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 FOR RESPONDENTS

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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 an 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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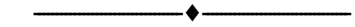
The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-30a) is reported at 693 F.3d 605, *cert. granted*, 186 L. Ed. 2d 962 (2013). The opinion of the United States District Court for the Western District of Michigan (Pet. App. 33a-54a) is reported at 424 B.R. 237, *cert. granted*, 186 L. Ed. 2d 962 (2013). 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, *cert. granted*, 186 L. Ed. 2d 962 (2013).

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).

STATUTES AND REGULATORY PROVISIONS INVOLVED

Copies of 26 U.S.C. § 501(c)(17)(D), Treas. Reg. §§ 1.501(c)(17)-2(j) (as amended in 1970), 1.6041-2(b)(1) (as amended in 2004) and 31.3401(a)-1(b)(14)(i) and (ii) (as amended in 2003), T.D. 6972, 1968-2 C.B. 222; 33 Fed. Reg. 12,899 (Sept. 12, 1968), and T.D. 7068, 1970-2 C.B. 252; 35 Fed. Reg. 17,328 (Nov. 11, 1970), are reproduced in the supplemental appendix to this brief. Supp. App., infra, 1a-6a. Other relevant statutory and regulatory provisions are reproduced in the appendix to Petitioner's brief and in the appendix to the petition for a writ of certiorari. Pet. App. 84a-214a.



STATEMENT OF THE CASE

This case involves the treatment, for purposes of taxation under the Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3128 ("FICA"), of supplemental unemployment compensation benefits paid by Quality Stores Inc., *et al*. (collectively, "Quality Stores" or "Respondents") to certain employees who were laid off when Quality Stores closed its doors. Only payments that fall within the definition of "wages" are subject to FICA taxation. Quality Stores contends that since the supplemental unemployment compensation benefits are not "wages" for income tax withholding purposes, they are likewise not "wages" under FICA.

The United States of America (the "Government") disagrees, arguing that supplemental unemployment

compensation benefits are "wages" under FICA unless – in addition to meeting the statutory definition set forth in Section 3402(o)(2)(A) of the Internal Revenue Code – the benefits payments also meet the specific criteria set forth in the IRS' most recent revenue ruling on the topic.

The bankruptcy court, district court and court of appeals all concluded that "wages" should be interpreted in the same way for both income tax withholding and FICA taxation purposes, and that supplemental unemployment compensation benefits are not "wages" for either purpose.

I. Statutory Background

1. Supplemental unemployment compensation benefits ("SUB payments") have existed in various forms since the 1950s. In 1960, Congress amended the Internal Revenue Code ("IRC") to provide an income tax exemption for trusts established to make SUB payments. Pub. L. No. 86-667, 74 Stat. 534 (1960). In doing so, Congress defined SUB payments as "benefits which are paid to an employee because of his involuntary separation from the employment of the employer (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. . . ." 74 Stat. at 535. This definition remains in the statute today. 26 U.S.C. § 501(c)(17)(D).

The Treasury Department recognized that all SUB payments, as defined in IRC Section 501(c)(17)(D), were non-wages. In 1968, after notice and comment, the Treasury Department promulgated regulations relative to IRC Section 501(c)(17). Those Treasury regulations required SUB payments of $600 or more to be reported on Form 1099 – a reporting form that cannot be used to report wages for income tax withholding or FICA taxation purposes. *See* Treas. Reg. §§ 1.501(c)(17)-2(j) (as amended in 1970) and 1.6041-2(b) (as amended in 2004); T.D. 6972, 1968-2 C.B. 222, 229 and 239; 33 Fed. Reg. 12,899 (Sept. 12, 1968).

2. The following year, Congress again amended the IRC with respect to SUB payments by enacting Section 3402(o). That provision extended income tax withholding to SUB payments, which it defined, almost verbatim, in the same manner as in Section 501(c)(17). The legislative history of Section 3402(o) states the reason for the amendment:

> Present law. – Under present law, supplemental unemployment benefits are not subject to withholding because they do not constitute wages or remuneration for services.
>
> General reasons for change. – Supplemental unemployment compensation benefits . . . 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.

S. Rep. No. 91-552 at 268 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2305-06.

The title of IRC Section 3402(o) states that it extends income tax withholding "to certain payments *other than wages*." 26 U.S.C. § 3402(o) (emphasis added). The section identifies three types of payments, other than wages, to which income tax withholding is nonetheless applied: "(A) any supplemental unemployment compensation benefit paid to an individual, (B) any payment of an annuity to an individual . . . , and (C) any payment to an individual of sick pay which does not constitute wages (determined without regard to this subsection). . . ." 26 U.S.C. § 3402(o)(1)(A)-(C).

As in Section 501(c)(17)(D), SUB payments are defined in Section 3402(o) 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. . . .

26 U.S.C. § 3402(o)(2)(A).

Although SUB payments are among the payments that the statute describes as "other than wages," Section 3402(o) mandates that a SUB payment "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) (emphasis added). Employers are therefore required to withhold income taxes from SUB payments even though SUB payments are not wages.

Section 3402(o) is necessary because SUB payments are taxable as income to recipients, but – because they are not wages – are not otherwise subject to income tax withholding, as established by the 1968 Treasury regulations preceding the enactment of Section 3402(o). As a result, prior to Section 3402(o)'s enactment, recipients would face potentially heavy tax burdens when they filed their returns. As the Government noted in its Petition, "[i]n 1969, at the Treasury Department's suggestion, Congress enacted Section 3402(o) to address that particular problem." Pet. 16.

3. Neither the 1968 Treasury regulations nor the 1969 legislative history of Section 3402(o) state anywhere that SUB payments, although non-wages for purposes of income tax withholding, nonetheless are wages for purposes of FICA taxation. Rather, the IRC defines the term "wages" substantially identically under Section 3121(a) (FICA taxation) and Section 3401(a) (income tax withholding):

Section 3121(a)	**Section 3401(a)**
For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; . . .	For purposes of this chapter, the term "wages" means 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 medium other than cash; . . .

26 U.S.C. §§ 3121(a), 3401(a).

Section 3121(b), in turn, defines "employment" for FICA taxation purposes as "any service, of whatever nature, performed by an employee for the person employing him. . . . ," thereby completing the parallel between the two sections defining "wages." *See* 26 U.S.C. § 3121(b)(A).

Section 3402(o)'s requirement that a SUB payment be treated *as if it were* a payment of wages is expressly limited to the chapter relating to income tax withholding. *See* 26 U.S.C. § 3402(o)(1) ("For purposes of this chapter (and so much of subtitle F as relates to this chapter) – "). Thus, Congress did not mandate treating SUB payments as if they were wages for FICA taxation or any other purpose.

II. Factual Background and Proceedings Below[1]

1. 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 (the "Payments"). Pet. App. 2a-3a. Quality Stores and the Government have stipulated that the Payments resulted directly from a reduction in force or the discontinuance of a plant or operation and were not attributable to the rendering of any particular services by the former employees. Government's Brief ("Br.") 6 n.1; Joint Appendix ("J.A.") 51-53.

2. Because the Payments constituted gross income to the employees for federal income tax purposes, Quality Stores reported the Payments as wages on W-2 forms and withheld federal income tax. Quality Stores also paid the employer's share of taxes under FICA and withheld each employee's share of FICA tax. Although Quality Stores collected and paid the FICA tax, it did not agree with the Internal Revenue Service ("IRS") that the Payments constituted "wages" for FICA purposes. Quality Stores believed that the Payments instead constituted SUB payments that are not taxable under FICA.

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[1] The facts in this case are set forth in the opinion of the court of appeals. Pet. App. 2a-7a, 11a.

Pet. App. 5a. Accordingly, Quality Stores filed claims for refund of the FICA taxes.

After the IRS failed to act on the claims for refund, Quality Stores filed a proceeding against the Government in the bankruptcy court where its chapter 11 case was pending, seeking to recover the overpaid employer and employee FICA taxes plus interest. Pet. App. 37a.

The bankruptcy court held that Quality Stores and its 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 Quality Stores and its employees in the amount of $1,000,125.00 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.

SUMMARY OF ARGUMENT

This Court should affirm the judgment below because the court of appeals correctly found that SUB payments are not "wages" for income tax withholding purposes and, consistent with the Court's holding in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), correctly found that SUB payments likewise are not "wages" for FICA taxation purposes.

1. The Payments were made by Quality Stores pursuant to two plans to which Quality Stores was a party, because of employees' involuntary separation from employment resulting directly from a reduction in force or the discontinuance of a plant or operation. There can be no dispute that the Payments made by Quality Stores to its employees meet the statutory definition of "supplemental unemployment compensation benefits" in IRC Section 3402(o), which defines SUB payments for purposes of income tax withholding. Br. 6 n.1; J.A. 51-53.

2. The plain language of Section 3402(o) clearly recognizes that SUB payments are not wages, but rather are to be treated *as if they were wages* solely for purposes of income tax withholding. This is confirmed by the legislative history of Section 3402(o), which explains that Congress enacted the section precisely because SUB payments are not wages, and thus are not subject to income tax withholding even though included in taxable income. S. Rep. No. 91-552 at 268 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2305-06 ("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.") (emphasis added).

This Court's decision in *Coffy v. Republic Steel Corp*., 447 U.S. 191 (1980) further supports the position that SUB payments do not constitute wages, since they are not remuneration to an employee for services performed. As the Court explained, "SUB's 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." *Id*. at 200.

3. The Government argues that SUB payments must be wages for FICA purposes because they do not fit within any of the enumerated statutory exceptions to FICA's definition of wages. The Government ignores the fact that a specific exception for SUB payments would only be needed if SUB payments met the definition of wages in the first instance. The statutory language and the legislative history of Section 3402(o) demonstrate that they do not. *See* S. Rep. No. 91-552 at 268 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2305-06.

Moreover, the statute defining wages for income tax withholding purposes, like the statute defining wages for FICA purposes, contains a long list of specific exceptions – none of which covers SUB payments. Despite this omission, the Government concedes that at least *some* SUB payments are not

"wages" for purposes of income tax withholding. Br. 33. Clearly, the lack of a specific exception for SUB payments from the statutory definition of wages for either income tax withholding or FICA purposes is not determinative of the status of SUB payments.

The Government further suggests that this Court's decision in *Social Sec. Bd. v. Nierotko*, 327 U.S. 358 (1946), mandates a finding that virtually any payment made by an employer to a current or former employee – including SUB payments – constitutes wages. This is a bridge too far; although *Nierotko*'s definition of wages is broad, it is not unlimited. In *Nierotko*, the Court, in the course of determining whether back pay constitutes wages under the Social Security Act,[2] addressed the breadth of the term "employment," which is part of the definition of wages. The Court explained that "'any service . . . performed . . . for his employer' . . . means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Id*. at 365-66 (citations omitted).

The facts in *Nierotko* are critical to understanding its holding. The employee had been wrongfully terminated before being reinstated, and under the

[2] At the time the Court decided *Nierotko*, the Social Security Act's definitions of both "wages" and "employment" were identical to the current definitions for FICA purposes under IRC Chapter 21. *See Nierotko*, 327 U.S. at 361; 26 U.S.C. § 3121(a).

National Labor Relations Act was legally still an employee for the duration of his wrongful termination:

> Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, *he had "employment"* under that Act and we need consider further only *whether under the Social Security Act its definition of employment, as "any service . . . performed . . . by an employee for his employer," covers what Nierotko did for the Ford Motor Company.*

Nierotko, 327 U.S. at 365 (emphasis added). In other words, the back pay that the employee received was compensation paid while he remained an employee and still had employment that met the definition of that term under the Social Security Act, notwithstanding the fact that he did not actually perform work during the employer's attempted termination of his employment.

The facts in *Nierotko* are plainly distinguishable from those in this case, where SUB payments were paid as part of a reduction in force or plant closing and the recipients did not legally remain employees or continue to have "employment" of any kind with Quality Stores. The exclusion of SUB payments from wages is in no way inconsistent with *Nierotko's* holding that wages should be construed broadly. Thus, the Government's reliance on *Nierotko* is misplaced.

4. Finally, while admitting that the statutory definition of "wages" in Section 3401 does not encompass all SUB payments, the Government contends that the *only* SUB payments that are excluded from the definition are those that meet the shifting requirements of the IRS' revenue rulings. Thus, the Government argues, any SUB payments that do not meet the IRS' current requirements (or such contrary requirements as the IRS may in the future adopt) *are* wages. Br. 36. Although the Government does not explicitly argue that the IRS' revenue rulings are entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), its position necessarily presumes that the IRS' administrative opinions are controlling as a matter of law.

There is no merit to the Government's position that the IRS' revenue rulings, rather than the definition adopted by Congress, determine whether SUB payments are wages. The Government has failed to articulate any reason why the Court should defer to the IRS' revenue rulings as authoritative. As the IRS itself concedes, such rulings do not have the force or effect of Treasury regulations. Rev. Proc. 89-14, 1989-1 C.B. 814 ("Revenue rulings published in the Bulletin do not have the force and effect of Treasury Department regulations. . . ."); *see also* Treas. Reg. § 601.601(d)(2)(v)(*d*) (as amended in 1987). Even more importantly, the IRS' revenue rulings regarding what constitutes non-wage SUB payments are inconsistent with the statutory definition of SUB

payments. Accordingly, the revenue rulings are not entitled to judicial deference under *Chevron*.

Nor do the revenue rulings have the "power to persuade" necessary to be entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Government makes no effort to defend the correctness of the IRS' revenue rulings. Indeed, it would be hard-pressed to do so, given that the IRS has, not once but twice, changed its mind about whether, in order to constitute non-wages, SUB payments must be linked to state unemployment benefits, and, not once but twice, changed its mind about whether SUB payments may be received in a lump sum. *See* Rev. Rul. 56-249, 1956-1 C.B. 488; Rev. Rul. 59-227, 1959-2 C.B. 13; Rev. Rul. 77-347, 1977-2 C.B. 362; Rev. Rul. 90-72, 1990-2 C.B. 211.

This Court has declined to give any special weight to administrative interpretations where those interpretations conflict with earlier pronouncements of the agency. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-143 (1976), *superseded on other grounds by* 92 Stat. 2076, 42 U.S.C. § 2000e(k) (citing *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 858 n.25 (1975)). Thus, the most current iteration of the IRS' opinion on what constitutes a non-wage SUB payment is entitled to no special weight. It is the statute, not the revenue rulings, that determines what a SUB payment is and whether it is within the definition of "wages."

5. This Court's holding in *Rowan* requires that the definition of wages under FICA be construed consistently with the definition of wages for income tax withholding. Therefore, because payments meeting the statutory definition of SUB payments under Section 3402(o) clearly do not fall within the definition of wages for purposes of income tax withholding, those payments are also not wages for purposes of FICA taxation.

ARGUMENT

SUB PAYMENTS MADE BY QUALITY STORES TO FORMER EMPLOYEES ARE NOT WAGES FOR PURPOSES OF FEDERAL INSURANCE CONTRIBUTIONS ACT TAXATION

The parties have stipulated that the Payments made by Quality Stores to its laid-off employees were paid pursuant to two plans to which Quality Stores was a party, because of the employees' involuntary separation from employment, resulting directly from a reduction in force or the discontinuance of a plant or operation. The parties have further stipulated that the Payments were not attributable to the rendering of any particular services by the former employees who received them. Accordingly, there can be no dispute that the Payments meet the statutory definition of "supplemental unemployment compensation benefits" set forth in IRC Section 3402(o)(2)(A). As SUB payments, the benefits paid by Quality Stores – although taxable income to the former employees –

are not "wages" for income tax withholding purposes, nor are they "wages" for FICA taxation.

I. SUB Payments Are Not Wages for Income Tax Withholding Purposes

A. The Plain Language of Internal Revenue Code Sections 3401 and 3402 Demonstrates that SUB Payments Are Not Wages

As with any question of statutory interpretation, the analysis must begin – and may well end – with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms.") (citations omitted).

The IRC's income tax withholding provisions define "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." 26 U.S.C. § 3401(a). *See* Pet. App. 148a-154a. Thus, based on the plain language of the statute, a payment constitutes "wages" – and must have income tax withheld from it – only if it is (1) remuneration (2) for services (3) performed by an employee for his employer.

Although this definition of wages is broad, it is not all-encompassing: some payments simply cannot be deemed to be "remuneration . . . for services performed by an employee for his employer." A SUB

payment is a type of payment that – although made by an employer to his former employee – nonetheless does not meet the statutory definition of "wages" because it is not remuneration for services. The IRC defines "supplemental unemployment compensation benefits" 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.

26 U.S.C. § 3402(o)(2)(A). As this Court explained in *Coffy*, "SUB's 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.

That SUB payments are not wages is borne out by the plain language of Section 3402(o). Section 3402(o) extends the income tax withholding requirement to "certain payments *other than wages*,"[3] including

[3] Although Quality Stores believes that the statutory language is plain, to the extent that there is any ambiguity under Section 3402(o) as to the wage or non-wage status of SUB payments, the title of the section is instructive. *See* Pet. App.

(Continued on following page)

(1) "any supplemental unemployment compensation benefit paid to an individual" (SUB payments); (2) certain annuity payments to an individual; and (3) certain payments of sick pay to an individual. 26 U.S.C. § 3402(o) (emphasis added). *See* Pet. App. 174a-179a. Section 3402(o)(1) requires that each of these types of payments shall be "treated *as if it were* a payment of wages" for income tax withholding purposes. 26 U.S.C. § 3402(o)(1) (emphasis added). The most logical inference to be drawn from this statutory language is that these types of payments were not wages; if they were wages, Congress would not have needed to enact Section 3402(o) to provide for the withholding of income taxes because such withholding already would have been occurring.

B. The Government's Position that Only Some SUB Payments Are Excluded from the Definition of Wages Is Contrary to the Plain Language of the Statute and the Canons of Statutory Interpretation

The Government concedes (as it must) that at least some SUB payments do not constitute wages within the meaning of the statute, since there otherwise would have been no need for Congress to enact Section 3402(o). *See* Br. 28. The Government insists,

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12a-13a; *INS v. National 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.").

however, that while some payments meeting the definition of SUB payments in Section 3402(o)(2)(A) are not wages, other SUB payments that likewise meet Section 3402(o)(2)(A)'s requirements nonetheless *are* wages. In the Government's view, meeting all of the requirements of the definition enacted by Congress is not enough to qualify a payment as a non-wage SUB payment. Rather, to be excluded from the definition of wages, a payment must also meet the requirements set forth in whichever revenue rulings happen to be in effect at the time the payment is made.

The Government argues that Congress was simply being over-inclusive in drafting Section 3402(o). According to the Government, when Congress indicated that it was extending income tax withholding to payments "other than wages," what it really meant to say was that the section applied to both wage and non-wage payments. Br. 28. And when Congress directed that SUB payments should be treated "as if [they] were a payment of wages," what it really meant to say was that income tax should be withheld "*whether or not* [the payments] would otherwise be 'wages.'" *Id.* (emphasis in original). There are at least three distinct problems with the Government's proposed interpretation.

First, the interpretation lacks any grounding in the language of the statute. As this Court has many times explained, "in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts

must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Nothing in the statute suggests that Congress, when it described SUB payments as "other than wages," actually meant something quite different: that only some SUB payments are "other than wages" while others actually are wages. Nor is there any evidence in the statutory language that in mandating the treatment of a SUB payment "*as if* it were a payment of wages," Congress actually meant that some SUB payments actually *are* wages.

The issue of construction here is analogous to that addressed by the Court in *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012). In that case, the Court considered whether assessable penalties were included in the IRC's definition of the term "tax" or merely treated in some instances *as if they were* taxes – leading to the negative inference that they were not, in fact, taxes. The Court observed:

> There would, for example, be no need for § 6671(a) to deem "tax" to refer to certain assessable penalties if the Code already included all such penalties in the term "tax." Indeed, amicus's earlier observation that the Code requires assessable penalties to be assessed and collected "in the same manner as taxes" makes little sense if assessable penalties are themselves taxes.

132 S. Ct. at 2584. Just as the language "in the same manner as taxes" indicates that assessable penalties are not actually taxes themselves, so too does the language "as if it were a payment of wages" indicate that SUB payments are not actually wages themselves.

Second, if Congress had meant to indicate that some of the payments described as "other than wages" actually *were* wages, it plainly knew how to do so. Section 3402(o) extends income tax withholding to sick pay, which may or may not constitute wages depending on whether the payments are made by an employer or by a third party, such as an insurer. *See* S. Rep. No. 96-1033 at 11 (1980) ("[N]o tax is specifically required to be withheld upon any wage continuation payment made by a person who is not the employer.") Congress clearly recognized that distinction by drafting Section 3402(o)(l)(C) to apply to any "payment to an individual of sick pay *which does not constitute wages*" (emphasis added). By contrast, neither subparagraph (A) (SUB payments) nor subparagraph (B) (annuity payments) distinguishes between wages and non-wages, demonstrating that all SUB payments under subparagraph (A) and all annuities under subparagraph (B) of Section 3402(o)(1) are non-wages.[4]

[4] When Section 3402(o) was enacted, retirement plan annuities were expressly excluded from the definitions of wages under Chapters 21 and 24. *See* 26 U.S.C. §§ 3401(a)(12)(B) and

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Congress obviously knew how to write a provision that encompasses a type of payment that could be both a wage and a non-wage and it did not do so when describing SUB payments. Since Congress differentiated between wage and non-wage sick pay, but drew no such distinction with respect to SUB payments, the reasonable conclusion is that *all* SUB payments – unlike sick pay – are outside the scope of "wages." *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] 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." (internal quotation marks omitted)); *see also In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (*en banc*) (noting that "where Congress knows how to say something but chooses not to, its silence is controlling" (internal quotation marks omitted)).

Third, the Government's position violates another basic rule of statutory interpretation because it renders Section 3402(o) – to the extent it would apply, as the Government argues, to SUB payments that allegedly are wages – entirely superfluous. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' . . .

3121(a)(5)(B) (1964). Those exclusions remain in the statute today.

We are 'reluctant to treat statutory terms as surplusage in any setting,'. . . ." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted).

Rather than interpreting Section 3402(o), as the Government urges, in such a way that makes it mere surplusage in all but the rare instances that a SUB payment comports with the requirements that the IRS seeks to impose through its revenue rulings, the better-supported interpretation is that Congress actually meant what it said – *all* SUB payments, without distinction, are something "other than wages."

C. The Legislative History Confirms that SUB Payments Are Not Wages

Quality Stores is mindful of the Court's instruction that "when the language of the statute is plain, legislative history is irrelevant." *Zedner v. United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in part and concurring in the judgment) (citing *United States v. Gonzales*, 520 U.S. 1, 6 (1997)). IRC Sections 3401 and 3402 make it unambiguously clear that SUB payments do not come within the definition of "wages."

However, if the Court were to consider the legislative history, a review of that history provides strong support for the conclusion that SUB payments are not remuneration for services and are not wages. *Cf. Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010) ("Although reliance on

legislative history is unnecessary in light of the statute's unambiguous language, we note the support that record provides for the [respondent's] reading."). The legislative history of Section 3402(o) explicitly provides that SUB payments are not wages:

> Present law. – Under present law, supplemental unemployment benefits are not subject to withholding *because they do not constitute wages or remuneration for services*.
>
> General reasons for change. – Supplemental unemployment compensation benefits . . . 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.

S. Rep. No. 91-552 at 268 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2305-06 (emphasis added). The Senate Finance Committee Report concluded that "[t]he withholding requirements applicable to withholding on wages are to apply to these *nonwage payments*." *Id.* at 2306 (emphasis added).[5]

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[5] Although these statements, as the Government points out, were made after the enactment of the definition of "wages" in the Internal Revenue Code, Br. 25, they nonetheless shed light

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Indeed, the Government's Brief cites testimony given by the Treasury Department before Congress that confirms that in 1969 the Treasury Department considered all SUB payments to be non-wages. Advising Congress about an earlier version of what ultimately became Section 3402(o), the Treasury Department testified that

> . . . the Treasury recommends the inclusion in the bill of provisions which could authorize the promulgation of regulations prescribing conditions for voluntary income tax withholding with respect to amounts paid for services *which are not "wages" as defined in section 3401* of the Code . . . This would simplify income tax payment for . . . recipients of payments under *supplemental unemployment benefit (SUB) plans*. . . .

Statements and Recommendations of the Department of the Treasury: Hearings on H.R. 13270 Before the Senate Comm. on Finance, 91st Cong. 1st Sess. 905 app. (1969) (emphasis added) (cited in Br. 32). It is plain from this testimony that the Treasury Department believed that payments under SUB plans were "not 'wages' as defined in section 3401" of the IRC.

Notwithstanding the Treasury Department's own congressional testimony to the contrary noted above, the Government now contends that the Senate

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on the state of the "present law" that gave rise to the need for, and subsequent enactment of, Section 3402(o) in 1969.

Finance Committee Report's reference to "present law" was not in fact a statement of the general status of SUB payments as non-wages within the basic meaning of the statute, but rather an "imprecise" allusion to the IRS' prior revenue rulings, which exempted certain SUB payments, meeting requirements chosen by the IRS, from the definition of "wages." Br. 35-36. This interpretation, however, fails to explain the Senate Finance Committee Report's statement that SUB payments not only are not "wages," but also are not "remuneration for services." Since there was no IRS revenue ruling opining that SUB payments were not "remuneration for services," the Report could not have been alluding thereby to a revenue ruling. Moreover, the Government offers no explanation why the Report should be deemed to refer to agency opinions, which lack the force and effect of law, as "present law."

It is apparent, instead, that by "present law" the Senate Finance Committee was referring to the statutory definition and Treasury regulations then in effect relating to SUB payments. In 1960, Congress amended the IRC to provide an income tax exemption for trusts established to make SUB payments. Pub. L. No. 86-667, 74 Stat. 534 (1960). In doing so, Congress defined SUB payments as "benefits which are paid to an employee because of his involuntary separation from the employment of the employer (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. . . ." 74 Stat.

535. This same definition remains in the statute today, and was imported almost verbatim into Section 3402(o)(2)(A). 26 U.S.C. §§ 501(c)(17)(D), 3402(o)(2)(A).

The Treasury Department's regulations adopted in 1968, shortly before the enactment of Section 3402(o), demonstrate that, under then-"present law," SUB payments were not deemed wages for any tax purposes. Those Treasury regulations required any SUB payments of $600 or more to be reported on Form 1099 – a reporting form that cannot be used to report an employee's wages for income tax withholding or FICA purposes. *See* Treas. Reg. §§ 1.501(c)(17)-2(j) (as amended in 1970) and 1.6041-2(b) (as amended in 2004); T.D. 6972, 1968-2 C.B. 222, 229 and 239; 33 Fed. Reg. 12,899 (Sept. 12, 1968). Thus, the Treasury Department implicitly recognized that SUB payments were not wages.[6]

If any SUB payments were wages (as the Government now claims), then reporting them on Form 1099 would have been impermissible. Thus, the IRS regulatory structure, which remains in effect today,

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[6] Shortly after Section 3402(o) was enacted, Treasury Regulation Sections 1.501(c)(17)-2(j) and 1.6041-2(b) were amended to provide that Form W-2 reporting would replace Form 1099 reporting for SUB payments made after December 31, 1970 that were subject to federal income tax withholding under Section 3402(o). *See* Treas. Reg. § 1.501(c)(17)-2(j); T.D. 7068, 1970-2 C.B. 252; 35 Fed. Reg. 17,328 (Nov. 11, 1970). However, this change – driven by Section 3402(o)'s requirement that SUB payments be treated "as if" they were wages – does not change the essential nature of such payments as recognized in the original 1968 Regulation.

confirms that under the "present law" at the time Section 3402(o) was enacted – which remains "present law" today – SUB payments were not and are not wages. Thus, the Government's contention that "[T]he 1969 Congress could not reasonably have believed that *all* of the payments it defined as 'supplemental unemployment compensation benefits' fell outside the existing statutory definition of 'wages'" (Br. 25) (emphasis in original), is contradicted not only by the IRC but also by the Treasury Department's own congressional testimony and regulations.

D. The Government's Insistence that "Dismissal Payments" Are Wages Is Irrelevant to the Issue Before the Court

The Government argues at length that since "dismissal payments" and other "termination-related payments" constitute wages within the statutory definition, and have historically been treated by the IRS as wages, SUB payments must also be wages. Br. 8, 16-17, 23-24, 34-36. There is a logical gap in that argument: It presumes, incorrectly, that "dismissal payments" and "SUB payments" are synonymous. Plainly, they are not.

SUB payments are defined as amounts paid pursuant to an employer plan, on account of an involuntary separation resulting directly from a reduction in force, discontinuance of a plant or operation or other similar conditions. There are no similar requirements for dismissal pay, which simply requires

an involuntary separation. Thus, for example, payments to employees fired for cause would be dismissal payments, while payments made pursuant to an employer plan to employees on layoff status are SUB payments.

The Government's attempt to conflate dismissal payments with SUB payments is directly contradicted by the Treasury regulations, which clearly recognize a distinction between the two types of payments. Treasury Regulation Section 31.3401(a)-1(b)(4) defines dismissal payments as payments made "on account of . . . involuntary separation from the service of the employer . . . regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payments." Under the regulation, dismissal payments constitute wages subject to income tax withholding. *Id.*

By contrast, Treasury Regulation Section 31.3401(a)-1(b)(14), effectuating IRC Section 3402(o), defines SUB payments in the same manner as the statute, as payments made "pursuant to a plan to which the employer is a party, because of the employee's involuntary separation . . . but only when such separation is one resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions." Treas. Reg. § 31.3401(a)-1(b)(14)(ii) (as amended in 2003). The regulation provides that SUB payments "shall be treated . . . *as if they were wages*, to the extent such benefits are includible in the gross income of such individual." *Id*. (emphasis added); Treas. Reg. § 1.6041-2(b) (as

amended in 2004). Obviously, even the IRS does not believe that dismissal payments are synonymous with SUB payments, or it would have had no need to promulgate separate regulations to address each of them.

There are good public policy reasons for treating SUB payments – which are intended to supplement unemployment compensation benefits – differently from other termination-related payments. As both the court of appeals in this case and the Federal Circuit court of appeals pointed out in *CSX Corp. v. United States*, 518 F.3d 1328 (Fed. Cir. 2008), it is important that SUB payments not be characterized as wages to avoid causing the loss of eligibility for state unemployment benefits, which "would largely defeat the purpose of supplemental unemployment benefits." *Id.* at 1335. The Government's proposed treatment of SUB payments as wages could adversely impact the underlying purpose of providing such benefits. It could also distort the statutory framework for unemployment benefits and extended unemployment benefits eligibility set up between the federal government and state governments, since 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 § 202(a)(3)(D) of the Federal-State Extended Unemployment Compensation Act of 1970, Pub. L. No. 91-373, 84 Stat. 708 (1970), as amended by Pub. L. No. 96-499, 94 Stat. 2659 (1980).

Further, as the district court below explained:

> The statutory enactments make clear that at some point a line is to be drawn on the taxation of employee financial benefits; otherwise, the benefits become the basis of the very taxes collected to return as benefits. That is, at one end of the spectrum are social security benefits and at the other end of the spectrum are wages/earnings, and at the point on the spectrum where severance payments are intended to serve the same purpose as social security benefits, i.e., support for workers in lieu of a lost ability to earn wages, the collection of social benefit taxes on the wage-replacement benefits makes little sense.

Pet. App. 48a-49a.

In short, the Government's argument that dismissal payments are wages is nothing but a red herring. The fact that *some* dismissal payments may constitute wages under the statutory definition does not mean that *any* SUB payments, as defined by the IRC, constitute wages under that definition. Rather, in accordance with the plain language of the statute, whether a payment constitutes "wages" must be determined by a factual review of whether it is "remuneration for services." 26 U.S.C. § 3401. In this case, the facts stipulated to by the parties show that the Payments made by Quality Stores were not remuneration for services.

E. This Court's Ruling in *Coffy* Strongly Supports the Conclusion that SUB Payments Are Not Wages

The only case in which this Court previously has considered the nature of SUB payments (albeit in a different context), is *Coffy*. In *Coffy*, the petitioner-employee, after being honorably discharged from the military, applied to his former employer for reinstatement. 447 U.S. at 193. Because the employer was in the process of laying off employees, the petitioner was reinstated in layoff status. *Id.* The issue that arose was the level of supplemental unemployment benefits to which the petitioner was entitled. Should he receive SUB payments based on credits for the work he actually performed, or was he entitled to SUB payments based on the credits he would have earned absent his service in the military? *Id.* The answer to that question turned on the nature of the SUB payments themselves, and whether they were intended to be a form of compensation for services rendered, or were a means of providing economic security during periods of layoff to employees who had been in the service of the employer for a significant period. *Id.* at 200.

In analyzing the nature of SUB payments, the Court held that such payments "cannot be compensation for work performed." *Id*. at 200. Rather, "they are contingent on the employee's being thrown out of work; unless the employee is laid off he will never receive SUB payments. In this sense, SUBs are analogous to severance payments: they are 'compensation

for loss of jobs.'" *Coffy*, 447 U.S. at 200 (citations omitted). "From the beginning . . . the purpose of SUB plans was to provide employment security regardless of the hours worked rather than to afford additional compensation for work actually performed." *Id.* In other words, while SUB payments are analogous to severance payments, they are not severance payments, nor are they dismissal payments. Rather, SUB payments are a separate and unique category of payment expressly defined by statute and subject to specific rules and regulations.

This Court's holding in *Coffy* that SUB payments do not constitute "compensation for work performed" is consistent with Congress' view, expressed in Section 3402(o), that SUB payments are not "wages." This holding is in no way undermined by the fact that a payment may constitute "remuneration" regardless of the "name by which [it] is designated," "the basis upon which [it] is paid," or "the medium in which [it] is paid." Br. 11 (citing Treas. Reg. §§ 31.3121(a)-1(c)-(e) (as amended in 2003)). There is no question that the definition of "remuneration" is broad. The issue is not whether SUB payments are remuneration, but whether they are remuneration for the employee's services or employment – as opposed to payments on account of the elimination of that employment.

F. This Court's Decisions in *Nierotko*, *Otte* and *Mayo* Are Distinguishable and Do Not Support a Finding that SUB Payments Are Wages

The Government contends that excluding SUB payments from the definition of wages conflicts with this Court's broad view of that term, relying primarily on the Court's decision in *Nierotko*. Br. 8, 11-12, 19. That case is distinguishable.

Nierotko involved an issue of "back pay," which is quite different, in purpose and practice, from supplemental unemployment compensation benefits. Unlike SUB payments, back pay is a form of reparation "based upon the loss of wages which the employee has suffered from the employer's wrong." *Id*. at 364. Back pay is awarded upon the employee's being reinstated in his employment, and is calculated based on the lost wages that he would have earned with the employer but for the unlawful discharge, less any net earnings during the time between discharge and reinstatement. *Id.* at 364-65. In short, "back pay," as analyzed in *Nierotko*, is simply the pay that the employee should have received earlier, paid at a later date. Had the employee received the pay when he should have, there is no question that it would have constituted "wages." The Court declined to reach a contrary conclusion simply because the payments were made retroactively.

The Government makes much of the fact that this Court, in *Nierotko*, read the phrase "service performed" broadly to include "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." Br. 18-19 (citing 327 U.S. at 365-66). In the Government's view, this phrase is proof positive that virtually any payment made by an employer to a current or former employee must be "wages."

However, this key phrase must be read in context. Just before it, the Court noted that Nierotko, whom the National Labor Relations Board had reinstated, remained legally employed during the time period for which the employer was required to pay him "back pay." *Id.* at 365. The fact that Nierotko still had "employment" that met the Social Security Act's definition was the key to the Court's determination that Nierotko's back pay constituted "wages":

> Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, he had "employment" under that Act and we need consider further only *whether under the Social Security Act its definition of employment, as "any service . . . performed . . . by an employee for his employer," covers what Nierotko did for the Ford Motor Company*.

Id. at 365 (emphasis added).

Because of the Labor Act, Nierotko's employer's attempt to terminate the employment relationship

failed; the employer-employee relationship continued after the improper discharge and Nierotko continued to have "employment" despite the fact that he was not actually doing work. In this context, it is clear that the Court's admonition that "service performed" encompasses "the entire employer-employee relationship" merely reflects the fact that, so long as Nierotko was still employed, his "employment" met the definition in the Social Security Act (which is the same as FICA's "employment" definition), and payments from his employer were his "wages," whether or not he actually worked for them.

Quality Stores did not make SUB payments to its former employees in the context of an ongoing employer-employee relationship, nor did the employees legally continue to have "employment." To the contrary, the Payments – like the payments in *Coffy* – were compensation for the *loss* of employment.

This conclusion is not altered by the Court's decision in *Otte v. United States*, 419 U.S. 43 (1974). Although the Government cites *Otte* for the proposition that "[p]ayments may be 'wages' under FICA 'even though * * * at the time of payment, the employment relationship * * * no longer exists,'" that case is completely inapposite. Br. 13 (citing 419 U.S. at 51). The issue in *Otte* was whether unpaid ordinary-course wages owed to former employees for *services performed while they were still employed* were exempt from federal income tax withholding and FICA taxes merely because the payments were made by a bankruptcy trustee instead of the employer. *Id.* at 49. This

Court held that the original character of the payments as wages was not altered by the fact that the trustee, rather than the employer, was the payor. *Otte*, 419 U.S. at 49-50. Unlike the payments for services performed in *Otte*, the SUB payments at issue here were never wages in the first place.

The Government also cites the Court's decision in *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011), in which the Court referenced the broad scope of the term wages. *Id.* at 709. *Mayo* involved stipend payments made to medical residents. There was no dispute in that case that the payments were remuneration for services performed by the residents and thus met the statutory definition of "wages." *Id.* at 708-09. Unlike the issue here, the question in *Mayo* was whether the payments came within a specified exception to "wages" – not whether they were within the definition of "wages" in the first instance. Thus, *Mayo*, like *Otte*, is irrelevant to the question of whether SUB payments are within the basic statutory definition of wages.

SUB payments, by contrast to the payments made in *Nierotko*, *Otte* and *Mayo*, are neither make-whole compensation paid in the context of a continuing employment relationship nor wages for services actually performed. *Coffy*, not *Nierotko, Otte* or *Mayo*, provides the proper framework for analyzing whether SUB payments are "wages," and *Coffy* indicates that they are not. The Government's application of *Nierotko* is seriously flawed in any case. Taken to its logical conclusion, that application posits that any

payment made by an employer to a current or former employee arises out of the employer-employee relationship and therefore constitutes wages. Yet this is clearly not the case. As the Government must and does concede, at least some SUB payments – payments made by employers to former employees – do *not* constitute wages. Br. 28.

II. The Internal Revenue Code Defines "Wages" Substantially Identically for Income Tax Withholding and FICA Taxation Purposes, and Therefore Must Be Construed *In Pari Materia*

As explained above, the statutory language, legislative history and the Treasury Department's own testimony make it clear that all payments qualifying as SUB payments, as defined in IRC Section 3402(o), are not wages for purposes of income tax withholding as defined by Section 3401(a). The parties have stipulated to facts demonstrating that all of the Quality Stores Payments fall within the statutory definition of SUB payments in Section 3402(o)(2)(A). The only issue, then, is whether SUB payments are non-wages not only for purposes of income tax withholding, but also for purposes of FICA taxation.

A. The Definitions of "Wages" Under Section 3121 (FICA Taxation) and Section 3401 (Income Tax Withholding) Are Substantially Identical

The IRC defines the term "wages" substantially identically for purposes of both FICA taxation and income tax withholding:

Section 3121(a)	**Section 3401(a)**
For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; . . .	For purposes of this chapter, the term "wages" means 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 medium other than cash; . . .

26 U.S.C. §§ 3121(a), 3401(a).

Section 3121(b), in turn, defines "employment" for FICA taxation purposes as "any service, of whatever nature, performed by an employee for the person employing him. . . . ," thereby completing the parallel between the two sections defining "wages." *See* 26 U.S.C. § 3121(b)(A). This Court recognized the identical nature of the two definitions in *Rowan*, 452 U.S. at 255 (1981) (noting that Congress chose to define the term "wages" for income tax withholding purposes

in "substantially the same language that is used in FICA. . . .").

Despite Congress' use of substantially the same language to define "wages" under both Chapter 21 and Chapter 24, the Government attempts to distinguish the two definitions. The Government notes that FICA contains many express exclusions from the definition of "wages" and suggests that, absent an express exclusion, Section 3121(a) should be read broadly to include SUB payments as wages. Br. 15. The Government points in particular to Section 3121(a)(13), which

> excludes from the statutory definition of "wages" a limited subset of termination-related payments, namely, certain types of disability payments made "upon or after the termination of an employee's employment relationship because of * * * retirement for disability." 26 U.S.C. 3121(a)(13)(A).

Br. 15. The Government argues that "[S]uch an exception would have been unnecessary if the basic definition of 'wages' did not cover termination-related payments at all." *Id.*

This argument misstates Quality Stores' position. Quality Stores does not contend that the basic definition of "wages" does not cover termination-related payments at all; it clearly does. But just as Section 3121(a)(13) shows that *some* termination-related payments are wages (otherwise there would be no need for the exception), it similarly demonstrates that

SUB payments are *not* wages. If – as the Government implies – all termination-related payments not covered by Section 3121(a)(13)'s limited exception must fit the definition of wages by default, there would have been no need for Congress to enact Section 3402(o), since SUB payments would already have been wages and thus subject not only to FICA taxation but to income tax withholding.

Furthermore, the nearly identical definition of "wages" in the federal income tax withholding provision, IRC Section 3401(a), similarly contains a long list of exclusions that does not include SUB payments. Yet the Government concedes that at least some SUB payments clearly are considered by Congress to be non-wages for income tax withholding purposes. Br. 28. Thus, whether SUB payments are among the enumerated statutory exceptions to the definition of "wages" clearly cannot be determinative of their status for either income tax withholding or FICA taxation.

B. Under *Rowan*, "Wages" Must Be Given the Same Meaning for Income Tax Withholding and FICA Taxation Purposes

The threshold question of whether a payment is "remuneration for employment" or "remuneration for services," and thus "wages," should be determined consistently for both FICA tax and income tax withholding purposes.

In *Rowan*, the Court considered whether the definition of "wages" under FICA and the Federal Unemployment Tax Act ("FUTA") included the value of meals and lodging provided to employees working on the Rowan Companies' offshore oil rigs. 452 U.S. at 249. Pursuant to the Treasury regulations in effect at the time, the IRS included the fair value of these meals and lodging in "wages" for purposes of FICA and FUTA tax withholding, but not for income tax withholding purposes. *Id.* The Treasury regulations prescribed this practice notwithstanding the fact that Congress defined the term "wages" in "substantially identical language for each of these three obligations upon employers." *Id.*

Based on the nearly identical definitions of "wages" in the three statutes, this Court concluded that "Congress intended 'wages' to mean the same thing under FICA, FUTA, and income-tax withholding." *Id.* at 255. The Court found that the statutory scheme was born out of "congressional concern for 'the interest of simplicity and ease of administration.'" *Id.* (citations omitted). The Court further found that "[i]t would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently." *Id.* at 257. Therefore, the Court held that the Treasury regulations were invalid, because they "fail[ed] to implement the statutory definition of 'wages' in a consistent or reasonable manner." *Id.* at 263.

As noted above, Congress specifically stated in the legislative history to Section 3402(o) that SUB payments "do not constitute wages or remuneration for services." S. Rep. No. 91-552 at 268 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2305-06. Under *Rowan*, the statutory definition of wages must be implemented consistently for both income tax withholding (Chapter 24) and FICA taxation (Chapter 21). Thus, payments that are not "remuneration . . . for services" (Chapter 24) cannot be "remuneration for . . . any services performed by an employee" (Chapter 21), and SUB payments are not "wages" under either chapter.

It is irrelevant to the *Rowan* analysis that Congress has chosen for policy reasons to treat SUB payments *as if they are wages* for income tax withholding purposes. Such payments are subject to income tax withholding not because they are wages, but because they are taxable income. To do otherwise would expose terminated employees to a heavy final tax burden when they file their tax returns. Congress did not, however, choose to treat SUB payments as if they are wages for FICA tax purposes, because there is no corresponding policy reason for doing so. Accordingly, such amounts are not subject to FICA taxes.

C. The Government's Arguments for Distinguishing the Definition of Wages Under FICA from the Definition of Wages for Income Tax Withholding Are Without Merit

1. Section 3402(o) Did Not Alter the Definition of "Wages" But Rather Recognized the State of the "Present Law"

Attempting to separate the definition of wages under FICA from the definition of wages for income tax withholding, despite this Court's clear holding in *Rowan*, the Government sets up a straw man, arguing that

> [i]t would be even more implausible to construe Section 3402(o) as an affirmative effort by Congress to narrow the pre-existing definition of "wages." . . . If Congress had intended either to limit Chapter 24's definition of "wages," or to eliminate FICA tax for the sorts of dismissal payments historically treated as "wages" under FICA, the language it used in Section 3402(o) would have been a remarkably oblique way of accomplishing that result.

Br. 36.

This misstates both the plain language and legislative history of Section 3402(o). In enacting Section 3402(o), Congress did not alter the pre-existing definition of "wages" but rather recognized the state of the "present law" as to that definition –

specifically, that SUB payments (as defined in Section 501(c)(17)(D)) were neither wages nor remuneration for services. S. Rep. No. 91-552 at 268 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2305-06. As both Congress and the Treasury Department recognized, payments made pursuant to an employer plan to employees involuntarily terminated due to reductions in force or plant closings were *already* outside of the definition of wages. Thus, there was no need to narrow that definition. The only thing that Congress attempted to accomplish through the passage of Section 3402(o) was the amelioration of any surprise tax burden caused by the pre-existing fact that SUB payments, though not wages subject to withholding, were nonetheless taxable income.

Still arguing against the false premise that Section 3402(o) is being used to try to narrow the definition of wages, the Government contends that

> [b]y its terms, Section 3402(o) is irrelevant to the FICA definitional provisions at issue in this case. The prefatory language of Section 3402(o)(1) states that the rules therein – including the rule that "supplemental unemployment compensation benefits" shall be treated as "wages" for purposes of income-tax withholding – apply "(f)or purposes of this chapter (and so much of subtitle F as relates to this chapter)." Section 3402(o)(1) thus applies only to Chapter 24 (income-tax withholding) and those portions of Subtitle F (matters of procedure and administration) that relate to Chapter 24. FICA, by contrast,

> is codified at Chapter 21 of the Internal Revenue Code.

Br. 22-23.

The Government's argument, once again, is wide of the mark. Section 3402(o)'s requirement that SUB payments be treated as if they are wages is limited to Chapter 24 simply because there is no need to treat them as if they were wages for any purpose other than income tax withholding. Accordingly, Congress explicitly established that SUB payments should only be treated as if they were wages for the limited purpose of ensuring that sufficient tax is withheld from non-wage taxable income. This is bolstered by Section 3402(o)'s directive that SUB payments be treated as "a payment of wages by an employer to an employee for a payroll period." As the Government admits, "payroll period" is relevant to the calculation of income tax to be withheld, but has no analog in FICA. Br. 24-25. It is thus clear that SUB payments are to be treated as wages *only* for purposes of income tax withholding. For all other purposes, including FICA, SUB payments continue to be treated as the non-wages that they are.

The Government has identified no basis on which the Court should ignore the longstanding precedent it set in *Rowan* and instead construe wages differently for income tax withholding and FICA taxation purposes. Before the court of appeals and the lower courts in this case, as well as before the Federal Circuit court of appeals in *CSX* (518 F.3d at 1343),

the Government argued that this Court's holding in *Rowan* was legislatively overruled by the so-called "decoupling amendment" contained in the Social Security Amendments of 1983, Pub. L. No. 98-21, § 327(b)(1), 97 Stat. 65 (1983) (the "Decoupling Amendment"). The Decoupling Amendment revised the definitional section of FICA, § 3121(a), to provide that

> [n]othing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter [Chapter 21 relating to FICA taxes].

26 U.S.C. § 3121(a).

The Government appears to have abandoned the argument that the Decoupling Amendment overruled *Rowan*, and for good reason. The argument was rejected by both the Sixth Circuit and the Federal Circuit courts of appeals (*see* Pet. App. 14a-17a; *CSX,* 518 F.3d at 1344), and suffers from at least two fatal flaws. First, the Decoupling Amendment provides for varying treatment of exclusions from wages for purposes of FICA and income tax withholding only through the promulgation of regulations. *Id.*; *see also CSX*, 518 F.3d at 1343-44. It says nothing at all about the threshold question addressed by *Rowan* – that is, whether a particular payment is wages for FICA tax or income tax purposes in the first place. *See CSX*, 518 F.3d at 1344 (noting that the language of the

Decoupling Amendment "addresses the construction of the regulations rather than chapter 24 itself; . . . it does not state that the term 'wages' in section 3401 will be defined independently from the term 'wages' in section 3121").

Second, the Decoupling Amendment, by its own terms, provides for the *exclusion* of payments from wages through the promulgation of regulations. It does not – at least on its face – provide for the *inclusion* of non-wage payments in the definition of wages. Thus, if a payment (such as a SUB payment) does not fall within the definition of wages for income tax withholding purposes, it is not at all clear that the Treasury Department could, through regulations, include such payments as wages for FICA purposes. In any event, it is undisputed that the Treasury Department has not issued such a regulation.

2. The Government's Position that SUB Payments Must Meet the Revenue Rulings' Definition Is Wrong

The parties before the Court agree on one thing: At least some SUB payments are not wages within the statutory definition. The Government concedes that

> Section 3402(*o*) does appear to reflect Congress's belief that *some* of the payments encompassed by the statutory definition of 'supplemental unemployment benefits' would not otherwise be viewed as 'wages' for

> purposes of income-tax withholding. The provision would have served no useful purpose if *all* such payments were already subject to the income-tax withholding that the provision requires.

Br. 28 (emphasis in original).

After that point, however, the parties diverge. Quality Stores' position – consistent with the "present law" described in the legislative history of Section 3402(o) – is that *no* SUB payments, as defined by Congress, are wages for purposes of income tax withholding or, pursuant to *Rowan*, for FICA taxation. The Government's argument to the contrary is underpinned by the implicit (and incorrect) presumption that this Court must defer to the opinions expressed in the IRS' revenue rulings.

The Government contends that the statutory definition of SUB payments enacted by Congress encompasses both wage and non-wage payments, and that only those payments meeting the IRS' current revenue ruling on SUB payments (or such conflicting rulings as the IRS may issue in the future) are non-wages for FICA purposes. Br. 17-18 ("A 1990 IRS Revenue Ruling concludes that FICA tax applies to severance payments unless, *inter alia*, the payments are 'linked to the receipt of state unemployment compensation.' Rev. Rul. 90-72, 1990-2 C.B. 211, 211. . . ."); *id.* at 28 ("The provision's history suggests that the payments Congress had in mind were the subset of 'supplemental unemployment compensation benefits' that the IRS had already determined, or

might later determine, to be 'income' but not 'wages.'").

Thus, the real question before the Court is which authority controls the determination whether a SUB payment constitutes "wages" – the statutory definition or the administrative opinion expressed by the IRS. As set forth in greater detail below, the statute must prevail.

(a) Revenue Rulings Lack the Force and Effect of Law

Revenue rulings are no more than the opinions of the IRS, and lack the force and effect of law. *Dixon v. United States,* 381 U.S. 68, 73 (1965) (stating that "the [Internal Revenue] Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law.").

As noted above, the IRS itself concedes that revenue rulings lack the force and effect of Treasury regulations. *See, e.g.,* Rev. Proc. 89-14, 1989-1 C.B. 814 (1989) ("Revenue rulings published in the Bulletin do not have the force and effect of Treasury Department regulations. . . ."). As discussed below, the fact that the revenue rulings lack the force of law determines the framework under which those rulings are evaluated by the Court.

(b) Revenue Rulings Are Not Entitled to *Chevron* Deference

The Court has established at least two distinct frameworks for evaluating agency guidance. The more deferential framework is outlined by the Court's decisions in *Chevron,* 467 U.S. 837 and *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Chevron (at least ostensibly) provides a two-step rule for determining the judicial deference to be accorded administrative interpretations. First, the Court considers whether Congress "has directly spoken to the precise question at issue." 467 U.S. at 842. If not, the Court then considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In *Mead*, the Court held that *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id*. at 226-27.

Conversely, agency opinions and other pronouncements lacking the force of law are not entitled to any special deference under *Chevron* but rather are evaluated under the older power-to-persuade regime of *Skidmore*, discussed below. *Id.; see also Christensen v. Harris County,* 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference. . . .").

There is no question that the revenue rulings on which the Government relies are "opinions" issued without notice and comment procedures. They lack the force of law, and thus are not entitled to judicial deference. This is confirmed by the fact that the Government itself has not claimed any entitlement to judicial deference under *Chevron*.

(c) These Revenue Rulings Lack Persuasive Power under *Skidmore*

Since the revenue rulings on which the Government relies are not entitled to judicial deference under *Chevron*, they must be evaluated based on their "power to persuade" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Skidmore*, the Court explained that the weight given to an administrative interpretation of a statute "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140. The IRS' revenue rulings are neither consistent nor well-reasoned. As explained below, the IRS has twice changed its mind about whether a SUB payment must be linked to state unemployment benefits, and twice changed its mind about whether a SUB payment may be received in a lump sum. *See* Rev. Rul. 56-249, 1956-1 C.B. 488; Rev. Rul. 59-227, 1959-2 C.B. 13; Rev. Rul. 77-347, 1977-2 C.B. 362; Rev. Rul. 90-72, 1990-2 C.B. 211.

Moreover, the limited reasoning in Rev. Rul. 90-72, the revenue ruling on which the Government primarily relies, is superficial and conclusory. It fails to explain the basis for the position that SUB payments must be tied to state unemployment compensation benefits in order to be excluded from taxable wages for FICA purposes. Indeed, the IRS has never offered a cogent explanation for that position in any of its revenue rulings or other pronouncements. Thus, under *Skidmore*, the interpretation set forth in Rev. Rul. 90-72 is entitled to no special weight.

(i) The IRS Has Repeatedly Changed Its Position in Its Revenue Rulings as to the Requirements for SUB Payments

The inconsistent and confusing history of the IRS' attempts to define SUB payments for FICA tax purposes began with the issuance of Rev. Rul. 56-249, 1956-1 C.B. 488. In that ruling, which, of course, was issued prior to the enactment of IRC Section 3402(o), the IRS opined that "benefits paid to former employees of M Company under the terms of the supplemental unemployment benefit plan do not constitute 'wages' for" FICA tax and income tax withholding purposes.[7] 1956-1 C.B. at 492. The ruling set forth

[7] The IRS noted, however, that such amounts were taxable income to the former employees. 1956-1 C.B. at 492.

eight distinct conditions that the IRS regarded as significant in determining that the SUB payments were not wages, including, among others, (i) that the benefits were linked to the receipt of state unemployment benefits; (ii) that the benefits were based in part on the amount of straight-time weekly pay received by the employee while employed; (iii) that the benefits were not attributable to the rendering of particular services by the recipient during the period of his employment; and (iv) that the benefits were paid weekly and not in a lump sum. 1956-1 C.B. at 492.

Three years after its first revenue ruling on SUB payments, the IRS decided that whether a SUB payment was paid periodically or in a lump sum was not critical, after all, in excluding it from FICA taxation. In Rev. Rul. 59-227, the IRS applied the principles of Rev. Rul. 56-249 to plans that made lump-sum payments to employees and found that such payments also constituted non-wage SUB payments. 1959-2 C.B. 13.

After the enactment of Section 3402(o) – in which Congress declined to incorporate the majority of the IRS' complex criteria for non-wage SUB payments – the IRS changed its mind about whether payments needed to be tied to receipt of state unemployment benefits to qualify as non-wage SUB payments. In Rev. Rul. 77-347, the IRS opined that – contrary to its position in Rev. Rul. 56-249 – "the fact that benefits under the plan are *not* tied to the State's unemployment benefits is *not* a material or controlling factor." 1977-2 C.B. 362, 363 (emphasis added). Accordingly,

the IRS advised that separation-related payments that were not tied to state unemployment benefits nonetheless qualified as non-wage SUB payments for FICA taxation purposes. Rev. Rul. 77-347 expressly cites IRC Section 3402(o)'s definition of SUB payments.

In Rev. Rul. 90-72, 1990-2 C.B. 211, the IRS performed yet another about-face and proclaimed that

> [t]he portion of Rev. Rul. 77-347 concluding that benefits do not have to be linked to state unemployment compensation in order to be excluded from the definition of wages for FICA . . . tax purposes is inconsistent with the underlying premises for the exclusion and is therefore hereby revoked.

1990-2 C.B. at 212. The IRS further changed its mind (again) about whether SUB payments could be received in a lump sum, stating that lump-sum payments would no longer be excludable from wages. *Id.*

This Court has declined to give any special weight to administrative interpretations where those interpretations conflict with earlier pronouncements of the agency. *Gilbert*, 429 U.S. at 142-43. The fact that the IRS has changed its mind not once, but twice on what it contends are two critical elements for SUB payment eligibility robs the revenue rulings of any persuasive force they might have possessed. *Skidmore,* 323 U.S. at 140 (whether judicial deference should be given to an agency ruling depends, in part,

on the ruling's "consistency with earlier and later pronouncements").

Furthermore, the Government's arguments before this Court are inconsistent with the revenue rulings on which it relies. The Government argues that the Quality Stores Payments cannot qualify as non-wage SUB payments because they were based on the length of the employee's service with the companies and the level of the employee's regular compensation. Br. 8, 19. Yet Rev. Rul. 56-249 provides that benefits based in part on the duration of an employee's service with the employer and the level of the employee's regular compensation may be characterized as non-wage SUB payments. 1956-1 C.B. at 492. Similarly, Rev. Rul. 90-72 included the same factors for non-wage SUB payment eligibility articulated in Rev. Rul. 56-249, noting that "the amount of weekly benefits payable is based [in part] upon . . . the amount of straight-time weekly pay," and that "the duration of the benefits is affected by . . . the employee's seniority." 1990-2 C.B. at 212.

The Government neither acknowledges nor attempts to explain these inconsistencies. Thus, the fact that the Quality Stores Payments were based on the length of an employee's service and level of regular compensation is not inconsistent with the conclusion that the payments were SUB payments and not wages.

(ii) The Revenue Rulings Are Not Well-Reasoned and Articulate No Sound Basis for Departing from the Plain Language of the Statute

When Congress enacted statutory provisions defining SUB payments in 1960 and again in 1969, it presumably was aware of the IRS' revenue rulings regarding SUB payments, yet did not adopt the revenue rulings' additional factors and limitations. Instead, Congress chose a simple and straightforward definition: SUB payments 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 . . . resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions." 26 U.S.C. § 3402(o); *see also* 26 U.S.C. § 501(c)(17)(D). The IRS' revenue rulings seek to depart from the plain language of the statutes by layering on numerous additional requirements that SUB payments must meet, none of which Congress has ever adopted.

The IRS' revenue rulings can have no persuasive force without a credible explanation of their departure from the statutory definition of SUB payments. Yet the revenue rulings conspicuously fail to articulate their own reasoning. For example, Rev. Rule 90-72 mandates that benefits must be tied to state unemployment compensation benefits to be excluded from taxable wages, but offers no explanation why that should be the case. Nor has the Government in

its arguments to this Court attempted to provide such an explanation. In light of the fact that the only power the revenue rulings have before this Court is the power to persuade, the Government's failure even to attempt to defend the correctness of the revenue rulings on which it relies is telling.

The Federal Circuit court of appeals in *CSX* did not address whether the revenue rulings upon which the Government relies are substantively correct or whether there is legal authority for revenue rulings to determine the FICA treatment of particular benefit payments. Instead, the Federal Circuit simply accepted the Government's argument that because the appellees in *CSX* had not asserted that the benefit payments at issue met the requirements of the revenue rulings, the payments were taxable for FICA purposes.

When the proper analysis under *Skidmore* is performed, however, it is clear that the revenue rulings are not entitled to any weight. As a result, there is no basis for departing from the plain language of Section 3402(o), which sets forth the definition of SUB payments actually drafted by Congress, and no basis for overruling this Court's decision in *Rowan*, which provides for the consistent construction of "wages" across chapters of the Internal Revenue Code.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals that the benefits paid by Quality Stores (i) constituted supplemental unemployment compensation benefits as defined in Section 3402(o) of the Internal Revenue Code, and (ii) are exempt from Federal Insurance Contributions Act taxes is correct and should be affirmed.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

1. 26 U.S.C. Section 501(c)(17)(D) provides:

The term "supplemental unemployment compensation benefits" means only –

(i) benefits which are paid to an employee because of his involuntary separation from the employment of the employer (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, and

(ii) sick and accident benefits subordinate to the benefits described in clause (i).

2. Treas. Reg. § 1.501(c)(17)-2(j) was amended by T.D. 6972, 1968-2 C.B. 222; 33 Fed. Reg. 12,899 (Sept. 12, 1968), to read in full as follows:

Required Records and Returns. Every trust described in section 501(c)(17) must maintain records indicating the amount of separation benefits and sick and accident benefits which have been provided to each employee. If a plan is financed, in whole or in part, by employee contributions to the trust, the trust must maintain records indicating the amount of each employee's total contributions allocable to separation benefits. In addition, every trust described in section 501(c)(17) which makes one or more payments totaling $600 or more in one year to an individual must file an annual information return in the manner described in paragraph (b)(1) of § 1.6041-2.

3. Treas. Reg. § 1.501(c)(17)-2(j) was further amended by T.D. 7068, 1970-2 C.B. 252; 35 Fed. Reg. 17,328 (Nov. 11, 1970), to read in full as follows (and it currently provides):

Required Records and Returns. Every trust described in section 501(c)(17) must maintain records indicating the amount of separation benefits and sick and accident benefits which have been provided to each employee. If a plan is financed, in whole or in part, by employee contributions to the trust, the trust must maintain records indicating the amount of each employee's total contributions allocable to separation benefits. In addition, every trust described in section 501(c)(17) which makes one or more payments totaling $600 or more in 1 year to an individual must file an annual information return in the manner described in paragraph (b)(1) of § 1.6041-2. However, if the payments from such trust are subject to income tax withholding under section 3402(o) and the regulations thereunder, the trust must file, in lieu of such annual information return, the returns of income tax withheld from wages required by section 6011 and the regulations thereunder. In such circumstances, the trust must also furnish the statements to the recipients of trust distributions required by section 6051 and the regulations thereunder.

4. Treas. Reg. § 1.6041-2(b)(1) provides:

Distributions under employees' trust or plan. (1) Amounts which are: (i) Distributed or made available to a beneficiary, and to which section 402 (relating to employees' trusts) or section 403 (relating

to employee annuity plans) applies, or (ii) Described in section 72(m)(3)(B), shall be reported on Forms 1096 and 1099 to the extent such amounts are includible in the gross income of such beneficiary if the amounts so includible aggregate $600 or more in any calendar year. In addition, every trust described in section 501(c)(17) which makes one or more payments (including separation and sick and accident benefits) totaling $600 or more in 1 year to an individual must file an annual information return on Form 1096, accompanied by a statement on Form 1099, for each such individual. Payments made by an employer or a person other than the trustee of the trust should not be considered in determining whether the $600 minimum has been paid by the trustee. The provisions of this subparagraph shall not be applicable to payments of supplemental unemployment compensation benefits made after December 31, 1970, which are treated as if they were wages for purposes of section 3401(a). Such amounts are required to be reported on Forms W-3 and W-2. See paragraph (b)(14) of § 31.3401(a)-1 of this chapter (Employment Tax Regulations).

5. Treas. Reg. § 1.6041-2(b)(1) was amended by T.D. 6972, 1968-2 C.B. 222; 33 Fed. Reg. 12,899 (Sept. 12, 1968), to read in full as follows:

Distributions under employees' trust or under supplemental unemployment benefit trust. (1) Amounts which are distributed or made available to a beneficiary, and to which section 402 (relating to employees' trusts) or section 403 (relating to

employee annuity plans) applies, shall be reported on Forms 1099 and 1096 to the extent such amounts are includible in the gross income of such beneficiary when the amounts so includible are $600 or more in any calendar year. In addition, every trust described in section 501(c)(17) which makes one or more payments (including separation and sick and accident benefits) totaling $600 or more in 1 year to an individual must file an annual information return on Form 1096, accompanied by a statement on Form 1099, for each such individual. Payments made by an employer or a person other than the trustee of the trust should not be considered in determining whether the $600 minimum has been paid by the trustee.

6. Treas. Reg. § 1.6041-2(b)(1) was further amended by T.D. 7068, 1970-2 C.B. 252; 35 Fed. Reg. 17,328 (Nov. 11, 1970), to read in full as follows (and it currently provides):

Distributions under employees' trust or under supplemental unemployment benefit trust. (1) Amounts which are distributed or made available to a beneficiary, and to which section 402 (relating to employees' trusts) or section 403 (relating to employee annuity plans) applies, shall be reported on Forms 1099 and 1096 to the extent such amounts are includible in the gross income of such beneficiary when the amounts so includible are $600 or more in any calendar year. In addition, every trust described in section 501(c)(17) which makes one or more payments (including separation and sick and accident benefits)

totaling $600 or more in 1 year to an individual must file an annual information return on Form 1096, accompanied by a statement on Form 1099, for each such individual. Payments made by an employer or a person other than the trustee of the trust should not be considered in determining whether the $600 minimum has been paid by the trustee. The provisions of this subparagraph shall not be applicable to payments of supplemental unemployment compensation benefits made after December 31, 1970, which are treated as if they were wages for purposes of section 3401(a). Such amounts are required to be reported on Form W-2. See paragraph (b)(14) of § 31.3401 (a)-1 of this chapter (Employment Tax Regulations).

7. Treas. Reg. §§ 31.3401(a)-1(b)(14)(i) and (ii) provide:

Supplemental unemployment compensation benefits. (i) Supplemental unemployment compensation benefits paid to an individual after December 31, 1970, shall be treated (for purposes of the provisions of Subparts E, F, and G of this part which relate to withholding of income tax) as if they were wages, to the extent such benefits are includible in the gross income of such individual.

(ii) For purposes of this subparagraph, the term "supplemental unemployment compensation benefits" means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of the employee's involuntary separation from the employment of the employer, whether or not such

separation is temporary, but only when such separation is one resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions.