cash?

7 There must have been, if they were
8 paying for 20 years, there must have been
9 something that triggered this inspiration to
10 say there's no --

11 JUSTICE KENNEDY: And if I could add
12 to that question, the employees thought it was
13 taxable as well.

14 MR. DUPREE: Well, I -- I think what
15 happened --

16 JUSTICE KENNEDY: And -- and -- and so
17 what effect do we give to this long-time
18 practice, given your -- your people in the
19 position of your own clients until recently
20 thought that it was taxable?

21 MR. DUPREE: Well, again, I think the
22 history going back to the Great Depression up
23 and through the mid-'90s is, as a general
24 matter, the railroads were not paying tax on
25 this.

1 As far as what changed, in 1994, the
2 IRS came out with a new regulation, it's the
3 one that's currently on the books, which is a
4 peculiar regulation, in all honesty, because it
5 basically says we're going to treat FICA wages
6 and RRTA compensation to mean the same thing,
7 except where they differ.

8 But the IRS never, to this day, it
9 never has issued a regulation saying that stock
10 options and stock is taxable under the Railroad
11 Retirement Tax Act. It has never said that.

12 So, in 1994, the IRS changed its
13 position. It got rid of its long-standing
14 historic understanding that money remuneration
15 did not include stock, and it issued this new
16 regulation.

17 At that point, there were several
18 years where I think parties, frankly, didn't
19 quite know what the state of the law was. I do
20 think it's right that there were some railroads
21 that paid tax. I suspect that may have been
22 just a judgment that, rather than litigate the
23 question, it was easier to pay the tax for a
24 few years.

25 But, in our case, the Petitioners in

1 this case, we didn't issue stock until 1996.
2 And that stock, obviously, the options take
3 years to vest. It can be up to a 10-year term
4 in instances. And in this case, we are seeking
5 refunds beginning with the 2006 tax year.

6 So, to the extent there was a period
7 in time where railroads were paying tax, does
8 that reflect a historical practice, I think the
9 answer is no. At most, it might have been a
10 handful of years in the overall 75- to 80-year
11 sweep of this railroad tax statute.

12 We think that if this Court construes
13 the railroad statute's language against FICA,
14 that strongly supports our interpretation
15 because we are asking you to give meaning to
16 the textual difference in the two statutes,
17 which were enacted virtually simultaneously in
18 the Great Depression.

19 Congress deliberately chose very
20 different language in establishing the tax
21 base.

22 And even though the railroad statute
23 and FICA have been amended numerous times in
24 the 80 years since, those words appear
25 unaltered today in the U.S. Code from the

1 moment they appeared when President Roosevelt
2 signed those bills into law. Congress has not
3 changed --

4 JUSTICE KAGAN: Mr. Dupree, just
5 asking a question not about the text but about
6 reasons and purposes, what would be your best
7 reason for why there should be a distinction
8 between FICA and the railroad system with
9 respect to stock options?

10 MR. DUPREE: Absolutely, Justice
11 Kagan. The reason why is, going back to
12 history and why Congress made the decision that
13 it did, it often, as this Court knows,
14 legislates specifically for the railroad
15 industry.

16 The railroads, unlike all other
17 industries, had an existing pension system.
18 And so the distinction was written into the law
19 to reflect the historic practice in the
20 railroad industry.

21 When Congress made the decision to
22 federalize these railroad pensions, it said we
23 are going to federalize it, but we will
24 maintain the existing cash-based pension
25 structure that --

1 JUSTICE KAGAN: Well, I understand the
2 government to be saying that that did exclude
3 certain kinds of things that were clearly not
4 cash-based, but -- you know, lunches or
5 something like that, but that's a different
6 question from the one I'm asking.

7 I'm just saying look at this thing,
8 stock options, and say why -- why would
9 Congress want it to be taxable in FICA but not
10 taxable in the railroad system?

11 MR. DUPREE: Because the railroad
12 system -- retirement system is fundamentally
13 different in key respects from Social Security.
14 It has much higher tax rates. I mean, the
15 railroad combined tax rate is north of
16 30 percent, whereas FICA is about 14 percent.
17 The railroad retirement system also provides
18 for much more generous benefits to retirees.

19 So they are two fundamentally
20 different retirement systems. Are there
21 similarities? Yes. Is there overlap? Yes.
22 And in places --

23 JUSTICE KAGAN: I guess I'm still
24 waiting for a difference that would -- would --
25 would match why Congress would make this

1 different treatment of stock options.

2 MR. DUPREE: Well, I -- I think the
3 different treatment of stock options traces
4 back to the original decision that Congress
5 made and that has maintained now in the
6 statutory text for 70-plus years, the
7 distinction between a broad wage-based tax
8 system in FICA that encompasses pretty much
9 everything the employee gets and the far
10 narrower tax base that the railroad system
11 utilizes.

12 So I think it's just a natural
13 function that when Congress designed the tax
14 basis for these two retirement systems, among
15 many other differences between the two regimes,
16 it formulated the tax base in a much narrower
17 manner. That's why today there are different
18 treatments for certain things, such as the
19 stock options in this case. It's a function --

20 JUSTICE SOTOMAYOR: I thought -- I
21 thought that the railroad pension system in the
22 1930s was at risk. That was one of the reasons
23 why this scheme was developed.

24 Why would you base a new scheme
25 completely on the old scheme that was

1 underfunded to start with? It seems
2 counterintuitive to me that Congress would want
3 to copy the old -- the old system, stock and
4 barrel, when it, as you say, already knew that
5 stock options were a part of -- of
6 remuneration.

7 MR. DUPREE: Right. The reason it
8 could address that concern, Justice
9 Sotomayor -- in other words, mirror the
10 existing cash-based pension structure in the
11 federal regime -- is it could address questions
12 of solvency simply by adjusting benefits and
13 tax rates.

14 In other words, it wanted to preserve
15 the overall structure, but it would adjust
16 benefit levels, it would adjust tax rates, and,
17 of course, there would be an underlying federal
18 guarantee.

19 JUSTICE SOTOMAYOR: So what's going to
20 happen now? Every railroad is going to not
21 pay -- if we buy your argument, not pay taxes,
22 payroll taxes, on stock options. Why don't
23 railroads move to giving out more stock options
24 and less cash?

25 MR. DUPREE: Well --

1 JUSTICE SOTOMAYOR: And wouldn't that
2 put the system into economic difficulty?

3 MR. DUPREE: It would not, Your Honor.
4 And a number of points. I guess with regard to
5 the last point about putting the system in
6 economic difficulty, the railroad system
7 actually has a statute, a provision, that
8 self-adjusts based on the money coming in and
9 the benefits going out, to ensure that the
10 system remains solvent. So the short answer to
11 Your Honor's question is the statute --

12 JUSTICE SOTOMAYOR: The pensioners get
13 less, is what you're saying to me? This
14 self-adjusting system means that pensioners
15 will get less.

16 MR. DUPREE: Well, no, no, not
17 necessarily. I mean, the rate could go up. In
18 other words --

19 JUSTICE SOTOMAYOR: Someone pays no
20 matter --

21 MR. DUPREE: Someone pays. I'm not
22 quarreling with you there. But my point is
23 that the system has been --

24 JUSTICE SOTOMAYOR: So who pays is the
25 Joe Blow who gets minimum wage or something

1 close to it, and the people who receive a lot
2 more in stock options pay less?

3 MR. DUPREE: I -- I -- well, no, I
4 don't -- I don't think that's right. In other
5 words, the -- the stock options in this case,
6 first of all, were not confined to a narrow
7 group of senior executives. They were issued
8 to rank-and-file employees, as well as senior
9 executives.

10 The other point is that the RRTA has a
11 wage cap, much like Social Security does. So
12 only the first portion of an employee's
13 remuneration is actually subject, for the most
14 part, to this tax.

15 So, as a practical matter, it doesn't
16 have a dramatic impact on overall tax revenues.
17 In this case, the amount of tax --

18 JUSTICE SOTOMAYOR: I don't understand
19 that. If you get less money into the system,
20 how are you going to pay out the same benefits?

21 MR. DUPREE: Oh, and my point is that
22 it may not be the -- less money going into the
23 system, as Your Honor is positing, and that's
24 because, if you have an executive who is
25 receiving a large salary and stock options,

1 they already exceed the compensation cap by
2 virtue of their salary alone. So the fact that
3 they are getting stock on top of that makes no
4 difference because they're already maxing out
5 on the tax. That's the point.

6 I think also, just as a practical
7 matter, I don't think railroads could move to a
8 pure stock-based compensation system for a
9 number of reasons. One is you have collective
10 bargaining agreements in place. But more
11 broadly than that, the stock would have to come
12 from somewhere. If a corporation said we are
13 now going to start printing more shares in
14 order to compensate our employees in stock,
15 that would massively dilute the value of the
16 share, and there's no way shareholders would
17 ever tolerate something like that. I think as
18 a practical --

19 JUSTICE KENNEDY: Can you tell me,
20 just as an empirical matter, in this case, are
21 these stocks always listed so that there's a
22 list price that everyone knows?

23 MR. DUPREE: Yes. These are publicly
24 traded stocks. That's right.

25 JUSTICE KENNEDY: Could there be

1 instances where there might be small satellite
2 corporations that are not listed, so the --

3 MR. DUPREE: I --

4 JUSTICE KENNEDY: Because -- because
5 you always know the value if it's publicly
6 traded.

7 MR. DUPREE: That's right, Justice
8 Kennedy. Actually, it's a great question
9 because BNSF railroad, one of the nation's
10 largest employers, stock is no longer publicly
11 traded. So you could have a situation where a
12 railroad that is not publicly traded issues
13 stock, and then you would have extremely thorny
14 valuation problems because it's one thing to
15 say, well, we can calculate the value of the
16 stock based on market price, but if it's not
17 publicly traded, as any accounting textbook
18 will tell you, it can be a very difficult
19 endeavor.

20 JUSTICE KENNEDY: Is it ever
21 backdated? If I get a bonus or the employee
22 gets a bonus for today, April 16, is it ever
23 backdated so that you can buy it as -- as of
24 April 16, 2017?

25 MR. DUPREE: I -- I'm not aware of

1 that, Your Honor. The way that the options in
2 this case worked is that the exercise price is
3 determined at the moment the option is issued.
4 So, if in year zero the stock is trading at
5 \$100, that's the so-called strike price that
6 you can purchase the stock for five, six,
7 seven, eight years down the road.

8 And I think, frankly, that also --
9 JUSTICE KENNEDY: But is the strike
10 price always equivalent to the price on the day
11 that the option is issued?

12 MR. DUPREE: Yes, yes. The day the
13 option is issued, that's when they set the
14 strike price. And I think -- just to conclude
15 my answer to one of Justice Kagan's earlier
16 questions, I think that's yet another respect
17 in which stock is fundamentally different from
18 money.

19 It's an investment property. The
20 value fluctuates. When these options were
21 issued, no one had any idea what they would be
22 worth. Maybe they'd be worth nothing five, 10
23 years down the road when the option has vested
24 and it's exercised. Stocks are investment
25 property with fluctuating value, stands in

1 sharp contradistinction to cash, which has a
2 fixed value.

3 For those reasons, we ask the Court to
4 reverse the judgment below. I'll reserve my
5 time.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Ms. Kovner.

9 ORAL ARGUMENT OF RACHEL P. KOVNER
10 ON BEHALF OF THE RESPONDENT

11 MS. KOVNER: Mr. Chief Justice, and
12 may it please the Court:

13 Three parts of this statute
14 demonstrate that the phrase "any form of money
15 remuneration" refers to those payments that can
16 be readily valued in or converted to cash. The
17 first is the statute's text. The RRTA contains
18 exclusions for particular kinds of stock
19 options and for in-kind benefits that only make
20 sense if the statute's money remuneration
21 language is given a broad scope.

22 Second are the contemporaneous
23 interpretations of the statutes. Both
24 predecessor legislation and the agency's
25 earlier regulations construed "any form of

1 money remuneration" broadly to reach non-cash
2 benefits like the stocks here.

3 And the third is the statute's
4 objective of providing a financially stable,
5 self-supporting retirement system for railroad
6 workers. That objective would be undermined if
7 employers could avoid taxes by paying employees
8 in stock, a highly liquid asset that serves as
9 the functional equivalent of cash for
10 employees.

11 JUSTICE GINSBURG: How does it -- how
12 does it work? When does the -- the railroad
13 worker get the remuneration? When he gets the
14 stock option or only when he cashes it in?

15 MS. KOVNER: It's only -- only when he
16 exercises it. And I think it's a really
17 important point that goes to what Mr. Dupree
18 was just discussing, which is that stock
19 options are only treated as compensation at the
20 moment when they have a readily discernible
21 cash value.

22 So not at the moment that they're
23 issued, but only at the moment that the
24 employee exercises them. And at that moment,
25 they have a 100 percent certain cash value.

1 And you can see that by looking at the record
2 in this case.

3 An employee at the company in this
4 case, when they exercised the stock option,
5 there's a one-page form, which is Exhibit 78 in
6 the record below. If they simply want cash
7 instead of stock, they just check a box on the
8 form and say "please deposit the cash value of
9 this option to my bank account."

10 So these options are only valued at
11 the moment when they have a readily discernible
12 cash equivalent.

13 If I can just go to a few of the
14 issues that Mr. Dupree discussed. I mean, the
15 first is the qualified stock option exemption.
16 And this exemption was added to the statute by
17 Congress, and it exempts one particular type of
18 stock option. So it -- it is obviously
19 signaling that Congress was understanding that
20 other kinds of stock options were going to be
21 subject to taxation under the RRTA.

22 JUSTICE KAGAN: Ms. -- Ms. Kovner, in
23 what circumstances do you think we are allowed
24 to look at what is clearly the natural import
25 of that exemption? In other words, that

1 exemption came about later, so do we have to
2 find that "money remuneration" is an ambiguous
3 phrase in order to look at it, or do we take
4 the statute as a whole just generally?

5 MS. KOVNER: I think, you know, what
6 this Court has said about this in West Virginia
7 University Hospitals versus Casey is that the
8 Court adopts the permissible meaning that fits
9 most logically and comfortably with both the
10 previously enacted and the subsequently enacted
11 provisions.

12 So here we think the only meaning that
13 fits with both -- I mean, Mr. Dupree
14 acknowledged when he stood up that money can
15 have this broader reading that readily
16 encompasses stock. And that's the only meaning
17 that fits with the qualified stock option
18 exemption.

19 It's also the only meaning that fits
20 with many other exemptions that Congress added
21 for things that just aren't cash, like for
22 lodging, like for healthcare benefits, like for
23 employee achievement awards, intangible
24 property. These exceptions only make sense if
25 the statute extends beyond cash.

1 JUSTICE SOTOMAYOR: May -- may I ask:
2 Was Mr. Dupree right about the history, that it
3 wasn't -- from 1938 to 1994, railroads were not
4 paying on -- cash on options?

5 MS. KOVNER: I think --

6 JUSTICE SOTOMAYOR: Or not paying
7 payroll taxes on cash options?

8 MS. KOVNER: I haven't seen any
9 authority on one side or the other regarding
10 very early in the statute's history. I think
11 we do know, and you can see, you know, page 7
12 of our brief is where we discuss cases that
13 recount this history.

14 We do know that some employees have
15 been paying taxes on stock options for quite
16 some time. So Union Pacific is one example.
17 They start issuing options in 1981. And they
18 pay taxes until 2007, when they file suit.

19 So 2011 is the first time that we see
20 a suit challenging whether stock options are
21 taxable under the RRTA and -- and Union Pacific
22 and other railroads were filing --

23 JUSTICE SOTOMAYOR: How -- what do I
24 do with the fact that where I'm having
25 difficulty making the leap in your argument is

1 Congress did use money remuneration in one
2 statute and wages defined very broadly in
3 another. That was in 1938.

4 Generally, when you have two different
5 descriptions of words, you have to give them
6 two different meanings of some sort.

7 MS. KOVNER: Sure.

8 JUSTICE SOTOMAYOR: So what do I do
9 with that? You're now equating money
10 remuneration with wages as it appears in FICA,
11 but there weren't identical words used.

12 MS. KOVNER: Sure. So -- and we agree
13 that money has to be given some meaning. And
14 we think that Congress was doing something
15 deliberate when it used money in the RRTA but
16 didn't include parallel language in FICA.

17 And at the time that the RRTA was
18 enacted, railroad workers -- and it's discussed
19 in the history and the hearings leading up to
20 the enactment of the RRTA -- they received a
21 variety of benefits that were sort of hard to
22 value, couldn't readily be assigned a monetary
23 value. And these included things like the
24 right to have certain safety gear on the job
25 and an unlimited but non-transferable sort of

1 lifetime use of the rail's travel benefit.

2 So these are things that would have
3 been hard to value, and we think the use of
4 money carves those out of the RRTA, whereas
5 they weren't carved out prior to that.

6 CHIEF JUSTICE ROBERTS: You -- you
7 would agree, wouldn't you, that not every form
8 of stock qualifies under your definition?

9 Justice Kennedy mentioned non-publicly
10 traded stock. I suppose there are some
11 entities in which their stock is particularly
12 volatile, I mean, it's expected to change
13 between the time you get the options or the
14 actual stock and -- and when you liquidate it.

15 How are we supposed to tell which
16 stock counts and which doesn't?

17 MS. KOVNER: Sure. So this is an easy
18 case and the Court obviously needs not go
19 further than publicly-traded stock.

20 But as with respect to
21 privately-traded stock, we think that's covered
22 too, and here's why. So it's true that private
23 --

24 CHIEF JUSTICE ROBERTS: When you say
25 covered too, you mean that counts as money

1 remuneration?

2 MS. KOVNER: It's -- that's right.
3 And it counts as money remuneration only at the
4 time that you exercise the option. So it might
5 be that that stock is more volatile than a
6 publicly-traded stock, but it has a certain
7 value on the date you exercise the option, and
8 that's the only value that you look to.

9 Somebody's going to have to value that
10 privately-traded asset for the purpose of
11 income tax. They're going to have to declare
12 income that's equal to the value of that stock.
13 And so we think once they're valuing it for
14 income, it also has a readily-discernible
15 market value for the purpose of the RRTA.

16 JUSTICE GORSUCH: Well, why would you
17 wait until the day of exercise, though, if it
18 -- why not the date of vesting, and -- and what
19 -- I'm still not clear on what you do with
20 privately-held stock that is not readily --
21 there's no liquid market value that you can
22 look to at any point in time.

23 MS. KOVNER: Sure. So, with respect
24 to the first point, we think that options like
25 those that are issued in this case only have a

1 readily ascertainable market value at the time
2 that they are exercised. And that's because
3 there tend to be limitations on the options,
4 like --

5 JUSTICE GORSUCH: Almost anything can
6 be valued, though. I mean, anything can be
7 reduced to money. So why -- why -- why wait,
8 other than it's convenient for the government?

9 MS. KOVNER: No, we think it's a
10 matter of whether it has a readily
11 ascertainable market value. And there's a
12 pretty big body of law on the issue of when
13 options satisfy that.

14 It starts with this Court's decision
15 in Commissioner versus LoBue and it's also the
16 same set of principles that are applied for
17 valuing options under the income tax code.

18 And that sort of body of law says, for
19 the kinds of options that are issued here in
20 the employment context, there are just too many
21 conditions and conditions -- contingencies on
22 whether you're going to be able to exercise the
23 option at all and what its value will be at the
24 time of exercise. To assign it --

25 JUSTICE GORSUCH: No, no, once it

1 vests, it's different. There's no question
2 that you will be able to exercise it. It's
3 just when. You may choose to exercise it years
4 later, but it vests, so you immediately at that
5 point in time have the right to exercise it on
6 that day.

7 I'm still not clear what your answer
8 to the Chief Justice would be.

9 MS. KOVNER: As -- as to a
10 publicly-traded stock?

11 JUSTICE GORSUCH: Sure.

12 MS. KOVNER: I think our -- our view,
13 you know, so there's a sort of pretty
14 established body of IRS law about this, and it
15 looks to, first, the point of issuance and,
16 second, the point of -- the point at which you
17 exercise the option.

18 I think the IRS has sort of made the
19 determination, applying this Court's decision
20 in Commissioner versus LoBue, that those are
21 the two points that you look to.

22 And the IRS has generally said at the
23 point that the option is issued --

24 JUSTICE GORSUCH: So more regulations.
25 Okay. Fine. And what do we do about the more

1 general problem, though, that lots of companies
2 issue lots of things to their employees that
3 are forms of compensation that can be reduced
4 readily to money.

5 You mentioned lifetime passes for
6 riding the rails, for example. Sports tickets
7 might be another. Home technology might be
8 another. Why aren't all those kinds of
9 benefits -- child care -- why don't all those
10 qualify as money remuneration in the
11 government's view, or do they?

12 MS. KOVNER: So I think there are --
13 our definition of money remuneration basically
14 has two pieces: First, can it be readily
15 valued into cash and, second, can it be readily
16 converted into cash?

17 We think that either suffices, but at
18 a minimum, we think the second, which is what
19 you have here and not in those other cases
20 suffices.

21 So, if't is something that you can
22 easily convert into cash, here just by sort of
23 checking a box on the form when you exercise
24 the option, we think at a minimum those kinds
25 of things qualify as money remuneration, which

1 is sort of what the Court of Appeals said.

2 JUSTICE GORSUCH: A home computer?

3 CHIEF JUSTICE ROBERTS: What about
4 bushels -- bushels of wheat? It's readily
5 convertible into cash on the Chicago
6 Commodities Exchange. So, if somebody gave you
7 20 bushels of wheat, you would count that as
8 money remuneration?

9 MS. KOVNER: Well, I don't think
10 that's readily convertible to cash for the
11 person who receives it. It's true that there
12 are certain circumstances in which a person
13 could buy or sell bushels of wheat.

14 But, certainly, the employee who
15 receives a bushel of wheat in their
16 compensation, if that were to occur, can't
17 readily convert it into cash in the same way
18 that they can convert an option.

19 JUSTICE SOTOMAYOR: I mean, I suppose
20 your answer would --

21 CHIEF JUSTICE ROBERTS: Well, okay,
22 they give you a little -- they say, okay, here,
23 you're entitled to buy 20 bushels of wheat on
24 the commodity exchange. Does that count as
25 money remuneration?

1 MS. KOVNER: Well, a voucher for
2 bushels of wheat? I'm not --

3 CHIEF JUSTICE ROBERTS: Sure.

4 MS. KOVNER: Right. I think the
5 problem is that that voucher for bushels of
6 wheat is not going to be something that you --
7 that the employee can readily convert into
8 cash.

9 If you -- if you do get to the point
10 where we're talking about vouchers that -- that
11 do have a readily ascertainable market value, I
12 think it's a pretty helpful example to us
13 because, if you look to the 1938 regulation
14 that Justice Gorsuch was alluding to, it gives
15 a pretty expansive definition of money
16 remuneration and it indicates that it includes
17 things like merchandise orders, which I think
18 is perhaps somewhat equivalent to the bushels
19 of wheat voucher. It's something that you
20 could exchange for -- for a commodity at the
21 company's store.

22 I mean, that kind of thing is less
23 liquid than -- than stock, which anybody can
24 convert to cash and which is used as a means of
25 exchange in a variety of circumstances. It's a

1 predominant medium of exchange now in many
2 corporate contexts and employee compensation
3 matters.

4 JUSTICE KAGAN: Ms. Kovner, would your
5 answer to the Chief Justice's question be
6 different if a -- if a company said you can
7 take a bushel of wheat or its equivalent in
8 cash value?

9 MS. KOVNER: Yes, Your Honor. I mean,
10 I think there it's -- it's -- and that's, I
11 think, more analogous to here, where
12 essentially the employee can check a box on a
13 form and they're just receiving cash. It's
14 essentially instantaneous conversion into cash.

15 It -- I mean, and I think going to the
16 purpose of the statute and what I think, you
17 know, this Court has indicated in United States
18 versus Silk is how this statute should be
19 construed. I mean, this is a statute that's
20 intended to provide a self-sustaining system of
21 retirement benefits for railroad workers, and
22 if an employer --

23 JUSTICE GINSBURG: Except Mr. Dupree
24 told us that there -- there isn't any real
25 jeopardy to the system if these stock options

1 were not subject to the -- to the tax.

2 MS. KOVNER: So I don't think -- with
3 respect, I don't think that the points that Mr.
4 Dupree was making are exactly correct, and if I
5 could explain why.

6 Mr. Dupree's first response was that
7 the tax rate self-adjusts under the RRTA.
8 That's true for the second tier of the RRTA,
9 the sort of supplemental pension benefit
10 system. It's not true for Tier 1, which is the
11 fundamental equivalent of Social Security.

12 For Tier 1, you've got the same tax
13 rate as FICA, and you're guaranteed the same
14 benefits level as FICA. So I think it's very
15 strange to imagine that Congress would have
16 thought you could have the same tax rate and
17 the same benefits but a much smaller tax -- tax
18 base.

19 And I think the other thing that Mr.
20 Dupree said as to why it's not going to
21 undermine the RRTA's system is that high-level
22 employees are going to max out on their
23 compensation. So it's not really going to
24 matter how their options or how stock-based
25 compensation is treated.

1 And I don't think that's exactly right
2 for two reasons.

3 The first is only part of the RRTA tax
4 maxes out. The part that funds Medicaid does
5 not max out. And the second is that there's
6 nothing to stop an -- an employer from
7 converting all of their railroad's compensation
8 of a high-level executive to cash. I mean,
9 it's not uncommon for a CEO to get \$1 in cash
10 and the rest of their payment in stock.

11 JUSTICE KENNEDY: Is a third -- a
12 third possibility that the employee waits until
13 after he or she retires and doesn't receive the
14 big salary and then exercises the option?

15 MS. KOVNER: The --

16 JUSTICE KENNEDY: Or -- or is that
17 unrealistic?

18 MS. KOVNER: You know, it's -- it's
19 possible that there are some options that don't
20 get taxed for that reason, but, obviously, if
21 the Court were to say that any payment that a
22 company makes to its employees over the
23 duration of their career that takes the form of
24 stock is not taxable, that's posing a -- a
25 threat to the railroad retirement system.

1 You know, I think if the Court has
2 doubts about how the term "any form of money
3 remuneration" is -- is construed, ambiguity in
4 the word "money," I think the surrounding
5 language is helpful. There's -- "any form of"
6 suggests that the -- the Congress was intending
7 a broader meaning of the term "money." And
8 then the -- and then the exceptions that
9 Congress added to the statute are really
10 incompatible with Petitioners' definition.

11 And then the contemporaneous
12 interpretations of the statute by both the RRB
13 and the Treasury Department are both broad.
14 And Congress amends the statute repeatedly
15 against the backdrop of those interpretations.

16 So whatever doubt one has about the --
17 you know, whether those interpretations were
18 too broad to begin with, once Congress
19 repeatedly amends the statute and doesn't
20 change that base definition of compensation --

21 JUSTICE GORSUCH: I guess I'm not sure
22 how the regulations help you. I mean, the more
23 recent regulation says effectively that money
24 is whatever money is under the statutes.

25 That doesn't do much work, it seems to

1 me. And the fact that -- that the IRS chose to
2 replace the 1938 regulation, that might or
3 might not be more helpful to the government, we
4 can debate that, seems to me a lost opportunity
5 for the government. No?

6 MS. KOVNER: I mean, I think that if
7 -- if the regulation had provided a lot greater
8 clarity and discussed stock in particular,
9 obviously, that would have been helpful. We
10 think the regulations are still helpful in two
11 ways.

12 JUSTICE GORSUCH: How is the existing
13 regulation helpful to the government?

14 MS. KOVNER: Sure. So the existing
15 regulation talks about specific limitations in
16 the statute as -- as being the way in which the
17 RRTA and FICA differ today. And we think the
18 only reasonable way to read "specific
19 limitations" is that it's talking about the
20 enumerated exceptions, which are different
21 under the statute.

22 If you look at the preamble, I mean,
23 that's what the agency explains that it's
24 doing. It's saying that now that all these
25 exceptions have come into this statute, which

1 deal with the kinds of hard-to-value benefits
2 that were being addressed by money in the first
3 instance, the statutes really have parallel
4 meaning.

5 And I think the agency also points out
6 that the statutes now function in parallel in
7 that they guarantee the same level of benefits
8 under Tier 1 and have the same tax rate under
9 -- under Tier 1. So it makes sense to construe
10 those things in tandem.

11 JUSTICE SOTOMAYOR: I don't know.
12 That doesn't help me because, if you're
13 equating, as the current regulations do, the
14 railroad money remuneration with FICA's wages,
15 what do we do -- FICA requires you to value a
16 hard-to-value stock option, and you're telling
17 me it's not required under money remuneration.

18 MS. KOVNER: No, we think --

19 JUSTICE SOTOMAYOR: So I'm not quite
20 sure how you can equate it when you yourself
21 have recognized the major difference.

22 MS. KOVNER: So we think that options
23 would be treated the same under FICA as they
24 are under the RRTA --

25 JUSTICE SOTOMAYOR: That's easy

1 because it's publicly traded, it's the known
2 value. But the way the regulation is reading,
3 it seems to be equating money remuneration
4 completely with wages. But you're suggesting
5 -- you're not.

6 MS. KOVNER: And we think "money" does
7 some work, we think -- but we think the work
8 that "money remuneration" is doing in FICA --
9 in the RRTA is now basically covered by
10 enumerated exemptions under FICA.

11 So, basically, Congress comes in
12 and they add exceptions for things like de
13 minimis benefits and fringe benefits. The
14 kinds of things that were generally falling in
15 that money bucket under the RRTA, Congress sort
16 of acknowledges that there's a lack of clarity
17 about how those things are going to be treated
18 under FICA and it enacts a variety of very
19 specific provisions that handle those things.
20 So that's why we think the agency was
21 reasonable in construing those statutes in
22 tandem.

23 But, of course, the Court doesn't need
24 to reach the question of whether all kinds of
25 in-kind benefits are treated exactly the same

1 under FICA and the RRTA. All this case
2 presents is whether stock options, which are a
3 form of remuneration that are readily
4 convertible to cash, qualify as money
5 remuneration.

6 JUSTICE GINSBURG: And --

7 CHIEF JUSTICE ROBERTS: If we were --

8 JUSTICE GINSBURG: -- and, Ms. Kovner
9 --

10 CHIEF JUSTICE ROBERTS: If we were to
11 agree with you, we would have to assume that
12 whoever wrote this statute was told we want you
13 to include money remuneration and stock
14 remuneration; and he says, well, a good way to
15 do that would be to say "money remuneration."
16 Right? You're asking us to accept that, aren't
17 you?

18 MS. KOVNER: I -- I don't think
19 exactly. I mean, I think, as my friend on the
20 other side acknowledged, money has -- has and
21 had at the time of the statute's enactment a
22 broader use as well as a narrow one. And the
23 broader use, we think, encompasses stock. And
24 I think some ways the Court can see that that
25 broader use existed is looking not only to

1 dictionary definitions but also to the
2 predecessor versions --

3 CHIEF JUSTICE ROBERTS: Well --

4 MS. KOVNER: -- of the statute.

5 CHIEF JUSTICE ROBERTS: -- I'm not --
6 I'm not saying there isn't a broader use and
7 someone might understand it, but I think if you
8 wanted to be even close to being clear, or
9 reasonably clear, and you want to include both
10 money and stock, you wouldn't pick the phrase
11 "money."

12 MS. KOVNER: I think --

13 CHIEF JUSTICE ROBERTS: You're going
14 to say "money and stock," or you might say, as
15 you suggested, is something readily
16 reducible -- ascertainable value readily
17 reducible to cash.

18 MS. KOVNER: It's not clear that
19 "stock" was, you know, necessarily at the
20 forefront of the drafters' mind. I do think
21 that the drafters used "money" in the phrase
22 "any form of money remuneration" in a broader
23 sense. And you can see that through the text
24 of the provisions that Congress put forward in
25 -- in sort of the various versions.

1 So there were versions that included a
2 carveout for various in-kind benefits. And the
3 enacted 1935 version of the statute also
4 included a carveout for one kind of in-kind
5 benefits, for free transportation. So I think
6 it's clear, from those sort of versions of the
7 language that Congress put forward, that it
8 understood "money" was being used in a broad
9 sense. And --

10 JUSTICE KENNEDY: I thought -- I
11 thought you might have answered the Chief
12 Justice by saying it means any form of money
13 remuneration. But that still just gives you
14 about a C minus on the drafting.

15 MS. KOVNER: You know, obviously --
16 (Laughter.)

17 MS. KOVNER: If -- if Congress had
18 spoken directly to stock one way or the other,
19 either said it's in or it's out, we wouldn't be
20 here today, but I think the only reasonable
21 interpretation of the word "money" as it was
22 used in the statute, particularly given the
23 regulations and Congress's ratification of
24 those regulations and all of the exceptions
25 that Congress has added since, is that it

1 reaches by --

2 CHIEF JUSTICE ROBERTS: You -- you
3 think that's the only reasonable -- I -- I
4 didn't think your argument went that far.

5 MS. KOVNER: Well, I -- I'd be happy
6 to accept that it's the most reasonable reading
7 of the statute --

8 CHIEF JUSTICE ROBERTS: I thought in
9 some places where you're talking about the
10 regulations, your idea was it was "a"
11 reasonable one.

12 MS. KOVNER: And -- and we think
13 that --

14 CHIEF JUSTICE ROBERTS: Saying it's
15 the only reasonable one is a bit of a stretch.

16 MS. KOVNER: Fair enough. We think
17 it's -- it's certainly the most reasonable
18 reading of the statute in light of its
19 language, in light of what happened since, and
20 in light of Congress's objective in providing a
21 self-sustaining employment system.

22 JUSTICE KAGAN: But if I --

23 JUSTICE ALITO: Do you -- do you think
24 the later adopted exemptions change the meaning
25 of "money remuneration"?

1 MS. KOVNER: I -- I don't think --

2 JUSTICE ALITO: How can they do that?

3 MS. KOVNER: So I think what this
4 Court has said -- I mean, it said it in Casey,
5 it said it in Faustoe, it's in the Scalia and
6 Garner treatise, is that when this Court
7 interprets statutes, if there's an ambiguous
8 term in the early statute and then later
9 provisions get enacted that shed light and make
10 clear that Congress is acting on the
11 understanding that it's the broader form of --
12 of the term that was used, then you construe
13 the statutes together. You adopt a reading
14 that makes sense of both provisions, rather
15 than adopting a reading that would make the
16 second enactment make no sense.

17 JUSTICE ALITO: So the -- what is the
18 answer to my question? Does it change the
19 meaning or not?

20 MS. KOVNER: It resolves an ambiguity
21 in the meaning of the prior provision.

22 JUSTICE KAGAN: If you could just go
23 back to some answers you gave to prior
24 questions about how to work this on privately
25 listed companies, did -- did I get it right

1 that you're just saying that -- that the how
2 and exactly -- the -- the method by which this
3 is understood as taxable in this context is the
4 same as in the income tax context? Is that
5 right?

6 MS. KOVNER: That's right. These --
7 these are going to be valued for purposes of
8 the income tax. Nobody disputes that. And we
9 think that once they're valued for purposes of
10 the income tax, they're -- they're also -- that
11 value should be ascribed to them for purposes
12 of the RRTA tax.

13 If there are no further questions, I
14 would ask that the Court affirm.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Four minutes, Mr. Dupree.

18 REBUTTAL ARGUMENT OF THOMAS H. DUPREE, JR.

19 ON BEHALF OF THE PETITIONERS

20 MR. DUPREE: Thank you. Just a few
21 points. The first is this Court obviously
22 needs to construe this tax provision in the
23 context of the code as a whole. We identify
24 numerous provisions in the code, both as it
25 existed during the Great Depression but also as

1 it exists today, that makes clear that when
2 Congress uses the word "money" in a tax
3 statute, it does not mean stock.

4 I think that if this Court were to
5 reach the conclusion that, in the context of
6 the tax statute, the word "money" can encompass
7 stock, I think that could have pretty
8 significant spill-over effects to the dozens,
9 if not hundreds, of places in the code today
10 that use the word "money."

11 The second --

12 JUSTICE SOTOMAYOR: How many of those
13 other code provisions use the words "money
14 remuneration" as opposed to just "money"?

15 MR. DUPREE: They don't, Justice
16 Sotomayor, but at the same time, I think "money
17 remuneration" can simply be understood as
18 remuneration in money, which, of course, begs
19 the question as to, well, what's money?

20 And our point is that when Congress
21 puts the word "money" in a tax statute, it
22 unambiguously excludes stock. There's no
23 question about that in the current code and the
24 code as it existed back in the Great
25 Depression.

1 The second point is to the extent the
2 government argues that anything that can be
3 valued and sold for cash falls within this
4 capacious definition of money is wrong because
5 I can think of many things that can be sold
6 faster for cash at a much lower transaction
7 cost, for example, baseball tickets.

8 If I have two tickets to the Nationals
9 and Rockies game, I can sell those and change
10 those into cash a lot faster than I could find
11 a broker and sell my shares of stock on a
12 market.

13 The third point I would make -- and I
14 think it's apropos since Tax Day is almost upon
15 us -- is the government, the IRS, requires that
16 we taxpayers pay our taxes in money. It will
17 not let taxpayers pay their taxes in stock.

18 Unless there are further questions, we
19 ask that the judgment below be reversed.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 10:55 a.m., the hearing
23 concluded.)

24

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