No. 12-1408

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
QUALITY STORES, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS QUALITY STORES, INC., ET AL. AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans that provide benefits to millions of active workers, retired persons, and their families nationwide.[1] ERIC frequently participates as *amicus curiae* in cases before this Court that have the potential for far-reaching effects on employee benefit design or administration.[2] All of ERIC's members do business in more than one State, and many have employees in all fifty States.

As employers, ERIC's members benefit from clarity in the administration of federal employment taxes under the Federal Insurance Contributions Act ("FICA"). By looking to the statutory definition of "supplemental unemployment compensation

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amicus* or its counsel made such a monetary contribution. All parties have consented to the filing of this brief in letters filed with the Clerk of this Court.

[2] *See, e.g., Conkright v. Frommert*, 130 S. Ct. 1640 (2010); *LaRue v. DeWolff, Boberg & Assocs.,* 552 U.S. 248 (2008); *Beck v. PACE Int'l Union,* 551 U.S. 96 (2007); *Gen. Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

benefits" ("SUB payments") in 26 U.S.C. § 3402(o)(2)(A) to determine the type of employer-provided unemployment benefits that are excluded from the definition of wages for purposes of FICA taxes, the Sixth Circuit has provided a clear, uniform rule that treats all similarly situated employers and employees throughout the country the same and does not turn on the vagaries of state law. By contrast, a rule that makes the classification of employer-provided unemployment benefits for FICA purposes turn on eligibility for state unemployment benefits, as the government contends, requires employers to consider the unemployment benefit requirements of up to fifty states (as well as the District of Columbia and Puerto Rico) in order to determine the FICA tax treatment for employees. Reliance on the statutory definition in 26 U.S.C. § 3402(o)(2)(A) fosters uniform administration of SUB plans and reduces the cost of providing such benefits to employees.

In addition, many of ERIC's members have filed refund claims to recover FICA taxes on benefits paid to former employees under SUB plans. The decision in this case likely will influence the outcome of the members' refund claims and determine whether affected individuals in similar circumstances are treated the same throughout the country.

Because employers' FICA tax refund claims provide an opportunity for employees to recover the employees' share of the FICA taxes, former employees will also benefit if the refund claims are granted. Refunds recovered by employers and by former employees may provide a source of economic

relief for companies and individuals in today's challenging economic environment, which in many cases has led to downsizing and layoffs triggering the need for the payments at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Respondent Quality Stores, Inc. ("Quality Stores") closed its stores, it paid supplemental unemployment compensation benefits to certain employees who were laid off. Both Quality Stores and the employees paid FICA taxes on these SUB payments. Quality Stores argues that the SUB payments are not "wages" under applicable statutory provisions, and therefore are not subject to FICA taxes.

The government recognizes that some SUB payments are not wages for FICA purposes. The parties disagree over which SUB payments are excluded from the definition of wages. Quality Stores argues that payments meeting the definition of SUB payments in the Internal Revenue Code ("I.R.C.") are not wages for FICA purposes. The government argues that, to qualify as non-wages, SUB payments must meet not only the statutory definition of a SUB payment but also criteria set out in Internal Revenue Service ("IRS") Revenue Rulings that have changed over time.

Both the statutory text and the legislative history support the conclusion that SUB payments, as defined in the I.R.C., are not "wages." The government's arguments to the contrary are internally inconsistent and at odds with this Court's

precedents. In addition, the government's approach produces to a cumbersome system in which the classification of SUB payments for FICA purposes turns on a recipient's eligibility for state unemployment benefits.

1. The definition of wages in the FICA chapter of the I.R.C., 26 U.S.C. § 3121(a), does not explicitly address SUB payments. The wage provisions in the income-tax withholding chapter *do* specifically address SUB payments, and make clear that such payments are not "wages." *See* 26 U.S.C. §§ 3401(a), 3402(o)(2)(A). This Court has concluded that the definitions of "wages" in the FICA chapter and in the income-tax withholding chapter are "substantially identical," and that Congress "intended its definition [of 'wages'] to be interpreted in the same manner for FICA . . . as for income tax withholding." *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 249, 263 (1981).

The text of 26 U.S.C. §§ 3401 and 3402(o)(2)(A) points to the conclusion that SUB payments are not "wages." *First*, SUB payments are not "remuneration . . . for services." 26 U.S.C. § 3401(a). Because SUB payments are "contingent on the employee's being thrown out of work," *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 200 (1980), they are not compensation for services. *Second*, § 3402(o) extends employers' obligation to withhold income tax to "certain payments *other than wages*," 26 U.S.C. § 3402(o), and lists SUB payments among the payments subject to this treatment. Moreover, § 3402(o)(1)(A) specifically provides that SUB payments "shall be treated *as if*" they are wages.

This statutory language clearly indicates that SUB payments are *not* wages.

The legislative history strongly confirms that SUB payments are not wages. The Senate Report that accompanies § 3402(o) states *three times* that SUB payments are not wages, and also states that they are not "remuneration for services." S. REP. NO. 91-552, at 268 (1969).

Moreover, when Congress adopted the current versions of §§ 3121, 3401, and 3402 in 1986, it was aware that the IRS treated all SUB payments as non-wages. *See* Rev. Rul. 77-347, 1977-2 C.B. 362. Under the doctrine of legislative reenactment, Congress is presumed to have approved the existing IRS practice, and therefore the IRS cannot now interpret "wages" for FICA tax purposes in a manner inconsistent with the reenacted statutes.

2. The government's contrary arguments are unpersuasive.

The government's arguments are internally inconsistent. The government argues that SUB payments are "wages" for FICA purposes unless there is an explicit statutory exemption. That argument is inconsistent with current IRS practice, which deems certain SUB payments to be non-wages for FICA purposes even though there is no express statutory exemption. *See* Rev. Rul. 90-72, 1990-2 C.B. 211. In addition, the government suggests that the IRS may have lacked statutory authority to exempt some SUB payments from "wages," but it continues to rely on the same Revenue Rulings it suggests may have been invalid. Finally, to overcome what it views as the potential invalidity of

the IRS exclusion of some SUB payments from "wages," the government argues that Congress acquiesced to the IRS position in two statutory provisions located outside the FICA chapter. By relying on provisions from the income tax (26 U.S.C. § 501(c)(17)) and income-tax withholding (§ 3402(o)) chapters of the I.R.C. to support its interpretation of "wages" under FICA, the government engages in the very interpretive method that it contends is impermissible for Quality Stores.

The government's position is also at odds with *Rowan*'s instruction that the definitions of "wages" for FICA and income-tax withholding must be interpreted consistently. Contrary to the government's claim, the interest in "simplicity and ease of administration" is a reason to reject the government's position, which creates complications due to varying treatment of SUB payments depending on state unemployment benefits.

The government asserts that the SUB payments at issue here are especially appropriate for "wage" treatment because they were paid to former employees and the payments depended in part on the length of time recipients worked and their salaries. But SUB payments, by definition, are paid to former employees, and the IRS has long approved non-wage treatment for payments that are linked to recipients' status within the former employer. Under the statutory definition, factors such as whether SUB payments are linked to seniority with the former employer are not relevant to whether the payments are wages.

Finally, the government attempts to rewrite § 3402(o) to support its position by describing the

statute as requiring that SUB payments "will be subject to income-tax withholding *whether or not* they would otherwise be 'wages.'" U.S. Br. at 28. But § 3402 contains no such limitation.

3. Policy considerations provide additional support for the conclusion that SUB payments are not wages for FICA tax purposes.

The government's position makes the status of SUB payments turn on whether the payments are "linked to state unemployment compensation" pursuant to Rev. Rul. 90-72. This results in a cumbersome system in which the federal tax status of SUB payments depends on the state of residence of recipients.

The government's position also imposes an undue hardship on the very recipients that SUB payments are designed to help. Under the government's approach, either: (i) an individual qualifies for state unemployment benefits and therefore can benefit from non-wage treatment of SUB payments under FICA, or (ii) an individual is not eligible for state unemployment benefits, and therefore must pay FICA taxes on SUB payments. The government's approach disadvantages recipients who must rely exclusively on SUB payments. There is no evidence that Congress intended to afford different federal tax treatment to companies and individuals based on their state of residence. Moreover, the government would prohibit non-wage treatment for SUB payments paid in a lump sum. This limitation imposes a hardship on individual recipients who rely on a lump sum SUB payment as a crucial supplement to state benefits to mitigate the costs occasioned by sudden loss of employment.

ARGUMENT

I. The Relevant Statutory Text Provides That SUB Payments Are Not Subject To FICA Taxes.

A. FICA Taxes And Income Taxes

As this Court has explained, "'wages' is a narrower concept than 'income.'" *Rowan*, 452 U.S. at 254. "'Wages usually are income, but many items qualify as income and yet clearly are not wages.'" *Id.* (quoting *Cent. Ill. Pub. Serv. Co. v. United States*, 435 U.S. 21, 25 (1978)). "Wages" generally are subject to both income taxes and FICA taxes, which fund Social Security and Medicare.

The parties agree that the SUB payments Quality Stores paid to employees who were laid off are income to the employees. They disagree, however, over whether the SUB payments are, or are not, "wages." If the SUB payments are "wages," then they are subject to FICA taxes, which are paid by both the employer and the employees. If they are not "wages," then Quality Stores and its former employees were not required to pay FICA taxes on the SUB payments.

FICA and income taxes are addressed in separate chapters of the I.R.C. The I.R.C. specifies that "wages" are subject to FICA taxes, 26 U.S.C. § 3101, and defines wages as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," with the exception of particular exclusions not relevant here, *id.* § 3121(a).

The income tax chapter of the Code imposes income-tax withholding on "wages," *id.* § 3402(a)(1), defined as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any other medium other than cash," with the exception of exclusions not relevant here, *id.* § 3401(a). This Court has explained that the definitions of "wages" in § 3121(a) and § 3401(a) are "substantially identical." *Rowan*, 452 U.S. at 249.

Unlike FICA taxes, which apply only to wages, income taxes apply to both wage and non-wage income. *See* 26 U.S.C. §§ 1, 61, 63. As a result, even if income-tax withholding and FICA taxes do not apply to a payment, the payment may still be subject to income tax. Thus, payments by an employer to an employee that are not "wages" as defined in § 3121(a) or § 3401(a) may be subject to income tax even though they are not subject to income-tax withholding or to FICA taxes.

In the absence of income-tax withholding, these non-wage payments might lead to burdensome tax payments for taxpayers at the time their income tax returns are filed because taxes already withheld would not cover their final income tax liability. S. REP. NO. 91-552, at 268-69. To address this concern, the I.R.C. imposes income-tax withholding on certain payments that would otherwise *not* be subject to withholding because they are not wages. 26 U.S.C. § 3402(o); *id.* § 3402(o)(1)(A) (imposing income-tax withholding on "any supplemental

unemployment compensation benefit paid to an individual").

B. SUB Payments Are Not Wages.

Section 3402(o)(2)(A) defines "supplemental unemployment compensation benefits" or "SUB payments" as:

> amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee's gross income.

Id. § 3402(o)(2)(A). The parties have stipulated that "[a]ll payments Quality Stores made to its former employees . . . satisfy this five-part statutory test to qualify as SUB payments." Pet. App. 11.

1. Several Statutory Provisions Are Relevant To Determining Whether SUB Payments Are "Wages" For FICA.

Quality Stores argues that *no* SUB payments are wages, Resp. Br. at 17-19, while the United States recognizes that *some* SUB payments are not wages, U.S. Br. at 28. The parties disagree over which statutory provisions are relevant to determining whether SUB payments are wages.

In any statutory construction case, the analysis begins with the statutory text. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). A prior question, however, is which statutory text is relevant.

The government focuses its attention on the FICA chapter of the I.R.C., with the definition of wages in § 3121(a). U.S. Br. at 10. Although it makes sense to begin the analysis by looking to the FICA chapter to assess whether SUB payments are "wages" for FICA purposes, a review of the FICA chapter quickly reveals that it does not explicitly address how SUB payments should be treated. That does not end the inquiry, however, because SUB payments *are* explicitly addressed in a parallel income-tax withholding provision, which this Court has looked to in the past to construe "wages."

This Court has held that "wages" in § 3121(a) must be construed consistently with the definition of "wages" in § 3401(a), which defines wages for purposes of income-tax withholding. In *Rowan Cos. v. United States*, 452 U.S. 247, this Court considered the precise issue of whether the word "wages" has the same meaning in 26 U.S.C. § 3401(a) (income-tax withholding) and § 3121(a) (FICA). Applying principles of statutory construction, the Court concluded that "wages" should be interpreted consistently across the two sections. *Id.* at 263. The Court observed that the definitions of "wages" in § 3401(a) and § 3121(a) are "substantially identical" and held that "[t]he plain language and legislative histories of the relevant Acts indicate that Congress intended its definition [of 'wages'] to be interpreted

in the same manner for FICA . . . as for income tax withholding." *Id.* at 249, 263. Accordingly, the Court treated non-wage payments for income-tax withholding purposes as non-wage payments for FICA tax purposes.

The Court's holding in *Rowan* is consistent with the "standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995) (noting that the principle that a "term should be construed, if possible, to give it a consistent meaning throughout the Act . . . follows from [the Court's] duty to construe statutes, not isolated provisions").

In short, Congress did not specifically address SUB payments in the FICA chapter, but it *did* explicitly address them in the income-tax withholding chapter, which, as the next Section explains, makes clear that SUB payments are non-wages. Per this Court's instruction in *Rowan* that the definition of "wages" should be interpreted consistently across the income-tax withholding and FICA chapters, § 3401 and § 3402(o) make clear that SUB payments are not "wages" and therefore are not subject to FICA taxes.

2. The Text Of 26 U.S.C. §§ 3401 And 3402(o)(2)(A) Demonstrates That SUB Payments Are Not Wages.

The relevant statutory text is clear that SUB payments are not "wages" and therefore are not subject to FICA taxes.

First, SUB payments are not wages because they are not "remuneration . . . for services" as required by the definition of wages in § 3401(a). As noted above, § 3401(a) defines "wages" as "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash." SUB payments are "remuneration," U.S. Br. at 10-11, but they are not "remuneration . . . *for services*," 26 U.S.C. § 3401(a) (emphasis added). In *Coffy v. Republic Steel Corp.*, this Court explained, "SUBs cannot be compensation for work performed, . . . for they are contingent on the employee's being thrown out of work; unless the employee is laid off he will never receive SUB payments." 447 U.S. at 200. In other words, it is precisely because the employee is not performing services that he or she is eligible to receive SUB payments. Therefore, SUB payments are not "remuneration . . . *for services performed*" and consequently do not meet the definition of "wages" in § 3401(a). 26 U.S.C. § 3401(a) (emphasis added); *see also id.* § 3121(a) (defining "wages" as "all remuneration *for employment*" (emphasis added)).

Second, the text of § 3402 makes clear that SUB payments are not wages. As explained above, employers who pay "wages" are required to withhold

income taxes with respect to those "wages." *Id.* § 3402(a). However, § 3402(o) extends employers' obligation to withhold income tax "to certain payments *other than wages*." *Id.* § 3402(o) (emphasis added). The list of payments "other than wages" includes SUB payments. Section 3402(o)(1)(A) specifically provides that "any supplemental unemployment compensation benefit paid to an individual . . . shall be treated *as if* it were a payment of wages." *Id.* § 3402(o)(1)(A) (emphasis added). Moreover, Congress's list of payments other than wages in § 3402(o) includes three items: (1) "any supplemental unemployment compensation benefit paid to an individual," (2) "any payment of an annuity to an individual," and (3) "any payment to an individual of sick pay *which does not constitute wages*." *Id.* § 3402(o)(1)(A)-(C) (emphasis added). Congress used language indicating that sick pay may or may not constitute wages; it did not use this language for supplemental employment compensation benefits (or annuities), indicating that all such payments are non-wages. *See* Resp. Br. at 22-23.

The clear implication of this statutory language is that SUB payments are not "wages" and that, but for the express rule of § 3402(o)(1)(A) instructing that they be treated "as if" they were wages, no income-tax withholding would be required with respect to such payments. By treating SUB payments "as if" they are "wages" and thereby requiring income-tax withholding, Congress assisted taxpayers in avoiding burdensome tax bills when they file their returns because the income-tax withholding would otherwise be insufficient.

If there were any remaining ambiguity, the title of § 3402(o) confirms that SUB payments are not wages. *See INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). Section 3402(o) is entitled "[e]xtension of withholding to certain payments *other than wages*." 26 U.S.C. § 3402(o) (emphasis added). Thus, the SUB payments addressed in that section are "other than wages," which is to say *not wages*. *See* Oxford English Dictionary, http://www.oed.com/view/Entry/133219?rskey=G2eR0K&result=1&isAdvanced=false#eid33046221 (Dec. 11, 2013) (definition 5(e), defining "other than" as "besides, except, apart from").

3. Legislative History Confirms That SUB Payments Are Not Wages.

The legislative history of § 3402(o)(2)(A) also supports the conclusion that SUB payments are not wages. The Senate Report on § 3402(o) at the time of its enactment categorically and repeatedly states that SUB payments are not wages. In relevant part, the Report explains:

> *Present law*.—Under present law, supplemental unemployment benefits are not subject to withholding <u>because they do not constitute wages or remuneration for services</u>.
>
> *General reasons for change*.—Supplemental unemployment compensation benefits (SUB) paid by

> employers are generally taxable income to the recipient. Consequently, the absence of withholding on these benefits may require a significant final tax payment by the taxpayer receiving them. The committee concluded that although these benefits are not wages, since they are generally taxable payments they should be subject to withholding to avoid the final tax payment problem for employees.
>
> *Explanation of provision*.—The committee amendments require the payor of taxable supplemental compensation unemployment benefits to withhold Federal income tax from these payments. The withholding requirements applicable to withholding on wages are to apply to these nonwage payments.

S. REP. NO. 91-552, at 268 (underlining added, italics in the original). In these few paragraphs, the Report states not once but *three* times that SUB payments "do not constitute wages," "are not wages," and are "nonwage payments." *Id.* Moreover, the Report explicitly states that SUB payments "do not constitute remuneration for services," which is a necessary element for SUB payments to constitute "wages" under the statute. Congress was clear both that SUB payments do not meet the "remuneration for services" criterion for constituting wages and, in case any ambiguity remained, that SUB payments

simply do not constitute wages for purposes of income-tax withholding under § 3401.

4. The Doctrine of Legislative Reenactment Demonstrates That SUB Payments Are Not Wages.

The doctrine of legislative reenactment provides that when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Pursuant to this doctrine, Congress's reenactment of existing legislation is presumed to incorporate administrative practice and interpretations of the existing legislation prior to the reenactment. In other words, if Congress reenacts a statutory provision without explicitly modifying it to conflict with an agency's preexisting practice, Congress is deemed to have "approved the administrative construction and thereby to have given it the force of law." *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 115 (1939). In such a circumstance, the agency is not permitted to change its interpretation of the reenacted provision in a manner inconsistent with the understanding that Congress had when it reenacted the statute.

Congress reenacted the statutory provisions at issue in this case against a backdrop in which the IRS considered SUB payments to be non-wages. The IRS therefore cannot now alter its interpretation of the statutory provisions to render SUB payments "wages" for FICA purposes.

The current versions of §§ 3121, 3401, and 3402 all were adopted as part of the Internal Revenue Code of 1986. By 1986, the IRS treated all payments that met the definition of SUB payments in § 3402(o)(2)(A) as non-wages for purposes of FICA taxes. *See* Rev. Rul. 77-347, 1977-2 C.B. 362. In Rev. Rul. 77-347, the IRS, relying on the statutory definition, explicitly recognized that whether SUB payments are "tied to [a] State's unemployment benefits is not a material or controlling factor" for non-wage treatment for both FICA and income-tax withholding purposes. *Id.*

Congress was aware of the IRS's practice of treating SUB payments as non-wages and specifically recognized that statutorily defined SUB payments are not wages. *See* S. REP. NO. 91-552, at 286; *see supra* pp. 15-17. Congress's actual awareness of the IRS practice more than satisfies the requirements for legislative reenactment, which usually rests on a mere *presumption* that Congress was aware of preexisting practice. *See R.J. Reynolds Tobacco Co.*, 306 U.S. at 115 (holding that, by virtue of legislative reenactment, Congress was presumed to have approved IRS administrative practice restricting the statutory definition of "gross income" in subsequent reenactments of the I.R.C.).

In other contexts, both Congress and this Court have recognized that the IRS has treated SUB payments as non-wages. When Congress first enacted the current statutory definition of "supplemental unemployment compensation benefits" in the context of extending tax-exempt status to trusts established to provide such benefits,

Congress acknowledged that IRS rulings held that SUB payments were not subject to income-tax withholding. H.R. REP. NO. 86-1145, at 4 (1959) ("Various rulings of the Internal Revenue Service have held that the contributions to these funds are deductible to the employers and distributions from these funds are taxable to the recipients as income (although not generally subject to withholding)."). Similarly, in *Rudolph v. United States*, this Court acknowledged that "supplemental unemployment benefit" payments are excluded from wages. 370 U.S. 269, 274 n.7 (1962) ("[P]ayments to laid-off employees from company-financed supplemental unemployment benefit plans are 'taxable income' to the employees although not 'wages' subject to withholding." (citing Rev. Rul. 56-249, 1956-1 C.B. 488)).

In sum, when it reenacted the relevant provisions of the I.R.C. in 1986, Congress is presumed to have been aware—and, in fact, was aware—that the IRS treated all SUB payments as non-wages, and Congress is presumed to have incorporated the non-wage treatment into the I.R.C. as of 1986. At the time Congress reenacted the relevant statutory provisions, the IRS's practice of treating SUB payments as non-wages was clearly set out in Rev. Rul. 77-347, 1977-2 C.B. 362, which applied the § 3402(o)(2)(A) definition of SUB payments to identify employer-provided unemployment benefits that were not wages for purposes of FICA taxes and also recognized that ties to state unemployment benefits were "immaterial" for non-wage treatment. Accordingly, under the legislative reenactment doctrine, the IRS is not free

to interpret the term "wages" for FICA tax purposes inconsistently with the reenacted statutes. The government's position that the SUB payments at issue in this case are "wages" for FICA tax purposes is inconsistent with the position the IRS held at the time the relevant provisions of the I.R.C. were reenacted in 1986, and it is therefore impermissible.

II. The Government's Contrary Arguments Are Unpersuasive And Incorrect.

A. The Government's Textual Argument Proves Too Much And Relies On The Very Interpretive Approach That The Government Elsewhere Rejects.

The United States argues that "[p]ayments that meet the basic statutory definition of 'wages' are covered by FICA 'unless specifically excepted,'" U.S. Br. at 13 (quoting 26 C.F.R. §§ 31.3121(a)-1(b)), and that "Respondents have not contended, and the court of appeals did not hold, that the severance payments at issue here fit within any of those exceptions," *id.* at 14. The government's argument suffers from several problems.

First, the government's position is internally inconsistent. The government's insistence that SUB payments are "wages" for FICA purposes unless there is an explicit exemption for such payments, *id.* at 13-14, is inconsistent with the government's own treatment of SUB payments under FICA. The government makes arguments based on Rev. Rul. 90-72, *id.* at 8, 17-18, but does not acknowledge that that Ruling deems certain SUB payments to be non-wages for FICA purposes *notwithstanding the lack of*

an express statutory exemption. Rev. Rul. 90-72, 1990-2 C.B. 211 (determining that SUB payments that are linked to state unemployment compensation and received over time (*i.e.*, not in a lump sum) are "not wages for purpose of the FICA . . . taxes").

Similarly, the government's insistence on an explicit exemption for SUB payments in the FICA chapter is inconsistent with its concession that *some* SUB payments are not wages for income-tax withholding purposes. U.S. Br. at 28. Like the FICA chapter, the income-tax withholding chapter does not include a statutory exemption from the definition of "wages" for SUB payments. *See* 26 U.S.C. § 3401(a). By insisting in its brief on an explicit statutory exemption in the FICA chapter while conceding that some SUB payments are not wages for income-tax withholding even absent a statutory exemption, the government treats the definitions of "wages" in § 3401(a) and § 3121(a) differently, despite this Court's admonition in *Rowan* that Congress intended the provisions "to be interpreted in the same manner." *Rowan*, 452 U.S. at 263.

Second, the government's argument that (at least with respect to FICA) SUB payments are wages unless there is an explicit textual exemption implies that the IRS may have lacked authority to exempt SUB payments from "wages" in its 1956 Rev. Rul. 56-249. U.S. Br. at 30 ("The IRS did not identify any explicit textual basis for concluding that these types of payments were not 'wages' under the applicable statutory definitions. Given the broad and facially unqualified wording of these definitions . . . , it might reasonably have been disputed whether, as an

original matter, the IRS was authorized to act as it did."). In other words, the government's argument proves too much because it suggests that the United States lacks authority to treat *any* SUB payments as non-wages—despite the fact that the United States has exercised this authority for decades and continues to do so. U.S. Br. at 28. Revenue Ruling 90-72 relies on Revenue Ruling 56-249 and explains that it "re-establish[es] the link between SUB pay and state unemployment compensation set forth in Rev. Rul. 56-249." Rev. Rul. 90-72, 1990-2 C.B. 211. Thus, current IRS practice depends upon the very Revenue Ruling that the government suggests may have been impermissible *ab initio*.

Third, the government's insistence that SUB payments are "wages" absent a specific exemption puts the United States in the untenable position of arguing in favor of the same type of reliance on the income-tax withholding chapter that it criticizes elsewhere in its brief. To overcome what, in its view, is a possible lack of authority for the IRS in Rev. Rul. 56-249 to treat some SUB payments as non-wages, the government argues that "Congress effectively acquiesced in the IRS's approach . . . by enacting complementary legislation that took the pertinent Revenue Rulings as given and ameliorated their potential unintended consequences." U.S. Br. at 30. As evidence of Congress's acquiescence, the United States cites two provisions: § 501(c)(17) and § 3402(o). *Id.* at 31-32. Both of those provisions are in the income-tax portion of the I.R.C., not the FICA portion. Thus, the United States seeks to bolster its interpretation of the FICA chapter by looking to provisions in the income-tax portion of the I.R.C.,

even as it rejects Quality Stores' reliance on income-tax withholding provisions to interpret FICA. *See id.* at 21 ("Section 3402(o) is not part of FICA, but instead appears in a section of the [I.R.C.] that establishes the substantive rules for income-tax withholding. That is not the correct place to look for guidance in the interpretation of FICA's definitional provisions."); *id.* ("Section 3402(o) has no bearing on FICA's definitional provisions."); *id.* at 22 (referring to the "court of appeals' reliance on Section 3402(o)" as "misguided").

The government cannot have it both ways: it cannot ignore clear indications in the income-tax withholding chapter that no SUB payments are wages, and yet rely on income-tax provisions to support its argument that the IRS has the authority to treat *some* SUB payments as non-wages. There is simply no reason to interpret Congress's actions with respect to SUB payments as acquiescence to treatment of the payments as non-wages for one purpose (income-tax withholding) but not for another (FICA), especially when the IRS itself drew no such distinction.

B. *Rowan* Continues To Require That "Wages" Be Interpreted Consistently For Income-Tax Withholding And FICA.

The United States appears to have abandoned the argument that *Rowan* has been legislatively overruled—an argument that both the Sixth Circuit below and the Federal Circuit in *CSX* rejected. Pet. App. 14a-17a; *CSX Corp. v. United States*, 518 F.3d 1328, 1344 (Fed. Cir. 2008). But in parts of its brief,

the government nonetheless tries to escape *Rowan*'s clear holding that "Congress intended its definition [of 'wages'] to be interpreted in the same manner for FICA . . . as for income-tax withholding." *Rowan*, 452 U.S. at 263.

Presumably referring to § 3402(o), the United States argues that *Rowan* did not "address whether a statutory provision that governs *substantive* income-tax withholding, and that by its own terms does not apply to FICA, may be construed to narrow FICA's definition of 'wages.'" U.S. Br. at 26. *Rowan*, however, did not instruct reviewing courts to narrow their focus to any particular statutory provisions in determining the meaning of "wages" for purposes of FICA and income-tax withholding. The implicit claim of the United States that § 3402(o) is irrelevant to understanding the definition of "wages" in § 3401(a) lacks any basis in this Court's *Rowan* holding, which focused on consistent interpretation of "wages" across the income-tax withholding and FICA statutory provisions.

The government also misses the mark by claiming that "the interest in 'simplicity and ease of administration,'" an interest this Court stressed in *Rowan* as a reason for consistent interpretation, is "disserved" by the Sixth Circuit's decision. *Id.* (quoting *Rowan*, 452 U.S. at 255). In fact, it is the government's position that undermines the interest in "simplicity and ease of administration." *Rowan*, 452 U.S. at 255. The government argues the Sixth Circuit's holding that SUB payments are not wages contravenes this interest because the IRS cannot treat any SUB payments as "wages" for FICA

purposes, while § 3402(o) requires that all SUB payments are treated as "wages" for income-tax withholding. U.S. Br. at 26-27. The government ignores, however, that the Sixth Circuit's holding provides a bright-line, easily administrable rule, whereas the government's position that *some* SUB payments are non-wages creates complications in administration due to differences between SUB payments and repeated shifts by the IRS about the wage or non-wage status of SUB payments. Resp. Br. at 54-57.[3]

C. The Government's Attempt To Characterize The SUB Payments At Issue As Particularly Likely To Be Deemed "Wages" Lacks Merit.

The government's claim that "[t]he link between severance payments and prior service is especially clear in . . . this case" is unfounded. U.S. Br. at 12.

First, the government argues that the link is clear because "[r]espondents' severance plans provided for payments only to individuals who had

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[3] The cases the government cites are inapposite. *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), involved back pay rather than SUB payments. *See* Resp. Br. 35-37. *Otte v. United States*, 419 U.S. 43 (1974), addressed unpaid wages owed to former employees for services rendered while they were employed. *See* Resp. Br. 35-38. And *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011), considered the scope of the student exception to the definition of wages, not the definition of wages itself. *See* Resp. Br. 38.

been respondents' employees (and thus had performed services on respondents' behalf)." *Id.* This argument is tautological: all SUB payments, by definition, are paid by employers to former employees. 26 U.S.C. § 3402(o)(2)(A) (defining SUB payments as "amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee's gross income").

Second, the government argues that "the terms of the payments were tied to particular aspects of the individual employment relationship," citing, *e.g.*, "the length of time they had worked for respondents, and the salaries they had earned during their periods of service." U.S. Br. at 12-13. But the IRS itself has deemed SUB payments that depended on the same type of factors to be non-wages. *See* Rev. Rul. 56-249, 1956-1 C.B. 488. Even Rev. Rul. 90-72, on which the government relies, affords non-wage treatment under FICA to plans in which "the duration of benefits depends in part on the . . . employee's seniority." Rev. Rul. 90-72, 1990-2 C.B. 211.[4]

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[4] Linking SUB payments to aspects of the individual's employment with the former employer is hardly surprising. State unemployment compensation benefits also typically depend upon, for example, the amount of wages the former (continued…)

D. The Government Attempts To Rewrite § 3402(o) To Support Its Position.

The government asserts that "Section 3402(o) directs that all payments falling within the statutory definition of 'supplemental unemployment compensation benefits' will be subject to income-tax withholding *whether or not* they would otherwise be 'wages.'" U.S. Br. at 28.

The problem with the government's reading of § 3402(o) is that it has no basis in the text of the statute. Contrary to the government's explanation, § 3402(o) does not include the phrase "whether or not they would otherwise be wages." If Congress had wished to indicate—as the government contends—that some SUB payments described in § 3402(o)(1)(A) were within the definition of wages, it could have added the very clarifying phrase the government proposes or a similar phrase, such as "whether or not such payments are wages." It did not do so.

Moreover, this Court has explained that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*,

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employee earned. *See, e.g.*, WASH. REV. CODE ANN. §§ 50.20.120-.1201 (LexisNexis 2013) (providing that the amount of an individual's state unemployment benefits is determined as a percentage of the individual's wages earned during a specified period).

464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) ("While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.").

Here, Congress specifically used a "whether or not" explanatory phrase in the very subsection at issue. *See* 26 U.S.C. § 3402(o)(2)(A) (defining SUB payments as payments for involuntary employment separation "whether or not such separation is temporary"); *see also* Resp. Br. at 22-23. Congress clearly knows how to clarify when its statutory language speaks broadly, and it did not do so with respect to SUB payments. Congress's omission of a "whether or not" phrase in defining the scope of § 3402(o)(1)(A) is therefore particularly meaningful and must be given effect. The Court should reject the government's attempt to insert statutory language that Congress chose to exclude.

III. Policy Considerations Support The Conclusion That SUB Payments Are Not Subject To FICA Taxes.

The government argues that treating SUB payments as wages for purposes of FICA is "consistent with IRS guidance," specifically the IRS's Revenue Ruling 90-72. U.S. Br. at 17. Revenue

Ruling 90-72 holds that SUB payments must be "linked to state unemployment compensation in order to be excluded from the definition of wages for FICA . . . tax purposes." Rev. Rul. 90-72, 1990-2 C.B. 211.

1. If the United States is correct that SUB payments are wages for FICA purposes unless they satisfy not only the statutory definition of a SUB payment, but also the IRS's criteria in Rev. Rul. 90-72, then employers will be subject to a burdensome system that produces inconsistent results.

Tying the status of SUB payments as wages or non-wages to whether the SUB payments are "linked to state unemployment compensation" pursuant to Rev. Rul. 90-72 results in a system in which the federal tax status of SUB payments turns on the state of residence of the recipient. Unemployment benefits are not uniform across states. As the U.S. Department of Labor has explained, "There are no federal standards for benefits in terms of qualifying requirements, benefit amounts, or duration of regular benefits. Hence, there is no common pattern of benefit provisions comparable to that in coverage and financing. The states have developed diverse and complex formulas for determining workers' benefit rights." OFFICE OF UNEMPLOYMENT INSURANCE, U.S. DEP'T OF LABOR, UNEMPLOYMENT COMPENSATION FEDERAL-STATE PARTNERSHIP 11 (2010), *available at* http://workforcesecurity.doleta.gov/unemploy/pdf/partnership.pdf. Thus, similarly situated recipients of SUB payments from the *same company* could face different *federal* tax liability depending on the

recipients' state of residence. The U.S. position therefore risks creating a lack of uniformity for the federal tax treatment of SUB payments.

By contrast, the position adopted by the court of appeals, which relies on the text of the federal statutory provisions addressing SUB payments and wages, results in a single, uniform rule that is applicable nationwide and provides the same federal tax treatment to all similarly situated SUB payment recipients.

2. Application of Rev. Rul. 90-72 also imposes undue hardships on individual recipients of SUB payments.

The application of Rev. Rul. 90-72 that the government seeks perversely limits the effectiveness of SUB payments in states in which it is more difficult for individuals to qualify for state unemployment benefits (and thus where SUB payments are most needed). The government recognizes that, as a historical matter, SUB payments "depended for their effectiveness on not being considered 'wages,' because employees in many States were ineligible for unemployment benefits if they were receiving 'wages' from employers." U.S. Br. at 29. But the United States, in advocating application of Rev. Rul. 90-72, unjustifiably runs the link to state unemployment benefits in the opposite direction: Rev. Rul. 90-72 essentially holds that if an individual is not eligible for state unemployment benefits, then the individual also cannot benefit from the non-wage treatment of SUB payments to which they would be entitled if they received state

unemployment benefits. In other words, the government's position insists that an individual either receives *both* the benefit of state unemployment benefits *and* the benefit of non-wage treatment under federal law for their SUB payments, or *neither* benefit. The government has proffered no persuasive reason for adding FICA taxation of SUB payments to the difficulties faced by individuals who are not eligible for state unemployment benefits.

The historical reason for treating SUB payments as non-wages for federal tax purposes—to prevent states from treating the SUB payments as "wages" that would disqualify the recipient from receiving state unemployment benefits—served to *benefit recipients*. It is perverse to use the historical linkage between SUB payments and state unemployment benefits as a reason to *reduce* the value of benefits to recipients.

The historic rationale for linking SUB payments and state unemployment benefits also does not support the particular features originally specified in Rev. Rul. 56-249, 1956-1 C.B. 488, and invoked by the IRS in Rev. Rul. 90-72, 1990-2 C.B. 211, as determining whether SUB payments are wages or not. The list of features is both over- and under-inclusive with respect to how states will treat SUB payments.

It is over-inclusive because some states deny state unemployment benefits based on receipt of SUB payments that qualify for federal non-wage treatment under the Revenue Rulings. For example,

Rev. Rul. 58-128, 1958-1 C.B. 89, permits non-wage treatment for plans unilaterally instituted by the employer. But Oklahoma law treats SUB payments as non-wages for state purposes only if they are paid under an employer-employee or collective bargaining agreement in effect prior to layoff. OKLA. ST. ANN. tit. 40, § 1-225(C)(1)–(3) (West 2013). Similarly, Rev. Rul. 60-330, 1960-2 C.B. 46, permits non-wage treatment for SUB payments paid directly by the employer. But Arizona law treats SUB payments as non-wages only if the employer makes the payments through a plan that qualifies as a supplemental unemployment benefit trust under 26 U.S.C. § 501(c)(17) (*i.e.*, not directly). ARIZ. ADMIN. CODE § R6-3-1705(E)(6), (F) (2012).

The features specified by the IRS are also under-inclusive because some SUB payments that the IRS treats as wages do not affect eligibility for state unemployment benefits and therefore would serve their purpose of supplementing state benefits. For example, Rev. Rul. 90-72, 1990-2 C.B. 211, treats all lump sum payments as wages. But under Arizona law, all SUB payments, including lump-sum payments, made by an employer through a plan that qualifies as a supplemental unemployment benefit trust under 26 U.S.C. § 501(c)(17) are treated as non-wages. ARIZ. ADMIN. CODE § R6-3-1705(F) (2012).

3. The lump-sum provision of Rev. Rul. 90-72 provides an additional reason to reject the government's position. As noted, in addition to holding that SUB payments must be linked to state unemployment compensation to be excluded from wages, Rev. Rul. 90-72 specifies that SUB payments

made as a lump sum "are not considered linked to state unemployment compensation for this purpose, and are therefore not excludable from wages as SUB pay." Rev. Rul. 90-72, 1990-2 C.B. 211. The IRS's position regarding lump sum payments harms individual recipients of SUB payments paid as a lump sum because it treats those lump sum payments as "wages," subject to FICA tax. The lump sum SUB payments may be a crucial supplement to state benefits to enable employees to deal with costs occasioned by sudden loss of employment, initial delay in getting state benefits, and the impact of suddenly finding oneself unemployed.

* * *

For all of these reasons, the government's position that Rev. Rul. 90-72, rather than statutory provisions, should govern the federal "wage" treatment of SUB payments is undesirable as a matter of policy. The government's position creates a cumbersome system in which the federal status of SUB payments depends on variances in state policies and subjects individual SUB payment recipients to inconsistent treatment and undue hardship, contrary to the original purposes of SUB payments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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