No. 12-1408

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

QUALITY STORES, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether "supplemental unemployment compensation benefits," which Congress has defined as amounts "paid to an employee, pursuant to a plan to which the employer is a party, because of the employee's involuntary separation from employment . . . resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions," 26 U.S.C. § 3402(o), constitute wages for purposes of the *Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3128*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is the United States of America.

Respondents are QSI Holdings, Inc. (f/k/a CT Holdings, Inc.); Quality Stores, Inc. (f/k/a Central Tractor Farm & Country, Inc.); Country General, Inc.; F and C Holding, Inc.; FarmandCountry.com, LLC; QSI Newco, Inc.; QSI Transportation, Inc.; Quality Farm & Fleet, Inc.; Quality Investments, Inc.; Quality Stores Services, Inc.; and Vision Transportation, Inc.

Respondents, through Rivershore Advisors, LLC, the Chief Litigation Officer appointed pursuant to the confirmed Chapter 11 plan of reorganization, serve as representatives of creditors of post-confirmation bankruptcy estates, some of which may be publicly-traded companies. None of Respondents is a subsidiary or affiliate of a publicly-traded corporation.

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The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-30a) is reported at 693 F.3d 605. The opinion of the United States District Court for the Western District of Michigan (Pet. App. 33a-54a) is reported at 424 B.R. 237. The opinion of the United States Bankruptcy Court for the Western District of Michigan (Pet. App. 55a-77a) is reported at 383 B.R. 67.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2012. A petition for rehearing and rehearing en banc was denied on January 4, 2013. Pet. App. 31a-32a. On March 25, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 3, 2013. On April 22, 2013, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including May 31, 2013. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are the statutes and regulations reproduced in Pet. App.

84a-214a and Treas. Reg. § 1.501(c)(17)-2(j) and Treas. Reg. § 1.6041-2(b).

STATEMENT

1. The facts in this case are set forth in the opinion of the court of appeals. Pet. App. 2a-6a, 7a, 11a. Quality Stores, an agricultural specialty retailer, closed all of its stores and distribution centers, terminated the employment of all its employees, and made payments to employees whose employment was involuntarily terminated. Pet. App. 2a-3a. Payments to involuntarily terminated employees were not attributable to the rendering of any particular services by the employees to Respondents. Pet. 5 n.1; Pet. App. 3a, 4a. About 900 terminated employees did not receive any payments because they were hired immediately by successor companies. *Id.* at 4a.

2. Respondents collected and paid taxes under the *Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3128 ("FICA")*, on the payments, but they did not agree with the Internal Revenue Service that the payments constituted wages for FICA purposes. Respondents took the position that the payments were not wages but instead constituted supplemental unemployment compensation benefit ("SUB") payments that are not taxable under FICA. Pet. App. 5a. Accordingly, Respondents filed claims for refund of the FICA taxes.

After the Internal Revenue Service failed to act on the claims for refund, Respondents filed a proceeding against the United States (the "Government") in the bankruptcy court seeking to recover the overpaid employer and employee FICA taxes plus interest. Pet. App. 37a.

The bankruptcy court held that Respondents and their employees were not liable for FICA taxes and were entitled to a refund of the FICA taxes previously paid. Pet. App. 55a-77a. The Government moved for reconsideration. Pet. App. 78a. The bankruptcy court granted the Government's motion for reconsideration, but ratified its prior decision. Pet. App. 78a-80a.

After the parties filed a stipulation regarding the amount of the FICA tax refund to be paid, the bankruptcy court entered a final judgment in favor of Respondents and their employees in the amount of $1,000,125 plus interest as provided by law. Pet App. 81a-83a. The Government appealed, and the district court affirmed the judgment of the bankruptcy court. Pet. App. 33a-54a.

3. The Government appealed again, and the court of appeals unanimously affirmed the decision of the district court. Pet. App. 1a-30a. The Government filed a petition for rehearing en banc, which the court of appeals denied on January 4, 2013. Pet. App. 31a-32a.

On March 25, 2013, the Chief Justice granted the Government's application to extend the time within which to file a petition for a writ of certiorari to and

including May 3, 2013. On April 22, 2013, the Chief Justice granted the Government's application to further extend the time within which to file a petition for a writ of certiorari to and including May 31, 2013. On May 31, 2013, the Government filed the Petition.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Decision Of The Court of Appeals Is Correct.

The Government argues that the petition should be granted because the court of appeals' decision is incorrect. *See* Pet. 9-20. Ordinarily, that is not a sufficient reason to grant a petition for certiorari. *See* S.Ct. Rule 10. But even if it was, the court of appeals reached the correct result in this case.

A. FICA taxes "wages," which is defined as "all remuneration" for "any service performed by an employee for the person employing him." 26 U.S.C. § 3121(a). SUB payments are not made for "employment" but rather for the "elimination of employment" due to plant shutdowns and similar conditions. Therefore, SUB payments are not wages. This Court's decision in *Coffy v. Republic Steel Corp.,* 447 U.S. 191 (1980), as well as § 3401(o) of the Internal Revenue Code (the "IRC") and its legislative history, confirm this. Moreover, in *Rowan Cos. v. United States,* 452 U.S. 247 (1981), this Court recognized that the definitions of "wages" under Chapter 21 (FICA taxation)

and Chapter 24 (income tax withholding) of the IRC are "substantially identical" and must be construed *in pari materia.* Accordingly, § 3401(o) of the IRC, under which SUB payments are not wages (although they are *treated as wages*) for purposes of income tax withholding, must be taken into account in construing the meaning of wages for purposes of FICA. The court of appeals correctly concluded, therefore, that SUB payments are not wages for purposes of FICA taxation.

In *Rowan*, this Court noted that the term "wages" is defined "substantially identically" under Chapter 21 (FICA taxation) and Chapter 24 (income tax withholding) of the IRC. For FICA tax purposes, § 3121(a) defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). *See* Pet. App. 85a-94a. The term "employment" is defined as "any service performed by an employee for the person employing him." 26 U.S.C. § 3121(b). *See* Pet. App. 95a-112a. Therefore, reading the sections together, "wages" for FICA tax purposes means "all remuneration" for "any service performed by an employee for the person employing him." For federal income tax withholding purposes, the term "wages" is defined in virtually identical terms by § 3401(a) 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." 26 U.S.C. § 3401(a). *See* Pet. App. 148a-154a. Contrary

to the Government's contention that the court of appeals failed to consider adequately the language of § 3121(a) in its analysis, that court carefully considered § 3121(a) and recognized the substantial identity between § 3121(a)'s definition of "wages" and the definition found in § 3401(a). *See* Pet. App. 8a-10a.

The Government contends that, in holding that the SUB payments at issue here are not subject to FICA tax, the court of appeals "did not suggest that those payments fall outside the applicable definition of wages." Pet. 8. This assertion is incorrect. The court of appeals based its decision, in part, upon this Court's holding in *Coffy* that SUB payments are not "compensation for services" and on the legislative history of 26 U.S.C. § 3402(o) evidencing congressional intent that SUB payments are neither "wages" nor "remuneration for services." Pet. App. 13a.[1]

The Government also notes that § 3121(a) contains many express exclusions from the definition of "wages" and suggests that, absent an express exclusion, § 3121(a) should be read broadly to include SUB payments as wages, citing this Court's decision in *United States v. Silk*, 331 U.S. 704, 711-12 (1947).

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[1] The Government asserts that the legislative history of § 3402(o) "belies any suggestion that the provision was intended to exempt [SUB payments]" from FICA taxation. Pet. 16. That is also incorrect. As the court of appeals noted, the legislative history of § 3402(o) makes clear that Congress did not consider SUB payments "wages" or "remuneration for services." Pet. App. 13a.

Pet. 11. However, the definition of "wages" in the federal income tax withholding chapter, 26 U.S.C. § 3401(a), similarly contains a long list of exclusions that does not include SUB payments; yet the Government concedes, as it must, that at least some SUB payments clearly are considered by Congress to be non-wages for income tax withholding purposes. Pet. 19.

B. In 1969, Congress enacted § 3402(o) of the IRC which expressly recognizes the exclusion of SUB payments from wages. 26 U.S.C. § 3402(o). *See* Pet. App. 174a-179a. The purpose of this section was to authorize the withholding of income taxes from certain types of payments "other than wages," specifically including (i) "supplemental unemployment compensation benefits" (SUB payments), (ii) "annuities" and (iii) "sick pay." *Id.* Section 3402(o)(2) defines each of these three types of non-wages. SUB payments are defined 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 includable in the employee's gross income.

26 U.S.C. § 3402(o)(2)(A). *See also* 26 U.S.C. § 501(c)(17) (adopting an almost identical definition of

SUB payments in 1960 for tax exemption purposes). The parties stipulated that the payments at issue here fall within this statutory definition. Pet. 5.

The language of § 3402(o) strongly supports the conclusion that payments qualifying as SUB payments constitute non-wages. *First*, the statutory text states that SUB payments "shall be *treated as* if [they are] a payment of wages" (for income tax withholding purposes), indicating that SUB payments are *not* wages. As the district court noted, if SUB payments constituted wages, there would be no need to treat them as though they are wages, *i.e.*, the withholding of income taxes would not need to be extended to such payments. Pet. App. 52a-53a.

Second, a comparison of the language of subparagraphs (A), (B) and (C) of § 3402(o)(1) supports the conclusion that all SUB payments constitute non-wages. Subparagraph (C) of § 3402(o)(1) refers to any "payment to an individual of sick pay *which does not constitute wages*." The words "which does not constitute wages" are included because payments of sick pay to an individual by an employer *do* constitute wages, whereas payments of sick pay to an individual by a third party, like an insurer, generally *do not* constitute wages. "No tax is specifically required to be withheld upon any wage continuation payment made by a person who is not the employer." S. Rep. No. 96-1033, at 11 (1980); *see also CSX Corp., Inc. v. U.S.,* 52 Fed. Cl. 208, 215 (Fed. Cl. 2002) ("*CSX I"), affirmed in part, reversed in part, CSX Corp. v. U.S.,* 518 F.3d 1328 (Fed. Cir. 2008) ("*CSX II*"). Thus, the language

of subparagraph (C) of § 3402(o)(1) recognizes that certain payments of sick pay *do* constitute wages and other payments of sick pay *do not* constitute wages. By contrast, subparagraphs (A) and (B) of § 3402(o)(1) do not distinguish between wages and non-wages because all SUB payments under subparagraph (A) and all annuity payments under subparagraph (B) are non-wages. *See CSX I*, 52 Fed. Cl. at 215-16. While annuity payments were considered "remuneration" when § 3402(o) was enacted, Congress recognized that "present law specifically excludes . . . [such payments] from the definition of wages." *CSX I*, 52 Fed. Cl. at 215 and n.10, quoting S. Rep. No. 91-552 at 268 (1969) and citing 26 U.S.C. §§ 3401(a)(12)(B) and 3121(a)(5)(B) (1964). Based upon the surrounding statutory text, therefore, if the Government's contention that Congress considered some SUB payments to be wages were correct, § 3402(o) would refer to "supplemental unemployment compensation benefits *which do not constitute wages*." *See Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

Third, as the court of appeals noted, the title of § 3402(o) is "Extension of withholding to certain payments *other than wages*." Pet. App. 174a (emphasis added). *See INS v. National Ctr. for Immigrants' Rights, Inc.*, 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.)

Consistent with the congressional intent of promoting ease of administration of the FICA and federal income tax withholding schemes, *Rowan* requires that the definition of wages under FICA (Chapter 24) be construed *in pari materia* with the definitions in the income tax withholding parts of the IRC (Chapter 21). 452 U.S. at 257.[2] Therefore, the court of appeals correctly held that because SUB payments clearly are not wages for federal income tax withholding purposes, SUB payments are also not wages for FICA purposes. Pet. App. 14a-20a.

C. A key element of the argument made by the Government in this case and in *CSX II* rests on the IRS's treatment of "dismissal payments." This argument is a red herring because, as the Government is well aware, the IRS's own definitions of "dismissal payments" and "SUB payments" are very different. *Compare* Treas. Reg. § 31.3401(a)-1(b)(4) (defining "dismissal payments") (*See* Pet. App. 199a-200a) with Treas. Reg. § 31.3401(a)-1(b)(14) (defining "SUB payments"). (*See* Pet. App. 213a-214a). SUB payments not only involve an *involuntary* separation

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[2] Recognizing the interpretive significance of *Rowan*, the Government argued before the Sixth Circuit in this case and the Federal Circuit in *CSX II* that *Rowan* was legislatively overruled by the *Social Security Amendments of 1983, Pub. L. No. 98-21, § 327(b)(1), 97 Stat. 65, 127 (1983) (codified in last para. of 26 U.S.C. § 3121(a))*, the so-called "Decoupling Amendment." Both the Sixth Circuit and the Federal Circuit rejected this argument. *See* Pet. App. 14a-20a; *CSX II*, 518 F.3d at 1343-45. Thus, there is no conflict between the Sixth Circuit and the Federal Circuit regarding the continuing validity of *Rowan*.

from employment, but also require the payments to be made *pursuant to a plan* and in connection with *the closure of a plant or operation or other similar work force reduction, i.e.,* the elimination of the job. *See NYSA-ILA Container Royalty Fund v. Commissioner,* 847 F.2d 50, 53 (2d Cir. 1988) (acknowledging the Government's argument that SUB payments and dismissal payments are "mutually exclusive categories").[3]

D. Pursuant to the Decoupling Amendment, Congress granted authority to the Treasury Department to issue regulations defining exclusions from "wages" for FICA purposes differently than exclusions from "wages" for federal income tax withholding purposes. IRC § 3121(a). As noted by both the Sixth Circuit in this case and the Federal Circuit in *CSX II*, however, the IRS has failed to issue FICA regulations under the Decoupling Amendment that address SUB payments, much less specifically adopt a position contrary to the deemed wage treatment for income tax withholding purposes. *See* Pet. App. 14a-16a; *CSX II*, 518 F.3d at 1343-45. *See also Anderson v. United*

[3] The Government's construction of SUB payments may adversely impact the statutory framework set up between the federal government and state governments for eligibility for unemployment benefits and extended unemployment benefits. The provisions for extended unemployment benefits expressly incorporate the statutory definition of SUB payments (26 U.S.C. § 501(c)(17)) into their eligibility requirements. *See, e.g.*, 26 U.S.C. 3304(a)(11) and section 202(a)(3)(D) of the *Federal-State Extended Unemployment Compensation Act of 1970, Pub. L. No. 91-373, 84 Stat. 695 (1970), as amended by P.L. 96-499, 94 Stat. 2659 (1980).*

States, 929 F.2d 648, 650-51, 653 n.10 (Fed. Cir. 1991) (noting the Treasury Department's failure to issue relevant regulations pursuant to the Decoupling Amendment). In the absence of such FICA regulations, the Government ignores the only Treasury regulations that address this issue[4] and, instead, asks this Court to give deference to certain administrative rulings issued by the IRS between 1956 and 1990 through which, the Government contends, the IRS developed a "framework" for establishing whether and when SUB payments are not wages. But the revenue rulings issued on this topic were not consistent. Indeed, as the court of appeals noted, Rev. Rul. 77-347, 1977-2 C.B. 362, issued in 1977 (although subsequently "modified") supports the lower courts' interpretation of the statute. Pet. App. 27a. Rev. Rul. 80-124, 1980-1 C.B. 212, does the same. *Id.* (stating that "[s]upplemental unemployment benefits [as defined in § 3402(o)] are not wages *under sections 3121(a) and 3306(b) of the Code*") (emphasis in the original).[5] Nor, as the District Court noted, do the revenue rulings have the authoritative import of Treasury regulations. Pet. App. 51a. In short, this is not a case involving longstanding and consistent

[4] The Treasury Department issued relevant information reporting regulations (implementing IRC § 6041) and SUB payment federal income tax withholding regulations (implementing IRC § 501(c)(17)) that reflect congressional intent to exclude SUB payments from wages. *See infra,* pp. 17-20.

[5] The Petition does not mention either Rev. Rul. 77-347 or Rev. Rul. 80-124.

interpretation of Treasury regulations entitled to judicial deference. *See United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 219-20 (2001). The court of appeals found the revenue rulings to be inconsistent and in conflict with congressional intent. Pet. App. 22a-29a.

II. There Is No Conflict That Warrants This Court's Review.

The Government contends that the court of appeals' decision conflicts with decisions of this Court and of other courts of appeals. *See* Pet. 20-25. Contrary to the Government's contention, there is no conflict with any decision of this Court or of the regional courts of appeals. Although the decision in this case diverges from decisions of the Federal Circuit, there are strong reasons not to grant immediate review on the basis of that shallow conflict.

A. In order to allege a conflict, the Government frames a question that is considerably broader than the question actually considered and decided by the court of appeals in this case. The Petition asks this Court to decide "whether severance payments made to employees whose employment was involuntarily terminated are taxable under the Federal Insurance Contributions Act." Pet. i. The issue actually decided by the court of appeals is whether payments made (i) pursuant to a plan to which the employer was a party, (ii) to employees whose employment was involuntarily terminated, (iii) where the employees' separation

from employment resulted directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions (*i.e.*, SUB payments), are taxable under FICA.

Apart from the Federal Circuit's decisions in *CSX II* and *Abrahamsen v. United States*, 228 F.3d 1360 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 957 (2001), the decisions of the courts of appeals cited by the Government do not conflict with the court of appeals' decision in this case because they all involved payments made to employees who had accepted some form of *voluntary* separation from employment or payments otherwise materially different in character from SUB payments. *See University of Pittsburgh v. United States*, 507 F.3d 165 (3d Cir. 2007) (early retirement payments made to faculty members who voluntarily retired were wages subject to FICA tax); *Appoloni v. United States*, 450 F.3d 185 (6th Cir. 2006) (severance payments made to public school teachers who agreed to resign and relinquish their statutory tenure rights and their teaching positions were wages subject to FICA tax); *North Dakota State Univ. v. United States,* 255 F.3d 599 (8th Cir. 2001) (severance payments made to university administrators under voluntary early retirement program were wages subject to FICA tax); *Hemelt v. United States*, 122 F.3d 204 (4th Cir. 1997) (payments under settlement of wrongful discharge claims were wages not "tort-based awards"); *Rivera v. Baker West, Inc.,* 430 F.3d 1253 (9th Cir. 2005) (payments made under settlement agreement resolving claims for discrimination and wrongful termination

constituted "back pay" subject to federal income tax withholding). While some of the payments in *Abrahamsen* were to former employees who had been involuntarily separated, that case did not involve SUB payments. SUB payments involve not only the dismissal of an employee but the elimination of the job. *See* 26 U.S.C. § 3402(o)(2)(A); *Coffy*, 447 U.S. at 200-01.

Moreover, the Petition does not cite or discuss the Second Circuit's decision in *NYSA-ILA Container Royalty Fund v. Comm'r,* 847 F.2d 50 (2d Cir. 1988), which favorably discusses § 3402(o)'s definition of SUB payments as the applicable test for FICA purposes. In *NYSA-ILA* the Government took a position contrary to its positions before the Sixth Circuit in this case and the Federal Circuit in *CSX II,* arguing that SUB payments and dismissal payments are "mutually exclusive categories." *Id*. at 53.

B. The Government contends that excluding SUB payments from the definition of wages conflicts with this Court's decision in *Social Security Board v. Nierotko,* 327 U.S. 358 (1946). Pet. 7-8, 20-22. The court of appeals clearly considered *Nierotko*'s broad construction of "wages" under FICA. Pet. App. 8a-9a. The Court went on to note, however, that *Coffy v. Republic Steel Corp.,* 447 U.S. 191 (1990), a more recent decision of this Court, held that SUB payments fall outside the broad statutory meaning of wages. Pet. App. 6a-7a, 9a. Moreover, *Nierotko* involved "back pay," a type of payment that clearly

differs from SUB payments. Indeed, SUB payments did not exist when *Nierotko* was decided.

The Petition also cites this Court's decision in *Otte v. United States*, 419 U.S. 43 (1974), but that case is inapposite. The issue in *Otte* was whether unpaid wages paid by a bankruptcy trustee to former employees were exempt from federal income tax withholding and FICA taxes merely because the payments were made by the trustee and not the employer. This Court held the payments were clearly wages subject to federal income tax withholding and FICA taxes because the original character of the payments as wages was not altered by the fact that the trustee, rather than the employer, was the payor. *Id.* at 49-50.

C. The court of appeals' decision in this case diverges from the Federal Circuit's decision in *CSX II*, but that disagreement does not warrant immediate review by this Court, for at least two reasons.

1. The disagreement between the Sixth Circuit and the Federal Circuit may have no practical effect. By statute, all taxpayers who file a claim for a tax refund may choose between filing their claims (i) in a federal district court (or bankruptcy court),[6] with an

[6] *See United States v. Bond*, 486 B.R. 9 (E.D.N.Y. 2012) (confirming the constitutional authority of bankruptcy courts to hear and finally determine claims for tax refunds against the IRS in the wake of *Stern v. Marshall*, 131 S.Ct. 2594 (2011)).

appeal to one of the regional courts of appeals, or (ii) in the Court of Federal Claims, with an appeal to the Federal Circuit. *See* 28 U.S.C. § 1295(a)(3) (limiting the jurisdiction of the Federal Circuit in civil tax cases to appeals from the Court of Federal Claims); 28 U.S.C. § 1346(a) (giving the Court of Federal Claims jurisdiction to adjudicate claims for federal tax refunds filed by taxpayers). Following the Federal Circuit's decision in *CSX II,* few if any taxpayers are likely to file refund claims in the Court of Federal Claims. Instead, taxpayers are likely to file such claims in the district courts (or bankruptcy courts), so that any appeals will be decided by one of the regional circuits.[7] If other courts of appeals follow the Sixth Circuit's decision in this case, taxpayers will be treated in a uniform way and the Federal Circuit's decision in *CSX II* will have limited practical significance. Accordingly, there is no pressing need for this Court to review the issue at this time.

2. The usual reasons for denying review of a shallow circuit split are particularly compelling in this case. The Federal Circuit viewed the statutory construction issue as "complex," and thought "that the correct resolution of the issue is far from obvious." *CSX II*, 518 F.3d at 1340. The Sixth Circuit agreed

[7] Such cases are already pending. *See, e.g.*, *Alliant Techsystems, Inc. v. United States of America*, Case No. 0:12-cv-00807-SRN-FLN (U.S.D.C. Minn.); *Kimberly-Clark Corporation v. United States of America*, Case No. 3:12-cv-01168-L (U.S.D.C. N. Tex.); and *Citigroup, Inc. v. United States of America*, Case No. 3:12-cv-00591-JCH (U.S.D.C. Conn.).

with this assessment. Pet. App. 30a. In such cases, decisions from more than two federal courts of appeals may be of assistance to this Court.

D. The second reason why immediate review by this Court is not warranted is the fact that regulatory and administrative authority that was cited to the Sixth Circuit in this case was not cited to the Federal Circuit in *CSX II*. The American Payroll Association, in its amicus curiae briefs filed with the Sixth Circuit in this case, informed the court that the Treasury Department adopted final regulations in 1968 addressing information reporting requirements which provided that SUB payments of $600 or more must be reported on annual information returns (*i.e.*, Forms 1099-MISC). *See* Treas. Reg. § 1.501(c)(17)-2(j). Treas. Reg. § 1.6041-2(b). T.D. 6972, 1968-2 C.B. 222, 229 and 239; 33 Fed. Reg. 12899 (September 12, 1968). Forms 1099-MISC, *Miscellaneous Income*, cannot be used to report either FICA wages, FITW wages or the withheld payroll taxes on such wages. Only Forms W-2, *Wage and Tax Statement* are used for those purposes. Thus, at the time Congress was considering § 3402(o) (and writing its legislative history), the relevant Treasury regulations had imposed Form 1099 information reporting on SUB payments, thereby recognizing that SUB payments were exempt from *any* type of wage withholding (FICA, the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA") or FITW).

Immediately after § 3402(o) was enacted, the Treasury Department issued regulations, forms, and

publications[8] to assist payroll administrators in the implementation of § 3402(o) and its deemed treatment of SUB payments as wages for federal income tax withholding purposes. In addition to restating and reissuing the prior information reporting regulations for pre-1971 years, the then-new Treas. Reg. §§ 1.501(c)(17)-2(j) and 1.6041-2(b) contemplated that Form W-2 reporting would replace Form 1099 reporting

[8] Although not authoritative guidance, the forms and publications issued to employers and payroll administrators were modified by the IRS in 1971 to implement § 3402(o)'s deemed wage treatment. In describing the practical impact of the statutory SUB payment definition for payroll compliance purposes, in the 1971 version of Circular E, Employer's Tax Guide, the IRS explained that SUB payments were subject to FITW, but exempt from FICA and FUTA taxes. *See* Circular E, Employer's Tax Guide, I.R.S. Pub. No. 15 (1971). To help illustrate this new FITW distinction, the 1971 Circular E included a chart which provided that SUB-Pay is taxable for FITW purposes, but exempt from wages for both FICA and FUTA purposes. *Id*. at 13-16. In calculating taxable wages, the 1971 Circular E also specifically warned employers when preparing payroll tax returns: "Do not include the amount of any . . . supplemental unemployment compensation benefit from which income tax has been withheld." *Id.*, at 11-12; *see also id.* at 5, 9, and 16. The IRS also released a 1971 Form 941E, Quarterly Return of Withheld Federal Income Tax for reporting SUB payments subject to FITW wage treatment. *See* Quarterly Return of Withheld Federal Income Tax, I.R.S. Form 941E (1971). No FICA wages or FICA taxes were or could be reported on the 1971 Form 941E by the SUB payment trusts. Similar special rules were adopted for SUB payments in the 1971 version of Form 941, Employer's Quarterly Tax Return. *See* Employer's Quarterly Tax Return, I.R.S. Form 941 (1971). The foregoing authority was cited to the Sixth Circuit in this case but not to the Federal Circuit in *CSX II*.

for most, but not all, statutory SUB payment benefits paid after December 31, 1970. *See* T.D. 7068, 1970-2 C.B. 252; 35 Fed. Reg. 17328 (November 11, 1970). Form 1099 reporting imposed on SUB payments was superseded by Form W-2 reporting only if the SUB payments were subject to federal income tax withholding under § 3402(o). *See* Treas. Reg. § 1.501(c)(17)-2(j). Form W-2 reporting was not triggered "in lieu of such annual [Form 1099] information return" if, for example, the terminated employee claimed exempt status, claimed personal allowances sufficient to avoid withholding, or received payments below the minimum withholding threshold amounts. If SUB payments were wages for FICA purposes (as the Government now claims), then any Form 1099 reporting would have been impermissible. Thus, the IRS regulatory structure adopted in 1970, which remains in effect today, contemplates that the Form W-2 wage reporting is limited to federal income tax withholding under § 3402(o).

In short, the regulations, forms, and publications promulgated by the IRS at the time § 3402(o) was enacted confirm Congress' position that SUB payments are *not* wages for FICA purposes and are only deemed wages solely for federal income tax withholding purposes. It is possible that these additional materials and arguments could cause the Federal Circuit to reconsider its position, particularly if other circuits agree with the Sixth Circuit's interpretation in this case. At a minimum, the Court would benefit from allowing the additional materials and arguments to be considered by other courts of appeals.

E. Finally, as both the Sixth Circuit in this case and the Federal Circuit in *CSX II* noted, the Treasury Department has not availed itself of its authority under the Decoupling Amendment to address this issue through regulations. Pet. App. 15a-16a; *CSX II*, 518 F.3d at 1343-45. This Court generally does not intervene to resolve a controversy that the Treasury Department could seek to address through the regulatory authority granted by Congress. *See United States v. Cleveland Indians Baseball Co.,* 532 U.S. at 218-19.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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