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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 your 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><b>A</b></p> <p><b>ability</b> 14:14</p> <p><b>able</b> 36:10</p> <p><b>aboveentitled</b> 1:11 36:17</p> <p><b>absolutely</b> 25:21 30:25 31:20</p> <p><b>accept</b> 26:23</p> <p><b>accepted</b> 30:8</p> <p><b>accommodate</b> 35:24</p> <p><b>accompanying</b> 4:10</p> <p><b>account</b> 4:15 9:22 12:21,25 32:17</p> <p><b>accrual</b> 10:3</p> <p><b>acknowledge</b> 26:21 27:12</p> <p><b>acknowledges</b> 18:2</p> <p><b>act</b> 10:3,3</p> <p><b>address</b> 7:10 26:5 32:21</p> <p><b>addressing</b> 11:8</p> <p><b>adjust</b> 9:19</p> <p><b>admin</b> 24:12</p> <p><b>administrability</b> 5:20</p> <p><b>administration</b> 15:12 18:22</p> <p><b>administrative</b> 24:12 31:20,21</p> <p><b>adopting</b> 32:25</p> <p><b>adopts</b> 9:5</p> <p><b>advantage</b> 9:21</p> <p><b>adverting</b> 28:9</p> <p><b>affect</b> 5:15 34:9</p> <p><b>agree</b> 19:7</p> <p><b>agrees</b> 13:10 30:6</p> <p><b>al</b> 1:6</p> <p><b>alito</b> 10:14 11:3 12:4 17:20,24 24:10 28:8</p> <p><b>allows</b> 29:7</p> 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