No. 12-1408

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

QUALITY STORES, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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To ensure adequate funding for the Social Security and Medicare programs, the Federal Insurance Contributions Act (FICA) expansively defines taxable "wages" to include "all remuneration for employment," 26 U.S.C. 3121(a), subject to enumerated exceptions. Respondents acknowledge (Br. 41) that "termination-related payments"—that is, payments triggered by the conclusion of the employment relationship—can qualify as "wages" under that "basic definition." Respondents also acknowledge (*e.g.*, Br. 11-12) that none of the FICA exceptions to the basic definition of "wages" encompasses involuntary severance payments like those at issue here.

Respondents largely disregard the text of FICA and focus instead on 26 U.S.C. 3402(*o*), which is part of a separate chapter of the Internal Revenue Code that addresses income-tax withholding. Respondents

recognize (Br. 45), however, that Congress's enactment of Section 3402(*o*) in 1969 "did not alter the preexisting definition of 'wages'" either in the income-tax-withholding statutes or in FICA. The relevant language in FICA (which has remained substantially the same for more than half a century), interpreted without regard to Section 3402(*o*), unambiguously encompasses involuntary severance payments. And, properly construed in light of its history and placement within the Internal Revenue Code, Section 3402(*o*) provides no basis for declining to apply the FICA definition of "wages" according to its plain terms. The judgment of the court of appeals therefore should be reversed.

A. Respondents' Severance Payments Are "Wages" Under FICA

As the government's opening brief explains (Br. 10-20), involuntary severance payments constitute "remuneration for employment," and thus fall within FICA's definition of "wages." 26 U.S.C. 3121(a). Respondents do not dispute that such payments are "remuneration," see Br. 34, and the phrase "for employment" naturally encompasses remuneration that functions as a final bonus for an employee's overall body of work. This Court has explained that FICA's definition of "employment" has a "broad reach, extending to 'any service, of whatever nature, performed . . . by an employee for the person employing him,'" *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 709 (2011) (quoting 26 U.S.C. 3121(b)); that "'service' as used by Congress in this definitive phrase" includes "the entire employer-employee relationship for which compensation is paid to the employee by the employer," *Social Sec. Bd.* v. *Nierotko*,

327 U.S. 358, 365-366 (1946); and that payments made after the employment relationship has ended can qualify as "wages," *Otte* v. *United States*, 419 U.S. 43, 51 (1974); see 26 C.F.R. 31.3121(a)-1(i). The payments at issue here—which were made only to respondents' employees and were calculated by reference to the employees' positions, length of service, and salaries—had a direct and obvious connection to the "employer-employee relationship" and thus qualified as "wages" under FICA's expansive definition.

1. Respondents contend (Br. 35-39) that this Court's decisions interpreting FICA's language broadly should be limited to their facts. The decisions themselves, however, do not support such a limitation. In *Nierotko*, for example, the Court construed the term "'employment'" to include the whole "employer-employee relationship," not because of the particular facts of the case, but because "[t]he very words 'any service . . . performed . . . for his employer,' with the purpose of the Social Security Act in mind, import breadth of coverage." 327 U.S. at 365-366. In adopting that construction, the Court referred with apparent approval to Treasury regulations classifying "dismissal pay" as "wages." *Id.* at 366 n.17.[1]

Respondents assert (Br. 38) that the "proper framework" for analyzing the question presented lies

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[1] The Court noted that the Treasury regulations reached a different conclusion with respect to "voluntary dismissal pay." *Nierotko*, 327 U.S. at 366 n.17. In 1946, however, when *Nierotko* was decided, "[d]ismissal payments which the employer [was] not legally required to make" were specifically excepted from the statutory definition of "wages." 26 U.S.C. 1426(a)(4) (1940); see Gov't Br. 16. That exception was later repealed. See Gov't Br. 16; pp. 4-5, *infra*.

outside this Court's FICA precedents and is instead found in *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191 (1980). Respondents' reliance on *Coffy* is misplaced. That decision does not address the proper interpretation of FICA, but instead concerns the application of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578. See, *e.g.*, 447 U.S. at 193. As the government's opening brief explains (at 18-19), the categorical distinction respondents would draw from *Coffy*—between "remuneration for the employee's services or employment" and "payments on account of the elimination of that employment," Resp. Br. 34—does not exist under FICA.

Respondents acknowledge (Br. 41) that payments triggered by the conclusion of an employee's service can fall within FICA's "basic definition of 'wages.'" Were it otherwise, the statute's current and historical exceptions for certain kinds of retirement pay would have been unnecessary. See Gov't Br. 15, 19-20. Respondents offer no basis in FICA for reading the words "remuneration for employment," 26 U.S.C. 3121(a), to include some types of separation pay (like retirement pay) while excluding other types of separation pay (like the severance payments here). Indeed, the Court in *Coffy* recognized that a payment to a laid-off employee is properly considered a "reward for length of service." 447 U.S. at 199. It is therefore a payment that arises out of the "employer-employee relationship," *Nierotko*, 327 U.S. at 366, and it constitutes "wages" under FICA.

2. The history of FICA demonstrates Congress's intent that "dismissal payments" be considered "wages." See Gov't Br. 15-17. From 1939 to 1950, one of

FICA's statutory predecessors, which contained a substantially identical basic definition of "wages," excluded "'[d]ismissal payments which the employer is not legally required to make'" from the scope of that definition. *Id.* at 16 (quoting Social Security Act Amendments of 1939, ch. 666, § 606, 53 Stat. 1383-1384); see note 1, *supra*. That exception indicated that such payments would otherwise have been covered. See, *e.g.*, *American Bank & Trust Co.* v. *Dallas Cnty.*, 463 U.S. 855, 863-864 (1983). When Congress repealed the exception, the accompanying House Report confirmed what was in any event implicit in the repeal itself, namely that any "dismissal payment" would thereafter "constitute wages" unless the recipient had already earned the maximum amount of taxable "wages" for a particular year. H.R. Rep. No. 1300, 81st Cong., 1st Sess. 124 (1949) (1949 House Report); see Pet. App. 24a ("[W]e agree that * * * in the 1950s, all 'dismissal payments' made to employees qualified as FICA 'wages' for purposes of taxation.").

The term "dismissal payment," as used by Congress in that context, referred to "any payment made by an employer on account of involuntary separation of the employee from the service of the employer." 1949 House Report 124. The payments at issue in this case unambiguously satisfy that definition. Respondents nevertheless contend (Br. 29-31) that, because their payments meet the more restrictive definition of "supplemental unemployment compensation benefits" set forth in 26 U.S.C. 3402(*o*)(2)(A), they cannot *also* be "dismissal payments."

Among its other flaws,[2] respondents' cramped interpretation of "dismissal payment" rests on a historical anachronism. In 1950, when Congress amended the statutory definition of "wages" to eliminate the prior exception for discretionary dismissal payments, Section 3402(*o*)(2)(A) did not yet exist. Congress therefore could not have contemplated, when it amended FICA in 1950, that payments meeting a definition in an income-tax-withholding provision enacted 19 years later would be excepted from the rule that "any payment made by an employer on account of involuntary separation of the employee from the service of the employer, will constitute wages." 1949 House Report 124. Nor can Section 3402(*o*) be interpreted as retroactively carving out such an exception, since, *inter alia*, it is undisputed that Section 3402(*o*)'s enact-

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[2] Respondents provide no sound reason why "dismissal payments," as understood by Congress in 1950, and "supplemental unemployment compensation benefits," as defined "for purposes of" Section 3402(*o*), 26 U.S.C. 3402(*o*)(2)(A), should be considered mutually exclusive categories under FICA. In particular, respondents' reliance (Br. 30-31) on certain Treasury regulations is misplaced. First, the regulations they cite address income-tax withholding, not FICA. See 26 C.F.R. 31.3401(a)-1(b)(4) and (14). Second, the cited regulations did not exist until 1957 and 1970 respectively, well after Congress eliminated the prior exception for "[d]ismissal payments which the employer is not legally required to make." See 22 Fed. Reg. 8434 (Oct. 26, 1957); 35 Fed. Reg. 17,328 (Nov. 11, 1970). Finally, the regulations do not dictate that the categories are distinct. One regulation classifies "dismissal payments" as "wages," 26 C.F.R. 31.3401(a)-1(b)(4); the other requires that "[s]upplemental unemployment compensation benefits" be treated as "wages," 26 C.F.R. 31.3401(a)-1(b)(14). No practical difficulties arise if a particular payment is subject to both regulations.

ment "did not alter the preexisting definition of 'wages.'" Resp. Br. 45.

3. Respondents and various amici question the policy wisdom of Internal Revenue Service (IRS) Revenue Ruling 90-72, 1990-2 C.B. 211, and assert that no deference is owed to that administrative document. See Resp. Br. 49-59; ERISA Indus. Comm. Br. 28-33; Am. Benefits Council Br. 2-25; Am. Payroll Ass'n Br. 25-28; see also Hickman Br. 3-35. Those arguments are not germane to the proper disposition of this case. For reasons stated above, and in the government's opening brief, the plain text of FICA dictates that the severance payments at issue here are "wages." Those payments are also "wages" under Revenue Ruling 90-72, even though certain *other* types of payments (namely, payments "linked to the receipt of state unemployment compensation") are not. 1990-2 C.B. at 211; see J.A. 52-53 (joint stipulation that respondents' payments are not linked to state unemployment compensation); Gov't Br. 17-18.

Although respondents and their amici question the propriety of Revenue Ruling 90-72, the government's position in this case would actually be stronger if that Ruling were found to be invalid. The only colorable statutory objection to Revenue Ruling 90-72 is that, by treating severance payments "linked to the receipt of state unemployment compensation" as non-wage payments, 1990-2 C.B. at 211, the Ruling defines the FICA term "wages" in an unduly *narrow* manner. Although the exception defined by Revenue Ruling 90-72 is not grounded in the FICA definition of "wages," Congress appears to have acquiesced in the IRS's longstanding practice of fashioning administrative exceptions of that general character. See Gov't Br. 30.

Any uncertainty about the IRS's authority to take that step, however, would simply reinforce the conclusion that FICA's definition of "wages" cannot be read to exclude an even *broader* class of severance payments, such as the ones at issue here.[3]

B. Section 3402(*o*) Does Not Implicitly Constrict FICA's Definition Of "Wages"

Respondents make no meaningful effort to dispute that FICA's definition of "wages," taken on its own terms, encompasses the severance payments at issue in this case. Rather, respondents ask this Court to draw a negative inference from Section 3402(*o*), which governs income-tax withholding and directs that any "supplemental unemployment compensation benefit" as defined in that provision "shall be treated as if it were a payment of wages by an employer to an employee for a payroll period." 26 U.S.C. 3402(*o*)(1). Respondents argue that, because the statutory definition of "supplemental unemployment compensation benefits" (26 U.S.C. 3402(*o*)(2)(A)) encompasses the severance payments at issue in this case, and because Section 3402(*o*) mandates that such payments "shall

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[3] Contrary to respondents' suggestion (Br. 31), the Court's resolution of the question presented here will have no effect on the "statutory framework for unemployment benefits set up between the federal government and state governments." Federal law encourages States to give extended unemployment benefits to recipients of "supplemental unemployment compensation benefits," as defined in 26 U.S.C. 501(c)(17)(D). See 26 U.S.C. 3304(a)(11); Federal-State Extended Unemployment Compensation Act of 1970, Pub. L. No. 91-373, 84 Stat. 708, as amended by the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2659. The operation of that federal-state program does not depend on whether the "supplemental unemployment compensation benefits" are considered "wages" under FICA. See *ibid.*

be treated" for withholding purposes "as if" they were "payment[s] of wages," such payments cannot actually *be* "wages" under *any* Internal Revenue Code provision. That analysis is misconceived.

1. Respondents do not explain why FICA's application to particular types of severance payments should be controlled by negative inferences drawn from Section 3402(*o*), a substantive income-tax-withholding provision whose scope is limited to Chapter 24 (the income-tax-withholding chapter) and certain related procedural provisions of the Internal Revenue Code. See Gov't Br. 22-25. As our opening brief explains (at 25-26), and contrary to respondents' assertions (Br. 42-44), nothing in *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), requires that a court look to the substantive rules for income-tax withholding in order to determine what sorts of payments are "wages" under FICA. Rather, "Congress's decision to restrict the scope of the rule set forth in [S]ection 3402(*o*) to chapter 24 suggests that Congress did not intend that rule, or any implication that might be drawn from that rule, to be applied outside the context of income tax withholding." *CSX Corp.* v. *United States*, 518 F.3d 1328, 1341 (Fed. Cir. 2008).

The result in *Rowan* was premised on Congress's intent that the "methods of collection, payment, and administration of the withholding tax" be "coordinated generally with those applicable to the Social Security tax" now imposed by FICA. 452 U.S. at 256 (quoting S. Rep. No. 221, 78th Cong., 1st Sess. 17 (1943)); see *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 575 (2007) (recognizing that the holding in *Rowan* turned on Congress's "interest [in] simplicity and ease of administration") (quoting *Rowan*, 452 U.S. at 257).

Respondents' invocation of *Rowan* is especially misplaced because the inference they would draw from Section 3402(*o*) would produce greater *dis*uniformity between the rules governing income-tax withholding and those governing FICA taxation. Respondents interpret Section 3402(*o*), which directs that certain payments be "treated as * * * wages" for purposes of collection, payment, and administration of income-tax withholding, to mean that *none* of those same payments should be treated as "wages" for purposes of collection, payment, and administration of FICA tax. That approach flies in the face of *Rowan*.

2. Respondents also identify no sound reason to conclude that the severance payments at issue in this case are not "wages" for purposes of income-tax withholding. Respondents' affirmative argument on this issue (Br. 17-39) relies on this Court's decision in *Coffy* and on Section 3402(*o*). For reasons explained above and in our opening brief, respondents' reliance on *Coffy* is misplaced. And respondents' reliance on Section 3402(*o*) is undermined by their acknowledgment (Br. 45) that Section 3402(*o*)'s enactment "did not alter the preexisting definition of 'wages.'" If Section 3402(*o*) "did not alter the preexisting definition of 'wages,'" then the critical question is what the "preexisting definition of 'wages'" was *before* Section 3402(*o*) was enacted.

In any event, Section 3402(*o*) does not, as respondents contend, imply that *all* payments encompassed by Section 3402(*o*)(2)(A)'s definition of "supplemental unemployment compensation benefits" are excluded from the basic definition of "wages." See Gov't Br. 27-28. An instruction that every pickup truck "be treated as if it were a commercial vehicle" would not imply

that pickup trucks can never be commercial vehicles; an instruction that every man "be treated as if he were six feet tall" would not imply that men can never be six feet tall; and an instruction that every guest "be treated as if he were a member of the family" would not imply that guests can never be family members. The title of Section 3402(*o*)—"[e]xtension of withholding to *certain* payments other than wages" (emphasis added)—likewise does not preclude the possibility that at least *some* of the covered payments are already "wages." See Gov't Br. 28 n.3.

Respondents rely (Br. 22-23) on Section 3402(*o*)(1)(C), which authorizes (but does not require) income-tax withholding from "sick pay which does not constitute wages." The limiting language "which does not constitute wages" reflects Congress's evident understanding that some sick pay would constitute "wages." Respondents are wrong, however, in arguing that the absence of similar language in Section 3402(*o*)(2)(A) suggests a different congressional understanding with respect to "supplemental unemployment compensation benefits."

Section 3402(*o*)(1)(C) was added to the statute in 1980, see Act of Dec. 24, 1980, Pub. L. No. 96-601, § 4(a), 94 Stat. 3496, 11 years after Section 3402(*o*)'s enactment, and it therefore provides little evidence of Congress's intent in enacting the original provision. In any event, Section 3402(*o*)(1)(C)'s special withholding rule applies only if the employee has made a specific "request that such sick pay be subject to withholding." If Congress had failed to clarify that the voluntary withholding rule in Section 3402(*o*)(1)(C) applies only to sick pay "which does not constitute wages," the rule might have been interpreted to re-

quire a "request" as a prerequisite to withholding even from sick pay that is *already* considered to be "wages." Because Section 3402(*o*)(1)(A) contains no similar "request" requirement, no similar clarifying language was necessary, as no practical harm results from applying Section 3402(*o*)(1)(A)'s automatic-withholding rule to payments that are already "wages."

Respondents' reliance (Br. 21) on *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012), is also misplaced. In that case, the Court rejected the contention that a particular "assessable penalty" was a "tax" under the Internal Revenue Code. *Id.* at 2584. The Court noted the existence of "many provisions treating taxes and assessable penalties as distinct terms," and it recognized that "[t]here would, for example, be no need for [26 U.S.C.] 6671(a) to deem 'tax' to refer to certain assessable penalties if the Code already included *all such* penalties in the term 'tax.'" *Ibid.* (emphasis added). This case, in contrast, does not involve a multitude of provisions drawing a "consistent distinction," *ibid.*, between "wages" and "supplemental unemployment compensation benefits." Nor has the government taken the position that Congress believed "all such" benefits, *ibid.*, were necessarily "wages." Rather, the government's position is simply that Section 3402(*o*) allows for the possibility that *some* such benefits *could* be "wages." See Gov't Br. 28.

As the government's opening brief explains (Br. 28-35), Congress intended Section 3402(*o*) as a catch-all provision to ensure that whatever *subset* of "supplemental unemployment compensation benefits" the IRS deemed in its Revenue Rulings to be non-"wages"

would be subject to income-tax withholding. Respondents agree (Br. 58) that Congress "presumably was aware of the IRS' revenue rulings" when it enacted Section 3402(*o*). Respondents correctly observe (*e.g.*, *ibid.*) that Section 3402(*o*)(2)(A) defined the set of payments subject to "treat[ment] as * * * wages," 26 U.S.C. 3402(*o*)(1), more broadly than the set of payments considered to be non-"wages" under the then-existing Revenue Rulings. But in light of Congress's undisputed intent to leave the pre-existing definition of "wages" intact, Resp. Br. 45, that additional breadth cannot be taken as a sign that Congress sought to require additional types of payments, beyond those addressed in the Revenue Rulings, to be classified as non-"wages." Rather, the additional breadth accommodated the possibility that the IRS might issue further Rulings classifying additional types of payments as non-"wages." See Gov't Br. 33-35. There was no downside to accommodating that possibility, because requiring a payment already considered "wages" to be "treated as if it were a payment of wages" would not create any practical difficulties.[4]

3. Respondents' primary argument appears to be that the 1969 Congress *believed* that no "supplemental unemployment compensation benefits" (as defined in

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[4] Like respondents, amicus ERISA Industry Committee acknowledges that Congress legislated against the backdrop of the IRS Revenue Rulings. Br. 17-20. It contends, however, that when Congress recodified Section 3402(*o*) in 1986, it intended to require the IRS to adhere in perpetuity to the then-current Revenue Ruling on this topic, which was promulgated in 1977. See *ibid.* The amicus does not explain, however, why Section 3402(*o*)'s original 1969 enactment would allow the IRS the flexibility to issue modified guidance in 1977, but the reenactment of that same language would preclude any further modifications.

that provision) could constitute "wages" for any Internal Revenue Code purpose, and that the FICA definition of "wages" should be construed to render it consistent with that belief. That analysis is misconceived.

Because individual statutory provisions are properly construed in light of the larger statutory context, a later-enacted provision may sometimes assist in choosing between textually-plausible readings of an earlier-enacted one. See, *e.g.*, *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3228-3229 (2010); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). That principle is inapplicable here, however, because the FICA definition of "wages" in effect in 1969—which then, as now, covered all "remuneration for employment," 26 U.S.C. 3121(a) (1964)—*unambiguously* encompassed the severance payments at issue in this case. To treat Section 3402(*o*) as excluding all "supplemental unemployment compensation benefits" from the FICA definition of wages would be to recognize a form of repeal by implication, a mode of statutory analysis that is severely disfavored. See *Fausto*, 484 U.S. at 452-453.

The 1969 Congress would have had no plausible ground for believing that "supplemental unemployment compensation benefits" as defined in Section 3402(*o*)(2)(A) were categorically outside FICA's definition of "wages." In 1946, this Court had explained that the definition of "employment" encompasses the "the entire employer-employee relationship." *Nierotko*, 327 U.S. at 365-366. In 1950, Congress had repealed the prior exception for discretionary dismissal payments to effectuate its intent that "any payment made by an employer on account of involuntary separation of the employee from the service of the employ-

er, will constitute wages" under FICA. 1949 House Report 124. In 1957, the IRS had promulgated a regulation—still in effect in 1969 (and today)—specifying that "[a]ny payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages" for income-tax-withholding purposes. 22 Fed. Reg. 8434 (Oct. 26, 1957); see 26 C.F.R. 31.3401(a)-1(b)(4) (1969); see also 26 C.F.R. 31.3401(a)-1(b)(4). And while the IRS Revenue Rulings had identified *some* types of "supplemental unemployment compensation benefits," as later defined in Section 3402(*o*)(2)(A), as non-"wages," the IRS had historically considered other types (like the ones at issue here) to be "wages." Gov't Br. 29-31, 33; see Resp. Br. 58; Pet. App. 25a n.5.

The only contemporaneous source of law[5] that respondents cite (Br. 28) as supporting the narrow view

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[5] In support of its argument that payments covered by Section 3402(*o*) are non-"wages," amicus American Payroll Association cites (Br. 19-25) various IRS materials that post-date Section 3402(*o*)'s enactment. Those materials do not illuminate the state of the law in 1969. In any event, the amicus is wrong in suggesting that the IRS has, since 1969, consistently treated payments like respondents' as non-"wages." In 1971, the IRS issued Revenue Ruling 71-408, 1971-2 C.B. 340, which concluded that payments very similar to respondents' payments here—"dismissal payments to * * * eligible employees" following an employer's "discontinuance of operations"—were "wages" for FICA and income-tax-withholding purposes. *Id.* at 341. Internal IRS records reflecting the receipt of thousands of refund claims following *CSX Corp.* v. *United States*, 52 Fed. Cl. 208 (2002), rev'd, 518 F.3d 1328 (Fed. Cir. 2008), the first decision ever to hold that such payments are *not* "wages," provide strong evidence that employers and employees have been paying FICA taxes on those payments. Sources cited by the amicus (Br. 19-25)—a 1977 Revenue Ruling, which was

of "wages" they attribute to the 1969 Congress is a pair of regulations that did not purport to interpret either FICA or the income-tax-withholding statutes. See 26 C.F.R. 1.501(c)(17)-2(j), 1.6041-2(b)(1) (1968). Those regulations address the reporting requirements for a trust enjoying tax-exempt status due to its payment of "supplemental unemployment compensation benefits" as defined in 26 U.S.C. 501(c)(17)(D), a provision that is part of neither FICA nor the income-tax-withholding statutes and that says nothing about "wages." The regulations require such a trust to report certain payments on IRS Form 1099, rather than on the Form W-2 typically used to report payments of "wages." Respondents assert (Br. 28) that the regulations "implicitly" reflect the Treasury Department's view that all "supplemental unemployment compensation benefits" were "not wages."

If the Treasury Department had held that view, however, it would not have continued to promulgate a separate regulation instructing that "[*a*]*ny* payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages" for withholding purposes. 26 C.F.R. 31.3401(a)-1(b)(4) (1968) (emphasis added). The regulations cited by respondents are, at most, evidence of the IRS's assumption

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retracted in 1990, see Gov't Br. 34 n.5; a Second Circuit brief filed in 1988, which urged that certain payments *were* "wages," see Gov't Cert. Reply Br. 5 n.1; and imprecise instructions on tax forms intended for laypersons, which are not authoritative sources of law, see, *e.g.*, *Casa de La Jolla Park, Inc.* v. *Commissioner*, 94 T.C. 384, 396 (1990); *Green* v. *Commissioner*, 59 T.C. 456, 458 (1972); *Adler* v. *Commissioner*, 330 F.2d 91, 93 (9th Cir. 1964)—do not support the amicus's contention that the IRS has a longstanding legal position in conflict with that widespread practice.

that all tax-exempt trusts paying "supplemental unemployment compensation benefits" were structured in a manner that would allow their payments to be considered non-"wages" under the then-existing Revenue Rulings. At the time, it was "standard procedure" for employers and employees negotiating a supplemental unemployment benefit plan to design the plan in a way that would avoid the payments being classified as "wages." Joseph M. Becker, *Guaranteed Income for the Unemployed: The Story of SUB* 60 (1968); see *id.* at 61 (observing that the IRS "has had a significant influence on the development of" supplemental unemployment benefits). In any event, regulations addressing payments from trusts provide no support for the non-wage status of payments, like those at issue in this case, that are made directly by an employer without the use of a trust.[6]

4. In arguing that the pre-1969 definition of "wages" excluded payments like theirs, respondents rely heavily (Br. 24-29) on statements in the legislative

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[6] Amicus American Payroll Association asserts (Br. 18 n.9), without citation, that the 1968 regulations were directed at trusts because trusts were "invariably" used to make these sorts of benefits payments "at the time." But as far back as 1960, employers had expressed interest in compensating laid-off employees without the use of a trust. See Rev. Rul. 60-330, 1960-2 C.B. 46 (responding to a request for "[a]dvice" on that subject). Indeed, the amicus goes on to acknowledge (Br. 18 n.9) that such compensation could have been paid "directly by employers." See also Br. 17 n.7. The amicus's unsupported assertion (Br. 18 n.9) that an employer paying such compensation would not have reported it as "wages" on a Form W-2 is implausible. The amicus provides no reason to believe that employers systematically violated 26 C.F.R. 31.3401(a)-1(b)(4) (1968), which classified all "involuntary separation" payments as "wages."

record accompanying Section 3402(*o*). As the government's opening brief explains (Br. 25, 35-36), those statements do not advance respondents' argument. Views expressed in the legislative history of a 1969 statute are not an authoritative source on the meaning of statutes enacted many years earlier. See, *e.g.*, *United States* v. *Woods*, No. 12-562 (Dec. 3, 2013), slip op. 16 (reiterating that "post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation") (quoting *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011)) (brackets omitted).

In any event, the legislative-record references on which respondents rely are best read as descriptions of the non-wage status of certain types of "supplemental unemployment benefits" under the then-existing IRS Revenue Rulings. Gov't Br. 35-36; see, *e.g.*, Rev. Rul. 56-249, 1956-1 C.B. 488, 490 (identifying certain payments as "supplemental unemployment benefits" and describing them as non-"wages"); Rev. Rul. 58-128, 1958-1 C.B. 89, 89-90 (same); Rev. Rul. 60-330, 1960-2 C.B. 46, 46-48 (same).[7] Although re-

[7] Respondents contend (Br. 27) that the Revenue Rulings' discussion of the non-wage status of certain payments would not explain the Senate committee report's statement that "supplemental unemployment benefits * * * do not constitute wages *or* remuneration for services." S. Rep. No. 552, 91st Cong., 1st Sess. 268 (1969) (emphasis added). But since "wages" were (and still are) defined as "remuneration for * * * services," 26 U.S.C. 3401(a) (1964)—or as "remuneration for employment," 26 U.S.C. 3121(a) (1964)), with "employment" defined, in turn, to include "any service, of whatever nature," 26 U.S.C. 3121(b) (1964)—the reference to "remuneration for services" is simply another way of referring to "wages." See *Woods*, slip op. 14 ("'or' * * * can sometimes introduce an appositive").

spondents dispute that interpretation, they identify nothing else to which the statements could plausibly have referred. For all the reasons discussed above (see pp. 13-17, *supra*), the law in 1969 provided no support for a belief that the pre-1969 definition of "wages" excluded *all* of the payments later described in Section 3402(*o*)(2)(A).

Although the IRS's pre-1969 Revenue Rulings provide the best explanation for why Congress perceived a need to enact Section 3402(*o*), this Court need not accept that explanation (or the validity of the Rulings themselves) to decide this case in the government's favor. Respondents could not prevail here even if the 1969 Congress could be shown to have believed that the pre-existing statutory definition of "wages" excluded all "supplemental unemployment compensation benefits" as later defined in Section 3402(*o*)(2)(A). Such a belief would have been contrary to the plain text of FICA's definition of "wages." Even assuming, *arguendo*, that the 1969 Congress failed to appreciate the breadth of that definition, Congress's enactment of Section 3402(*o*) would not have transformed that incorrect belief into reality.

In enacting Section 3402(*o*), Congress addressed a problem (large end-of-year tax bills) that arose from the IRS's view that certain types of severance payments were taxable income to the recipient but were not "wages" subject to withholding. Gov't Br. 32-33; Resp. Br. 25-26. There is no reason to suppose that Congress intended its solution to expand the set of payments as to which the problem would arise. Rather, Congress left intact the broad pre-existing definition of "wages," the plain language of which unambiguously encompasses the payments at issue here.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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