No. 00-203

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLEVELAND INDIANS BASEBALL COMPANY,
A LIMITED PARTNERSHIP

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

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I. TAXES UNDER FICA AND FUTA ARE BASED ON "WAGES PAID DURING" A CALENDAR YEAR

1. The question presented in this case is whether, for purposes of the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.*, and the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*, back pay is taxed in the amounts applicable to the year in which it was actually paid or instead to the year or years in which it should have been paid but was not. Five distinct statutory provisions govern that question. Two of them address the rate of FICA tax, and they each provide that that rate is equal to a specified percentage of "wages paid during" a particular year. 26 U.S.C. 3111(a) and (b). Two others define the wage base for FICA social security and FUTA taxes, providing that the term "wages" does not include an amount greater than the wage base for a given year that "is *paid* to [the employee] by [the] employer *during* such calendar year." 26 U.S.C. 3121(a)(1) (emphasis added); 26 U.S.C. 3306(b)(1) (emphasis added). A fifth provision addresses the rate of FUTA tax, and it provides that the rate is "equal to [specified percentages] of the total wages * * * *paid* by [the employer] *during* the calendar year with respect to employment." 26 U.S.C. 3301 (emphasis added).[1]

In all five of those provisions, Congress based the amount of FICA and FUTA taxes on the wages "paid during" a calendar year. It did not base the tax on wages that would or should or could have been paid during a calendar year, had circumstances been other than what they were. Accordingly, wages that are actually paid to a given employee

[1] Two other provisions address the FICA tax levied on employees. See 26 U.S.C. 3101(a)-(b). They are framed in terms of the "wages received" instead of the "wages paid." As respondent agrees (Br. 10 n.8), "[i]n general, wages are received by an employee at the time that they are paid by the employer." 26 C.F.R. 31.3121(a)-2(a). See U.S. Br. 19 n.11.

during a given year are taxed in accordance with the FICA and FUTA provisions applicable to that employee's wages for that year.

2. The history of the FICA and FUTA provisions at issue demonstrates that Congress did not choose the "wages paid" rule in an effort to achieve an abstract ideal of fairness (though Congress's choice is a fair one) or to enhance federal revenues, but with the specific intent to minimize confusion and ease calculation of the taxes for employers, employees, and the IRS.[2] See generally U.S. Br. 13-19, 21-24. Under the original Social Security Act, the amount of tax—not yet labeled "FICA" and "FUTA"—was set based on the year the wages were earned, not the year in which the wages were paid. See § 804, 49 Stat. 637 (social security tax equal to a percentage of "wages * * * paid * * * [w]ith respect to employment during [specified] calendar years"); accord § 801, 49 Stat. 636 (same for "wages * * * received" by employee); § 811, 49 Stat. 639 (social security tax wage base defined to exclude amounts in excess of $3000 paid to an employee in a year "with respect to employment during such calendar year"). Indeed, the unemployment tax provision (the ancestor of the current FUTA provision) was unambiguous on this point, requiring an employer to pay "for each calendar year" a tax on a percentage of wages "payable by him (*regardless of the time of payment*) with respect to employment * * * during such calendar year." § 901, 49 Stat. 639 (emphasis added).[3]

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[2] Although in this case the "wages * * * paid" rule apparently results in higher taxes, that will not always be the case. For example, a lump-sum back-pay award covering multiple years of employment may exceed the FICA and FUTA wage bases and therefore not be taxed under FICA and FUTA in whole or in part, while allocating that same award over a prior period of years may result in payment of FICA and FUTA taxes on the whole amount. See U.S. Br. 29.

[3] The original unemployment tax did not include a wage base provision. When a wage base provision was added in 1939, however, it was virtually identical to the "with respect to employment during such calen-

In 1939, Congress amended the tax rate provisions (in the newly christened FICA and FUTA statutes now moved from Title 42 to to Title 26 of the United States Code, see 26 U.S.C. 1400 *et seq.*, 1600 *et seq.* (1940)) to replace the "with respect to employment in such year" rule with a simpler "wages paid during" a particular year rule. See § 604, 53 Stat. 1383 (FICA tax on employers), § 608, 53 Stat. 1387 (FUTA); see also § 601, 53 Stat. 1381-1382 (FICA tax on employees). In 1946, Congress completed the job by amending the FICA and FUTA wage base definitions to replace the "with respect to employment in such year" provisions with the simpler "wages paid during" a calendar year. See §§ 412(a) (FICA), 412(b) (FUTA), 60 Stat. 989.

The committee reports accompanying the 1939 and 1946 amendments explained the purposes for the changes. The reports emphasized that the original social security tax schemes set the amount of tax based on "the time of the performance of the services for which the wages are paid." H.R. Rep. No. 728, 76th Cong., 1st Sess. 57 (1939) (FICA rate of tax); see also *id.* at 62 (FUTA rate of tax); S. Rep. No. 734, 76th Cong., 1st Sess. 70-71, 75-76 (1939) (same); S. Rep. No. 1862, 79th Cong., 2d Sess. 35-36 (1946) (FICA and FUTA wage base); H.R. Rep. No. 2447, 79th Cong., 2d Sess. 35 (1946). That formula "unnecessarily complicate[d] the making of returns and the collection of the taxes" and resulted in "confusion." H.R. Rep. No. 728, at 57, 58. The 1939 Senate report explained that "[t]he attendant difficulties and confusion cause a burden on employers and administrative authorities alike," while "[t]he placing of this tax on the 'wages paid' basis will relieve this situation." S. Rep. No. 734, at 76. The 1946 Senate report explained that, while formerly taxes had to be paid on remuneration "irrespective of the year of payment," the amendments "constitute as the yardstick the

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dar year" provision defining the social security wage base. See § 614, 53 Stat. 1392-1393.

amount paid during the calendar year * * *, without regard to the year in which the employment occurred." S. Rep. No. 1862, at 35; H.R. Rep. No. 2447, at 35 (same).

3. The "wages paid" rule achieves Congress's purposes. There is very little basis for dispute regarding when wages are "paid" for purposes of FICA or FUTA. The "wages paid" rule is identical to the general rule applicable in calculating income taxes, see U.S. Br. 30, thus easing the confusion for the IRS, employers, and employees that would ensue if a given wage payment were taxable for income tax purposes in one year and for FICA and FUTA purposes in another year.[4] The "wages paid" rule provides a simple, straightforward rule for the routine task of calculating the often relatively small FICA and FUTA taxes.

II. THE "SHOULD HAVE BEEN PAID" RULE WOULD REINSTITUTE THE DIFFICULTIES CONGRESS HAD ELIMINATED BY 1946

1. Respondent argues that wages should be "deemed 'paid' at the time they should have been paid" (Br. 9) under FICA and FUTA. Respondent contends (Br. 26-27) that its "relation-back principle" does not contravene Congress's intent, because it "says nothing about the time when services are performed, or when wages are 'payable'"—the touchstones for FICA and FUTA taxation that Congress expressly repudiated when it amended the relevant statutes in 1939 and 1946.

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[4] Respondent is correct (Br. 30 n.18) that in 1943 Congress amended the Internal Revenue Code to authorize allocation of back pay to earlier periods for income tax purposes. As respondent notes, that authority was limited to back pay that exceeded 15 % of an employee's income. Moreover, while that provision was a "not * * * greater than" provision that necessarily resulted only in lowering a taxpayer's taxes, the "should have been paid" rule advocated by respondent may equally likely raise the total taxes paid by employees who receive wages at times other than when they "should have been paid." See note 2, *supra*. In any event, Congress eliminated the back pay allocation rule in 1964. § 232(a), 78 Stat. 107.

2. Respondent's "should have been paid" rule, however, would reinstate the "difficulties and confusion" that Congress remedied through the 1939 and 1946 amendments—and worse. The time when wages "should have been paid" is precisely the time when wages are "payable"—the standard under the original unemployment tax provisions of the Social Security Act that Congress replaced with the current "wages paid" rule. See p. 2, *supra*. Moreover, in most ordinary employment situations, the employer pays the employee for services performed during a particular period of time. Therefore, to determine when wages "should have been paid," it is ordinarily necessary, first, to determine the date of the services for which the wages are to be paid, and, second, to determine the date on which wages for those services should be paid. Only after going through both steps can respondent's rule—based on when, "in the ordinary course," Resp. Br. 36, 38, wages "should have been paid"—be applied.

The first of these inquiries—determining the date when the services were (or should have been) performed—requires the employer, employee, and the IRS to determine the period of employment with respect to which wages were paid before the tax rates and wage base can be determined. That is precisely the inquiry that Congress rejected when it amended FICA and FUTA in 1939 and 1946.

After identifying the time period when the employee's services were provided, the next step is to identify when the wages for that time period would have been paid "in the ordinary course." Resp. Br. 36, 38. There is little precedent for such a determination, because even the pre-1939 and pre-1946 statutes did not require that additional step. Employment relationships in our society vary widely, especially for seasonal, casual, or part-time workers, or (as the committee report on the 1939 amendments noted) employees compensated through bonuses or "a percentage of profits, or * * * future royalties." S. Rep. No. 734, at 75. It can therefore be

predicted that determining the date when wages should have been paid will be a fruitful source of conflict and litigation. In our self-reporting system, respondent's rule also offers an avenue for employers and employees to attempt to claim whatever application of the "should have been paid" rule will benefit them in a given case.[5]

3. In the back pay context, the "should have been paid" rule could generate disputes and uncertainty even in litigated or arbitrated cases, since a trier of fact or arbitrator often need not settle disputes concerning the precise period of employment for which back pay is awarded or the date on which back pay would have been paid "in the ordinary course." Resp. Br. 36, 38. In cases that are resolved by settlement, the parties would have an incentive to characterize the period covered by a back pay award in accordance with their own interests in minimizing taxes, rather than addressing when the back pay genuinely "should have been paid."

The confusion engendered by the "should have been paid" rule would not be limited to the increasingly common back-pay context. Respondent steadfastly rejects (Br. 44 n.23) any limitation of the "should have been paid" rule to *statutory*—as opposed to tort-based or contractual—back-pay claims. Moreover, if the time when wages are "paid" depends on when they "should have been paid" in back pay cases, the time when wages are "paid" should logically depend on when they "should have been paid" in other situations as well. Respondent's arguments therefore would pre-

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[5] There is no reason why employer and employee would necessarily agree on the time when particular wages "should have been paid." In a given case an employee may have an interest in allocating FICA employee taxes to one year (when, for example, the employee has paid the maximum FICA social security taxes by reason of having several employers), while the employer would prefer to allocate the payments to another year (when, perhaps, other affected employees are likely to have exceeded the FICA and FUTA ceilings). Under respondent's rule, the IRS would have to reconcile the conflicting positions.

sumably apply whenever an employee is not paid on the date when, "in the ordinary course," Br. 36, 38, the employee would have been paid. That would encompass "front pay" claims, in which an employee seeks a money recovery for *future* work not performed. See, *e.g.*, *Gerbec* v. *United States*, 164 F.3d 1015, 1020-1023 (6th Cir. 1999) (noting circuit conflict in characterizing front pay settlement proceeds). It would also encompass any other case in which, for any reason or no reason, an employer pays wages on a date that is not (or is asserted not to be) the date on which the wages "should have been paid." An employer who decides to pay a bonus that has no set "ordinary course" date, or to make a partial payment to a commissioned salesperson pending a year-end calculation of commission due, would have to determine when the wages "should have been paid" before determining the amount of tax due. In all such cases, respondent's rule would breed disputes and litigation.

4. It made eminent sense for Congress to adopt the easily administrable "wages paid" rule in the context of the FICA and FUTA statutes. FICA and FUTA taxes are ordinarily relatively modest, on a per-employee basis; FUTA taxes, for example, are ordinarily limited to $56 per employee per year. See 26 U.S.C. 3301 (6.2% FUTA basic tax rate), 3302(b)-(c) (5.4% credit for employers who make timely contributions to state unemployment fund), 3306(b)(1) ($7000 wage base). Congress therefore embraced the values of certainty and stability offered by the "wages paid" rule and eschewed the high transaction costs and uncertainty of the rule originally embodied in the FICA and FUTA. It follows *a fortiori* that Congress eschewed the even more complex "should have been paid" rule that respondent espouses.

III. THE *NIEROTKO* ALLOCATION RULE DOES NOT APPLY IN THE TAX SETTING

Respondent argues (Br. 16) that the question presented in this case was decided by this Court in *Social Sec. Bd.* v.

Nierotko, 327 U.S. 358 (1946). The Court in *Nierotko*, however, saw the question before it as having to do solely with benefits, did not address or discuss the provisions of the FICA and FUTA tax statutes at issue here, and even as to the benefits issue applied an earlier version of the statute that has now been superseded. *Nierotko* accordingly provides no support for respondent's rule.

1. The primary question at issue in *Nierotko*—indeed, the only question presented in the petition for certiorari—was whether back pay is "wages" for purposes of determining an employee's entitlement to social security benefits. The Court held that back pay does constitute "wages" for that purpose, relying primarily on the fact that the statutory definition of "employment" as "any service . . . performed . . . by an employee for his employer" is one that "import[s] breadth of coverage" and "means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." 327 U.S. at 365-366 (quoting § 811, 49 Stat. 639).

After an extensive discussion of that issue, the Court turned in the final two paragraphs of its opinion to one final argument that had been advanced by the government. The Court explained that "petitioner argues," 327 U.S. at 370, that the Act's requirement that wages must be allocated to particular quarters for purposes of determining eligibility under Section 209(g) of the 1939 Amendments

> tends to show that 'back pay' cannot be wages because the Amendments of 1939 use 'quarters' as the basis for eligibility as well as the measure of benefits and require 'wages' to be 'paid' in certain 'quarters.'
>
> If, as we have held above, 'back pay' is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which

> the Board will be called upon to solve but we do not believe they are insuperable.

Ibid. (footnote omitted). Respondent argues that the same allocation rule should be applied to the FICA and FUTA tax provisions.

2. Respondent's contention is mistaken.

a. Initially, the *Nierotko* case presented the question whether the claimant in that case was eligible for social security benefits; the case had nothing to do with taxes. The passage quoted above refers only to "eligibility" and the "measure of benefits", not to any tax issue. See also 327 U.S. at 361 (explaining that "[w]ages are the basis for the administration of federal old age *benefits*" and time periods "may be crucial on *eligibility* under either the original act or the Amendments of 1939") (emphasis added). The court of appeals had decided the case in the claimant's favor based largely "upon consideration of the great humanitarian purpose of the Social Security Act in all of its aspects." *Nierotko* v. *Social Sec. Bd.*, 149 F.2d 273, 274 (6th Cir. 1945). This Court similarly decided the case on the ground that, "with the purpose of the Social Security Act in mind," the Act's terms "import breadth of coverage." 327 U.S. at 365. As our opening brief explains (at 28-29), that rationale has nothing whatever to do with the considerations of administrative ease and dispute avoidance that motivated Congress to amend the FICA and FUTA tax provisions. Accordingly, it ought not govern interpretation of those tax provisions.

Indeed, while the Court's opinion in *Nierotko* cited and quoted extensively from benefits provisions of the Social Security Act, it did not discuss or quote any tax provision. The closest the Court came was to quote the Act's definition of "wages" in Section 210(a)—a provision applicable both to the tax and benefits provisions of the 1935 Act. See 327 U.S.

at 362.[6] And even there, the Court omitted from its quotation of the Section 210(a) definition of "wages" the portion that included the "with respect to employment during such calendar year" language defining the wage base that was of special importance for tax purposes under the original Act.

The Court in *Nierotko* obviously believed that it could decide the benefits questions before it without regard to the tax provisions at issue here. Cf. Resp. Br. 20 ("[T]he wage ceiling was not at issue in *Nierotko*."). Having analyzed the benefits issue in *Nierotko* without consideration of the language and history of the tax provisions, this Court ought not now assume, as respondent suggests, that the *Nierotko* holding must after all be extended to apply to taxes as well. To do so would frustrate Congress's expressed intent, embodied in the 1939 and 1946 amendments and reiterated in their legislative history, that an easy-to-administer "wages paid" rule applies to tax liabilities under FICA and FUTA.

b. Respondent argues that this Court in *Nierotko* decided the allocation issue under the 1939 Amendments, not the original version of the Act enacted in 1935. See Resp. Br. 6-7, 11, 18-19, 20-21. We continue to believe that respondent is wrong on that point. See U.S. Br. 27 n.14. But even if correct, respondent's claim would have no impact on the issues here.

With respect to whether the 1939 Amendments or the 1935 Act governed the allocation issue in *Nierotko*, the Court stated in the passage quoted above, see p. 9, *supra*, that "petitioner [the government] argues"—not that the Court accepts—that the need to allocate wages to certain quarters for purposes of benefits calculations under the 1939 Amendments supports the conclusion that back pay is not wages.

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[6] Because the term "wages" was defined in a single provision for purposes of both taxes and benefits under the 1935 Act, the Court did briefly mention some tax regulations and an Office Decision of the Bureau of Internal Revenue with respect to the question whether back pay is to be viewed as "wages." 327 U.S. at 366 n.17, 367.

327 U.S. at 370.[7] The Court had earlier in the opinion made clear that the major question before it—the question whether back pay is wages for benefits eligibility purposes—was governed by the original 1935 Act. See *id.* at 360 ("the governing provisions which determine whether this 'back pay' is wages are those of the earlier enactment"). Having relied on the 1935 Act to resolve the basic question of whether back pay is wages, the Court had no reason to rely on a different version of the statute to decide the allocation question.

Moreover, in the passage regarding allocation quoted above, the Court did not expressly or impliedly depart from the conclusion that the 1935 Act governed. The single sentence that states the Court's view—rather than the government's argument—recites that "[i]f, as we have held above, 'back pay' is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual." 327 U.S. at 370. That sentence does not address any question regarding which version of the Act was controlling. However, by referring broadly to "periods" (which includes the timing rules for benefits under the 1935 Act, see § 210(c), 49 Stat. 625 (defining "qualified individual")) rather than to "quarter[s]" (relevant for the timing rules for benefits under the 1939 Act, see § 209(g), 53 Stat. 1376-1377 (defining "fully insured individual")), the statement suggests that the 1935 Act provisions controlled the timing of the benefit calculation.[8]

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[7] Both parties in *Nierotko* briefed the case entirely as if the 1939 Amendments controlled the case. Neither party addressed the issue of which version of the Act governed either the primary question whether back pay is wages or the secondary question concerning the allocation of wages to prior periods for benefits purposes.

[8] Had the Court considered the tax provisions of the 1935 Act, it would have found that those provisions supported its conclusion on the allocation issue. See U.S. Br. 26-27. As explained above, see pp. 2-3, *supra*, those provisions tied social security and unemployment taxes to wages paid (or, in the case of FUTA, "payable") "with respect to employ-

Even if the Court in *Nierotko* had viewed the 1939 Amendments as governing the allocation of back pay to particular time periods for benefits purposes, the Court at most considered the 1939 amendments to the *benefits* scheme in the Social Security Act, which remained after 1939 in Title 42 of the United States Code. There is no reason to believe that, in considering the benefit allocation issue, the Court considered the tax statutes (the now newly entitled FICA and FUTA, see 26 U.S.C. 1432, 1611 (1940)), that had been re-enacted and moved to Title 26. The only statutory provision cited in this part of the Court's discussion was the new 1939 definition of "fully insured individual" in Section 209(g)—a provision applicable only to benefits. See 327 U.S. at 370 n.25. Moreover, the only provisions of the 1939 amendments cited or quoted elsewhere in the Court's opinion were that and other benefits provisions, whose enactment had nothing to do with ending the "difficulties" and "confusion" caused by the earlier tax provisions. See, *e.g.*, *id.* at 360 & nn.2 & 5, 361-362 & n.7, 363 n.10, 364 n.13. Nothing in *Nierotko* suggests that the Court was taking into account the 1939 amendments to FICA and FUTA.

Finally, even if the Court in *Nierotko* had considered the 1939 amendments to FICA and FUTA, *Nierotko* would still have no bearing on the analysis in this case. Congress did not finally place the FICA and FUTA taxes on a "wages paid" basis until the 1946 amendments were enacted—after this Court's decision in *Nierotko*. Between 1939 and 1946, the tax rate provisions in FICA and FUTA were phrased in terms of "wages paid during" a given year, but the wage base definitions in both statutes were still phrased in terms

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ment during [a particular] calendar year." Moreover, the definition of the wage base as sums paid "with respect to employment during [a particular] calendar year" was identical in the tax and benefits provisions of the 1935 Act. See U.S. Br. 26 n.13. It was only in 1946 that Congress modified the definition of "wages"—which included the definition of the wage base—to include a "wages paid" rule.

of remuneration "paid * * * with respect to employment during" a given year. It is the post-1946 provisions of FICA and FUTA—not the benefits provisions of the Social Security Act or even the pre-1946 versions of FICA and FUTA—that govern this case.

3. Respondent's argument thus reduces to the contention (Br. 23-26) that the benefits provisions of the Social Security Act in Title 42 and the FICA and FUTA tax statutes in Title 26 both use "wages paid" formulations, and that the *Nierotko* rule must therefore be applied to both. This Court has long recognized that the "presumption that identical words used in different parts of the same act are intended to have the same meaning * * * is not rigid." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); accord *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995); *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). As the Court stated in *Atlantic Cleaners & Dyers*, 286 U.S. at 433:

> Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.

The Court in *Nierotko* construed the benefits provisions of the Social Security Act on the basis of considerations that have no application to the FICA and FUTA tax provisions as they were amended by Congress in 1939 (and again, subsequently, in 1946), and the Court viewed as irrelevant the FICA and FUTA provisions that govern this case. Accordingly, *Nierotko* poses no obstacle to effectuating Congress's intent in amending the tax provisions.

A difference between the rule applicable in calculating FICA and FUTA taxes and the rule applicable in calculation of social security benefits would not be unusual. See U.S. Br. 28-29. There are other circumstances in which wages may be allocated to different periods for purposes of taxes and benefits. That can occur when, for example, an individual obtains modification of his earnings record for benefits purposes for a long past time period, see 42 U.S.C. 405(c)(5)(H), even though the amount of tax for that period cannot be altered because of the generally applicable three-year statute of limitations, see 26 U.S.C. 6501(a). Respondent is correct (Br. 24) that Congress intended "to preserve the essential character of Social Security as a solvent 'contributory' system of social insurance." But the contributions of any given individual have never had a close relationship to the benefits that individual would receive. See *Flemming* v. *Nestor*, 363 U.S. 603, 609 (1960). Congress's intent that individuals receive benefits only if they also make contributions, as well as its desire to maintain the solvency of the system as a whole, is not implicated or affected by the question presented in this case.

4. Respondent argues (Br. 20-22) that Congress should be assumed to have embodied the *Nierotko* rule in the amendments that it enacted in 1946, six months after *Nierotko* was decided. There is no evidence that Congress considered *Nierotko* when it enacted the 1946 amendments. At most, however, the 1946 Congress would have assumed that the *Nierotko* rule provided an interpretation of the benefits provisions of the Social Security Act—Section 209(g), in particular. As noted above, *Nierotko* did not purport to resolve any tax issue and Congress would have had no reason to believe that it did. In addition, as respondent concedes (Br. 26), shortly after *Nierotko* was decided, the Internal Revenue Service issued Mim. 6040, 1946-2 C.B. 155, in which it advised employers that, although *Nierotko* requires that "back pay awards * * * in compliance with an

order of the [NLRB] constitute 'wages,' * * * as defined in the Federal employment tax statutes," *id.* at 155-156, an employer should include the "'back pay' *paid* by him *during* the quarter" in preparing employment tax returns, *id.* at 156 (emphasis added). Accordingly, Congress would likely have relied on the Treasury's consistent position on that point, see U.S. Br. 19-20 & n.10, when adding the "wages paid" language to the FICA and FUTA wage base provisions in 1946. Indeed, the committee reports on the 1946 legislation and the Treasury regulations are entirely in accord.

IV. APPLICATION OF RESPONDENT'S "SHOULD HAVE BEEN PAID" RULE WOULD HAVE UNTOWARD RESULTS

Respondent's replacement of the statutory "wages paid" rule with an indeterminate "should have been paid" rule would interfere with sound administration of the FICA and FUTA tax schemes.

1. Respondent errs in arguing (Br. 43-44) that under its "should have been paid" rule, "an employer never has an incentive to create or prolong a wage dispute." Employers generally have the usual incentive to prolong a wage dispute —to keep possession of the money that would have been paid at an earlier date. But, because the FICA social security wage base tends to increase over time with inflation, under the "wages paid" rule employers have a modest built-in incentive not to delay their payment of wages. In any event, the FICA and FUTA systems are based on the premise that other factors and employment regulations—not the relatively modest amount of FICA and FUTA taxes—will determine when wages are paid. Under the "wages paid" rule in FICA and FUTA, whenever wages are paid, the taxes must be paid as well.[9]

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[9] Contrary to the suggestion of amicus Major League Baseball Players Association (Br. 7-8), the "wages paid" rule should not result in any detriment to employees due to an employer's failure to pay wages when

2. Respondent cites (Br. 32-33) the exclusion from "wages" of "any payment on account of sickness or accidental disability * * * made" to an employee more than six months after the employee last worked for the employer. 26 U.S.C. 3121(a)(4). Respondent argues that back pay should be subject to FICA tax under that provision if it in fact was paid more than six months after the employee ceased work but should have been paid earlier, within the six-month period. The six-month rule in Section 3121(a)(4), however, like most rules setting fixed time periods, enhances certainty and simplifies calculations for the employer, employee, and the IRS, by clearly delineating which payments may be excluded from the FICA and FUTA wage base and which may not. Under respondent's rule, all parties concerned would have to determine, for each payment made more than six months after employment ended, whether it "should have been paid" at some earlier date and therefore must be included in the wage base. Indeed, respondent's rule would also presumably require all parties involved to determine, for each payment made *within* the six-month period, whether it "should have been paid" at a later date and therefore should be excluded from the wage base. The resulting administrative difficulties and confusion are just what Congress sought to avoid in drafting the provisions at issue.

3. The same is true of respondent's reference (Br. 34) to the exclusion from FICA wages of "any payment made by an employer to the survivor or the estate of a former employee after the calendar year in which such employee died." 26 U.S.C. 3121(a)(14). Respondent's "should have been paid" rule would replace an easily administrable statutory excep-

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due. If calculating the employee's FICA taxes in the year the wages were actually paid would result in under-compensation of the employee, the employee should include that amount in the "make-whole" damages sought from the employer. See *Mazur* v. *C.I.R.*, 986 F. Supp. 752, 756 (W.D.N.Y. 1997) ("[T]he remedy * * * is obtained against the wrongdoer and not against the United States or its Treasury.").

tion with a rule that would require that the IRS examine every such payment after the calendar year of death to determine whether it "should have been paid" earlier, and every payment within the calendar year of death or earlier to determine whether it "should have been paid" later. Respondent expresses concern (Br. 34) that, "[w]ithout the relation-back principle of *Nierotko*, surviving widows and children * * *, could lose benefits altogether." What is at issue here, however, is taxes, not benefits. Under respondent's "should have been paid" rule, needy surviving widows and children who receive back pay would be forced to pay a FICA tax that Congress determined in Section 3121(a)(14) was unnecessary.

4. The same problems infect respondent's argument (Br. 35-39) that its "should have been paid" rule should apply to long-since repealed FICA and FUTA provisions that made student and some other employment taxable in part on the basis of a timing-of-payment rule, and to current FUTA provisions that use a timing-of-payment rule in part to define "employer." Because FUTA taxes are ordinarily quite small in amount, see p. 7, *supra*, transaction costs would make it impractical to applying respondent's rule to FUTA taxes. And in general, respondent's citation to these provisions merely demonstrates that the "should have been paid" rule has no logical stopping place. In each case, settled and certain methods for calculating taxes due would be replaced with uncertain determinations of the period of employment compensated by particular wages and when those wages "should have been paid." That is not what Congress intended when it drafted the precisely worded definitions and exceptions in the FICA and FUTA statutes.[10]

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[10] Respondent also refers (Br. 33) to the FICA provision exempting payments to retired federal judges serving on active duty if the payment "is received during the period of such service." 26 U.S.C. 3121(i)(5). Respondent claims (Br. 33) that under the "wages paid" rule, "a retired federal judge or justice who receives a back pay award covering active-

V. TREASURY REGULATIONS AND REVENUE RULINGS, WHICH ALLOCATE BACK PAY TO THE YEAR OF ACTUAL PAYMENT, ARE ENTITLED TO DEFERENCE

Even prior to the Court's decision in *Nierotko* and continuing to the present day, the Treasury Regulations adopted an actual payment rule. See U.S. Br. 19-20 & n.10. Respondent concedes that the regulations applicable to the time period here at issue have not been substantively changed. Resp. Br. 48; see also U.S. Br. 19-20, 24-25. Respondent nonetheless argues (Br. 48-50) that the regulations should not control.

1. Respondent's contention (Br. 48) that the regulations do not specifically discuss back pay is mistaken. The regulations state a general rule of *actual* payment, 26 C.F.R. 31.3121(a)-2, 31.3301-4; see also J.A. 38-42 (gathering other related regulations), and they do not create an exception for back pay. See U.S. Br. 19-20. Moreover, the Treasury has issued Revenue Ruling 89-35, 1989-1 C.B. 280, specifically applying the actual payment rule in the context of back pay, thereby foreclosing the argument that the rule in the regulations does not apply to back pay. See also U.S. Br. 20 (citing other Revenue Rulings). Notwithstanding numerous amendments to the FICA scheme since 1946, Congress has

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duty service after service is complete must pay the full amount of FICA tax," which would allegedly be "contrary to the clear congressional intent." Payments to retired judges not on active duty, however, are likely to be exempted from FICA tax in any event, either because they are not remuneration for employment under the particular scheme governing such payments or because they are made under an "exempt governmental deferred compensation plan." 26 U.S.C. 3121(a)(5)(E). See *Robinson* v. *Sullivan*, 905 F.2d 1199 (8th Cir. 1990) (senior judges exempted from FICA, regardless of whether they perform judicial services). If it were otherwise, then even under respondent's theory senior judges would be subject to FICA taxes on payments for active service if such payments are received when they "should have been" but after the active service is complete.

never indicated any disagreement with the plain reading of the statutory provisions by the Treasury and the IRS.

2. For the reasons discussed in detail in the briefs recently filed by the United States in *United States* v. *The Mead Corp.*, No. 99-1434 (argued Nov. 8, 2000), respondent errs in asserting (Br. 48) that Treasury rulings and regulations "[are] not entitled to deference." See 99-1434 U.S. Br. at 23-27; 99-1434 U.S. Reply Br. at 1-5 & n.3. (We have provided copies of those briefs to respondent's consel.). This Court has consistently held that the authoritative interpretive rulings and regulations adopted by the Treasury to implement the Internal Revenue Code must be upheld when they represent a "reasonable" interpretation of the statute. *United States* v. *Correll*, 389 U.S. 299, 307 (1967). The Court has explained that the agency's interpretative rulings are to be upheld when "reasonable" because "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. § 7805(a)." *Ibid.* The Court has emphasized that "we do not sit as a committee of revision to perfect the administration of the tax laws," and that, "[i]n this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.'" *Ibid.* (quoting *C.I.R.* v. *Stidger*, 386 U.S. 287, 296 (1967)). Affording such deference to the Treasury's interpretations of the Code "helps guarantee that the rules will be written by 'masters of the subject,' *United States* v. *Moore*, 95 U.S. 760, 763 (1878), who will be responsible for putting the rules into effect." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

Before the 1960's, the Secretary had not made a formal, general delegation of rulemaking authority to the Commissioner. Because the rulings adopted by the Commissioner prior to that date were not binding on the Department or on the Secretary, they did not have the same status as the

Treasury Regulations and Treasury Decisions that *were* adopted directly by the Secretary. See *Bartels* v. *Birmingham*, 332 U.S. 126, 132 (1947) (citing 1944-1 C.B. 1). Prior to 1960, the Court had therefore concluded that the "departmental rulings *not* promulgated by" the Secretary were to be given little deference. *Biddle* v. *C.I.R.*, 302 U.S. 573, 582 (1938) (emphasis added). In 1961, however, the Secretary of the Treasury made a formal, general delegation of rulemaking authority to the Commissioner, subject only to the requirement that the rulings and regulations adopted by the Commissioner be issued with the "approval of the Secretary." 26 C.F.R. 301.7805-1. See also Treas. Order No. 111-2, 1981-1 C.B. 698, 699 (delegating authority "to make the final determination" on "regulations" and "Revenue Rulings" to the Assistant Secretary of the Treasury (Tax Policy)). Under this modern scheme of administration, although the Revenue Rulings adopted by the Commissioner and approved by the Secretary are inherently narrower in their scope—and thus have a narrower "force and effect"—than broadly applicable "regulations," see *Davis* v. *United States*, 495 U.S. 472, 484 (1990), "they [now] may be used as precedents" (1968-1 C.B. 1) and are therefore to be sustained if they establish a "reasonable" interpretation of the statute. *Correll*, 389 U.S. at 307. "The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner." *Ibid.*

* * * * *

For the reasons stated above and in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

FEBRUARY 2001

APPENDIX

STATUTORY PROVISION

1. Section 202(a) of the Social Security Act of 1935, ch. 531, Tit. II, 49 Stat. 623 (42 U.S.C. 402(a) (Supp. II 1937)), provides in pertinent part:

> Every qualified individual (as defined in section 210) shall be entitled to receive * * * an old-age benefit (payable as nearly as practicable in equal monthly installments) * * *.

2. Section 210(a) of the Social Security Act of 1935, ch. 531, Tit. II, 49 Stat. 625 (42 U.S.C. 410(a) (Supp. II 1937)), provides:

> The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

3. Section 210(c) of the Social Security Act of 1935, ch. 531, Tit. II, 49 Stat. 625 (42 U.S.C. 410(c) (Supp. II 1937)), provides:

> The term "qualified individual" means any individual with respect to whom it appears to the satisfaction of the Board that—
>
> (1) He is at least sixty-five years of age; and
>
> (2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before

he attained the age of sixty-five, was not less than $2,000 * * *.

4. Section 801 of the Social Security Act of 1935, ch. 531, Tit. VIII, 49 Stat. 636 (42 U.S.C. 1001 (Supp. II 1937)), provides:

Income tax on employees. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1 1/2 per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2 1/2 per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum.

5. Section 804 of the Social Security Act of 1935, ch. 531, Tit. VIII, 49 Stat. 637 (42 U.S.C. 1004 (Supp. II 1937)), provides:

> **Excise tax on employers.** In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:
>
> (1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.
>
> (2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1 1/2 per centum.
>
> (3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.
>
> (4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2 1/2 per centum.
>
> (5) With respect to employment after December 31, 1948, the rate shall be 3 per centum.

6. Section 811(a) of the Social Security Act of 1935, ch. 531, Tit. VIII, 49 Stat. 639 (42 U.S.C. 1011(a) (Supp. II 1937)), provides:

> The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after

remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

7. Section 901 of the Social Security Act of 1935, ch. 531, Tit. IX, 49 Stat. 639 (42 U.S.C. 1101 (Supp. II 1937)), provides:

> **Imposition of tax.** On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:
>
> (1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;
>
> (2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;
>
> (3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

8. Section 202(a) of the Social Security Act Amendments of 1939, ch. 666, Tit. II, 53 Stat. 1363-1364 (42 U.S.C. 402(a) (1940)), provides:

> Every individual, who (1) is a fully insured individual (as defined in section 209(g)) after December 31, 1939, (2) has attained the age of sixty-five, and (3) has filed application for primary insurance benefits, shall be entitled to receive a primary insurance benefit (as defined in section 209(e)) for each month, beginning with the month in

which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies.

9. Section 209(a)(1) and (2) of the Social Security Act Amendments of 1939, ch. 666, Tit. II, 53 Stat. 1373 (42 U.S.C. 409(a)(1) and (2) (1940)), provides:

> The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—
>
> (1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year prior to 1940, is paid to such individual by such employer with respect to employment during such calendar year; [or]
>
> (2) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual with respect to employment during any calendar year after 1939, is paid to such individual with respect to employment during such calendar year[.]

10. Section 209(g) of the Social Security Act Amendments of 1939, ch. 666, Tit. II, 53 Stat. 1376-1377 (42 U.S.C. 409(g) (1940)), provides:

> (g) The term 'fully insured individual' means any individual with respect to whom it appears to the satisfaction of the Board that—
>
> (1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the

quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

(2) He had at least forty quarters of coverage.

As used in this subsection * * *, the term 'quarter' and the term 'calendar quarter' mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term 'quarter of coverage' means a calendar quarter in which the individual has been paid not less than $50 in wages. * * *

11. Section 601 of the Social Security Act Amendments of 1939, ch. 666, Tit. VI, 53 Stat. 1381-1382 (26 U.S.C. 1400 (1940)), provides:

Rate of Tax. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426(a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

(2) With respect to wages received during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(3) With respect to wages received during the calendar years 1946, 1947, and 1948, the rate shall be 2 1/2 per centum.

(4) With respect to wages received after December 31, 1948, the rate shall be 3 per centum.

12. Section 604 of the Social Security Act Amendments of 1939, ch. 666, Tit. VI, 53 Stat. 1383 (26 U.S.C. 1410 (1940)), provides:

> **Rate of Tax.** In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426(a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:
>
> (1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.
>
> (2) With respect to wages paid during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.
>
> (3) With respect to wages paid during the calendar years 1946, 1947, and 1948, the rate shall be 2 1/2 per centum.
>
> (4) With respect to wages paid after December 31, 1948, the rate shall be 3 per centum.

13. Section 606(a) of the Social Security Act Amendments of 1939, ch. 666, Tit. VI, 53 Stat. 1383 (26 U.S.C. 1426(a) (1940)), provides in pertinent part:

> **Wages.**—The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—
>
> (1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any cal-

endar year, is paid to such individual by such employer with respect to employment during such calendar year[.]

14. Section 608 of the Social Security Act Amendments of 1939, ch. 666, Tit. VI, 53 Stat. 1387 (26 U.S.C. 1600 (1940)), provides:

> **Rate of tax.** Every employer (as defined in section 1607(a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calendar year with respect to employment (as defined in section 1607(c)) after December 31, 1938.

15. Section 614(b) of the Social Security Act Amendments of 1939, ch. 666, Tit. VI, 53 Stat. 1392-1393 (26 U.S.C. 1607(b) (1940)), provides in pertinent part:

> **Wages.**—The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—
>
> (1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year[.]

16. Section 412(a) of the Social Security Act Amendments of 1946, ch. 951, Tit. IV, 60 Stat. 989 (26 U.S.C. 1426(a) (1946)), provides in pertinent part:

> **Wages.**
>
> The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—
>
> (1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year is paid, prior to January 1, 1947, to such individual by such employer with respect to employment during such calendar year; or that part of the remuneration which, after remuneration equal to $3,000 with respect to employment after 1936 has been paid to an individual by an employer during any calendar year after 1946, is paid to such individual by such employer during such calendar year[.]

17. Section 412(b) of the Social Security Act Amendments of 1946, ch. 951, Tit. IV, 60 Stat. 989 (26 U.S.C. 1607(b) (1946)), provides:

> **Wages.**
>
> The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include —
>
> (1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any

calendar year, is paid after December 31, 1939, and prior to January 1, 1947, to such individual by such employer with respect to employment during such calendar year; or that part of the remuneration which, after remuneration equal to $3,000 with respect to employment after 1938 has been paid to an individual by an employer during any calendar year after 1946, is paid to such individual by such employer during such calendar year[.]