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IN THE SUPREME COURT OF THE UNITED STATES
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WISCONSIN CENTRAL LTD., ET AL.,)
Petitioners,)
v.) No. 17-530
UNITED STATES,)
Respondent.)

- - - - -
Washington, D.C.
Monday, April 16, 2018

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:05 a.m.

APPEARANCES:
THOMAS H. DUPREE, JR., ESQ., Washington, D.C.; on
behalf of the Petitioners.
RACHEL P. KOVNER, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-530, Wisconsin Central versus the United States.

Mr. Dupree.

ORAL ARGUMENT OF THOMAS H. DUPREE, JR.

ON BEHALF OF THE PETITIONERS

MR. DUPREE: Mr. Chief Justice, and may it please the Court:

The Railroad Retirement Tax Act levies a payroll tax on railroad employees' money remuneration. The question presented in this case is whether remuneration in shares of stock is remuneration in money.

We believe it is not for a simple reason. Stock is not money. The plain meaning of "money" is a generally accepted medium of exchange. And stock is not that. You can't buy --

JUSTICE KENNEDY: How about -- how about a check?

MR. DUPREE: We think a check would constitute a medium of exchange, Justice Kennedy. It -- it essentially transfers

1 currency. There is a legal right to obtain
2 currency on a bank draft, so we do think that a
3 check would constitute money remuneration.

4 JUSTICE KENNEDY: So you end the
5 slippery slope about that -- at that point?

6 MR. DUPREE: Well --

7 JUSTICE KENNEDY: What about a bond, a
8 U.S. savings bond?

9 MR. DUPREE: That would not be, Your
10 Honor. We don't think a bond would constitute
11 money remuneration. Typically, the things that
12 would constitute money remuneration obviously
13 would be cash, paper notes, coins, but it would
14 also encompass more modern ways of transferring
15 currency, such as direct deposit or a check.

16 We think that the plain meaning of
17 money remuneration is also confirmed when this
18 tax provision is viewed in the larger context
19 of the tax code as a whole, and that's true
20 both for the tax code as it existed during the
21 Great Depression, when this railroad statute
22 was enacted, and also the code as it exists
23 today. The code --

24 JUSTICE GINSBURG: Mr. Dupree, wasn't
25 it -- wasn't it so that when the Act was

1 enacted, compensation was in money, but over
2 time, compensation in the form of stock has
3 become more frequent. And it serves the same
4 purpose.

5 So why can't one read "any form of
6 monetary compensation" to include any form of
7 compensation readily convertible into cash?

8 MR. DUPREE: Well, Justice Ginsburg,
9 what the historical record shows is that at the
10 time of the Great Depression, when the statute
11 was enacted, railroad employees were actually
12 compensated through a variety of means, both
13 cash-based and also non-cash-based. Railroads
14 gave their employees everything from in-kind
15 benefits, free transportation, property. And
16 so that same issue that presents itself today,
17 where railroad employees get a variety of
18 different types and forms of remuneration, also
19 existed back in the Great Depression.

20 And what Congress did was it said we
21 recognize that railroad employees get a variety
22 of types of remuneration, including stock, by
23 the way, at that time, and yet it drew the line
24 in such --

25 JUSTICE GINSBURG: How common was

1 stock at that time?

2 MR. DUPREE: How common was it?

3 JUSTICE GINSBURG: Yes.

4 MR. DUPREE: It -- it was sufficiently
5 common. There was a report cited in our papers
6 in the National Industrial Conference that
7 talked about how, going back to the 19th
8 century, many railroads offered stock purchase
9 plans to their employees. So it certainly was
10 a well-recognized form of remuneration back
11 when the statute was enacted.

12 And I think if this Court were to
13 compare the language that Congress chose to put
14 in the railroad statute compared to what it put
15 in FICA, which was enacted virtually
16 simultaneously in the Great Depression, that
17 underscores our interpretation of money
18 remuneration.

19 FICA sweeps broadly. As this Court
20 has noted, it encompasses all remuneration,
21 including -- and this is critical text --
22 including any remuneration that is not in cash
23 but that can be valued in cash. So not --

24 JUSTICE KAGAN: Mr. Dupree, in the way
25 you talked about it, it's not just that we have

1 to give meaning to the term "money." I think
2 you're quite right to say that the term we have
3 to look at is "money remuneration."

4 Is that correct?

5 MR. DUPREE: That's the key term, yes,
6 Your Honor.

7 JUSTICE KAGAN: And so that's really
8 money in a -- in a compensation scheme, right?
9 I mean, that's what that means. Remuneration.

10 MR. DUPREE: Money remuneration.
11 That's right.

12 JUSTICE KAGAN: So let's even take
13 your own definition, which I think that there's
14 a lot to be said for. Your definition tends --
15 of money tends to be the one that's first in
16 the dictionaries. So you said a generally
17 accepted medium of exchange.

18 But now you put that with the word
19 "remuneration", in other words, in a
20 compensation scheme, and then the question
21 becomes: Is stock a generally accepted medium
22 of exchange in a compensation scheme?

23 And I would think that the answer to
24 that is yes. I mean, we see this all over the
25 place, that companies give stock as well as

1 cash in a compensation scheme, that it is a
2 generally accepted medium of exchange for
3 compensation.

4 MR. DUPREE: Well, I'm not sure it --
5 it quite works out that way, Justice Kagan. In
6 other words, if a company remunerates its
7 employees through some form, say, for example,
8 free lunches, I don't think it would be right
9 to say, well, therefore, food has now become a
10 medium of exchange.

11 I think a medium of exchange --

12 JUSTICE KAGAN: Well, I think partly
13 it's because, you know, some companies might
14 give free lunches and other companies might not
15 give free lunches, and -- and you -- I mean,
16 this is -- this is a kind -- instead of getting
17 a check, you're getting stock. Isn't that
18 right?

19 MR. DUPREE: Well, you're getting a
20 stock option, which then needs to percolate for
21 many years --

22 JUSTICE KAGAN: Well -- right.

23 MR. DUPREE: -- before it turns into a
24 butterfly and becomes stock.

25 JUSTICE KAGAN: But you can --

1 JUSTICE GINSBURG: Yes.

2 MR. DUPREE: But, yes.

3 JUSTICE KAGAN: -- you can take it in
4 stock. You can take it in cash.
5 Ninety-three percent of -- of some of these
6 companies' employees just take it in cash;
7 forget about the stock.

8 So why isn't it just, you know, you
9 can get it in cash, you can get it as a stock
10 option or in stock when that matures; it's a
11 generally accepted medium of exchange?

12 MR. DUPREE: Well, I -- I think a
13 generally accepted medium of exchange refers to
14 something that, number one, has a fixed value.
15 In other words, it's a measure of value. And
16 it's something that any citizen could use to
17 obtain goods or services in an economy.

18 In other words, cash certainly
19 fulfills that function. I can obtain goods and
20 services with cash. If my employer --

21 JUSTICE KAGAN: But that's why -- I
22 mean, in your briefs, you keep on saying you
23 can't take a stock option to a grocery store.
24 But I think -- and that's obviously right.

25 But I think what I'm saying is that

1 would be a relevant question if all we were
2 asking is what's the definition of money. But
3 that's not what we're asking. We're asking
4 what's the definition of money remuneration.

5 So the fact that you can't take a
6 stock option to a grocery store is irrelevant
7 to that question. The question is that, when
8 it comes to compensation, is a stock option
9 used interchangeably with money? And, I think
10 in this company and many others, it is. Isn't
11 it?

12 MR. DUPREE: Well, I -- I don't think
13 so. Certainly, in this company, the record
14 shows that fewer than half the options at issue
15 were actually promptly exchanged for cash. So
16 the record in this case shows that these
17 employees -- again, the majority of options at
18 issue were retained as stock. They were not
19 sold for cash.

20 And -- and I think under Your -- Your
21 Honor's question, pretty much anything that
22 could be sold for cash would be swept into the
23 definition of money. Anything that an employer
24 gives to an employee can be valued and could be
25 sold. Granted, there are some things that are

1 more liquid than others.

2 JUSTICE KAGAN: Well, let me ask
3 another question, Mr. Dupree, just to test this
4 a little bit. So let's say a company has two
5 employees, and one employee makes \$200,000 in
6 cash and is granted \$5 million in stock-based
7 compensation. Two hundred thousand plus five
8 million. And the other employee is just given
9 \$250,000 in cash.

10 Now who makes more money?

11 MR. DUPREE: Well, the -- in Your
12 Honor's -- context of Your Honor's question, I
13 think money is essentially synonymous with
14 overall wealth or assets. And that is a
15 definition of money.

16 JUSTICE KAGAN: Right. So the answer
17 to my question is, of course, the guy who gets
18 the \$5 million in stock makes more money.

19 MR. DUPREE: But in -- in the context
20 of that question, I think that's fair. But I
21 think in the context of this tax statute, I
22 don't think it's right to say that when the
23 1937 Congress put the word "money" into this
24 tax statute, it meant it in that capacious
25 sense to include the value of everyone's assets

1 or their wealth generally. That wouldn't make
2 sense. That --

3 JUSTICE SOTOMAYOR: Why do we have to
4 go that far?

5 MR. DUPREE: I --

6 JUSTICE SOTOMAYOR: Why go that far?
7 Why don't we just take what the Seventh Circuit
8 said, which is this form of compensation is
9 money?

10 MR. DUPREE: Well --

11 JUSTICE SOTOMAYOR: I agree with you,
12 a bottle of wine at Christmas is not. I don't
13 think going to a baseball game occasionally
14 would be, because those are not -- I don't
15 think of who's richer or not or who's getting
16 paid more or not by those items.

17 But why do we have to go as far as
18 you're going?

19 MR. DUPREE: Well, I think, to answer
20 Your Honor's question about the Seventh
21 Circuit's analysis, the Seventh Circuit and
22 Judge Posner actually agreed with our
23 definition of money as a commonly accepted
24 medium of exchange.

25 Where he went awry in our view is

1 concluding that in the year 2018 stock has
2 become a medium of exchange. We don't think
3 that's right. He certainly cited no legal or
4 economic authority for that proposition.

5 His point, I --

6 JUSTICE GINSBURG: I thought Judge
7 Posner's main point was that there's no
8 economic difference to the recipient, whether
9 he gets \$1,000 in cash in hand or a share of
10 stock that he can easily convert to \$1,000.

11 MR. DUPREE: Right. And -- and our
12 response to that, Justice Ginsburg, is that,
13 again, taken to its logical conclusion, it
14 would mean that anything an employee gets is
15 money. If an employee is given a car worth
16 \$10,000, in an economic sense, there may be no
17 difference between getting a car that is worth
18 \$10,000 and getting \$10,000 in cash.

19 But, when Congress put the word
20 "money" in the statute, it did not mean to
21 sweep in anything, as the government says, that
22 can be valued or that can be sold. That goes
23 way too far. I think that --

24 JUSTICE GINSBURG: But if you're
25 right, then Congress did a -- an idle thing

1 when it specifically excluded from
2 compensation, subject to the tax, a qualified
3 stock option. If stock options were not money,
4 then there was no need for that.

5 MR. DUPREE: Well, a few points on
6 that, Justice Ginsburg.

7 The first is that the government
8 argues that that exemption is relevant to this
9 case because, in the government's view, it
10 essentially renders our definition -- or it
11 would render the provision surplusage under our
12 definition of money remuneration.

13 We think that's wrong, and the reason
14 why that's wrong is because, when an employee
15 exercises a qualified stock option, they always
16 get stock, but -- and this is the critical
17 point and one the government concedes -- they
18 often get cash as well.

19 That is why that (e)(12) exemption is
20 not surplusage under our reading. It does
21 work.

22 I think it also bears mention that
23 that exemption was enacted in 2004, about 70
24 years after the original money remuneration
25 statute was enacted. And I think it would be a

1 little peculiar to say that in 2004 Congress
2 intended to change or to tamper with the
3 definition of money remuneration that, by the
4 way, has remained in that statute unaltered for
5 almost 70 years now.

6 JUSTICE GORSUCH: Mr. Dupree, if we're
7 going to look back, as you're encouraging us to
8 do, further than 2004, why not look at 1938 and
9 the regulations that were promulgated then that
10 suggest that money remuneration is broader than
11 you're arguing?

12 MR. DUPREE: Well, Justice Gorsuch, I
13 think actually that that original regulation
14 strongly supports our point. What that
15 regulation says, and this is the original IRS
16 regulation interpreting the statute, is it says
17 that the IRS is going to construe "money" to
18 include money or anything, and this is the
19 critical language, anything that can "be used
20 in lieu of money."

21 And then they provide a host of
22 examples, most of which are salary, bonuses,
23 commissions, cash payments. So we think that
24 that original regulation strongly supports our
25 view because it underscores the IRS's original

1 understanding of the medium of exchange
2 requirement. That's what the words, "used in
3 lieu of." Stock has never been used in lieu of
4 money.

5 JUSTICE GORSUCH: Well, what if we
6 read it more broadly? Would you have any
7 further response?

8 MR. DUPREE: Well, if -- if you read
9 it more broadly, I don't think you could read
10 it more broadly to encompass stock.

11 JUSTICE GORSUCH: I'm sure you don't,
12 but let's just suppose we did. Then what?

13 MR. DUPREE: Well, then I would say
14 that that regulation was impermissible,
15 conflicts with the statute.

16 JUSTICE SOTOMAYOR: So what do we do
17 with history? I -- I wasn't talking about the
18 tax regulation. I was talking about the U.S.
19 Railroad Retirement Board, their opinion that
20 says stock options are likely to be
21 remuneration, money remuneration.

22 You have the 1994 regulation by
23 Treasury, and you have your company and many
24 others paying this tax without saying anything
25 until very recently.

1 At what point do we say that history
2 supports one reading as opposed to another?

3 As the government points out, yes, you
4 can't perhaps change meaning with later
5 regulation, but later regulation can be a
6 reflection of what everyone has understood the
7 meaning to be.

8 MR. DUPREE: Right. And -- and,
9 Justice Sotomayor, I think it's fairly clear,
10 and I don't think the government disputes this
11 point, that for the vast majority of this
12 railroad statute's existence, the railroads
13 were not, in fact, paying tax on stock.

14 The government certainly hasn't said
15 we have evidence from the 1950s and 1960s that
16 this was being done. And, in fact, under the
17 regulation that Justice Gorsuch mentioned, it
18 would not be included.

19 What the -- the government has
20 identified, and Your Honor alluded to this, is
21 that Railroad Retirement Board regulation that
22 actually first was issued by way of a decision
23 in 1938, and we think that's very telling,
24 because what the Railroad Retirement Board says
25 is it says, under the statutory language, we

1 will only treat stock as remuneration if the
2 party, the employer and the employee agree to
3 do so, and that they can value it in advance.

4 None of that happened here. So, if
5 the government is right that this Court should
6 look to the Railroad Retirement Board's
7 historic treatment of stock, we think that
8 strongly supports our position.

9 In fact, under a plain,
10 straightforward application of that regulation,
11 we win this case.

12 JUSTICE GINSBURG: Was the government
13 wrong in saying that at least for the last --
14 for 20 years, railroads have been paying tax,
15 treating the stock option as equivalent to
16 cash?

17 There must have been, if they were
18 paying for 20 years, there must have been
19 something that triggered this inspiration to
20 say there's no --

21 JUSTICE KENNEDY: And if I could add
22 to that question, the employees thought it was
23 taxable as well.

24 MR. DUPREE: Well, I -- I think what
25 happened --

1 JUSTICE KENNEDY: And -- and -- and so
2 what effect do we give to this long-time
3 practice; even your -- your people in the
4 position of your own clients, until recently,
5 thought that it was taxable.

6 MR. DUPREE: Well, again, I think the
7 history going back to the Great Depression up
8 and through the mid-'90s is, as a general
9 matter, the railroads were not paying tax on
10 this.

11 As far as what changed, in 1994, the
12 IRS came out with a new regulation, it's the
13 one that's currently on the books, which is a
14 peculiar regulation, in all honesty, because it
15 basically says we're going to treat FICA wages
16 and RRTA compensation to mean the same thing,
17 except where they differ.

18 But the IRS never, to this day, it
19 never has issued a regulation saying that stock
20 options and stock is taxable under the Railroad
21 Retirement Tax Act. It has never said that.

22 So, in 1994, the IRS changed its
23 position. It got rid of its long-standing
24 historic understanding that money remuneration
25 did not include stock, and it issued this new

1 regulation.

2 At that point, there were several
3 years where I think parties, frankly, didn't
4 quite know what the state of the law was. I do
5 think it's right that there were some railroads
6 that paid tax. I suspect that may have been
7 just a judgment that, rather than litigate the
8 question, it was easier to pay the tax for a
9 few years.

10 But, in our case, the Petitioners in
11 this case, we didn't issue stock until 1996.
12 And that stock, obviously, the options take
13 years to vest. It can be up to a 10-year term
14 in instances. And in this case, we are seeking
15 refunds beginning with the 2006 tax year.

16 So, to the extent there was a period
17 in time where railroads were paying tax, does
18 that reflect a historical practice, I think the
19 answer is no. At most, it might have been a
20 handful of years in the overall 75- to 80-year
21 sweep of this railroad tax statute.

22 We think that if this Court construes
23 the railroad statute's language against FICA,
24 that strongly supports our interpretation
25 because we are asking you to give meaning to

1 the textual difference in the two statutes,
2 which were enacted virtually simultaneously in
3 the Great Depression.

4 Congress deliberately chose very
5 different language in establishing the tax
6 base.

7 And even though the railroad statute
8 and FICA have been amended numerous times in
9 the 80 years since, those words appear
10 unaltered today in the U.S. Code from the
11 moment they appeared when President Roosevelt
12 signed those bills into law.

13 JUSTICE KAGAN: Mr. --

14 MR. DUPREE: Congress has not changed
15 --

16 JUSTICE KAGAN: Mr. Dupree, just
17 asking a question, not about the text but about
18 reasons and purposes: What would be your best
19 reason for why there should be a distinction
20 between FICA and the railroad system with
21 respect to stock options?

22 MR. DUPREE: Absolutely, Justice
23 Kagan. The reason why is, going back to
24 history and why Congress made the decision that
25 it did, it often, as this Court knows,

1 legislates specifically for the railroad
2 industry.

3 The railroads, unlike all other
4 industries, had an existing pension system.
5 And so the distinction was written into the law
6 to reflect the historic practice in the
7 railroad industry.

8 When Congress made the decision to
9 federalize these railroad pensions, it said we
10 are going to federalize it, but we will
11 maintain the existing cash-based pension
12 structure that --

13 JUSTICE KAGAN: Well, I understand the
14 government to be saying that that did exclude
15 certain kinds of things that were clearly not
16 cash-based, but -- you know, lunches or
17 something like that, but that's a different
18 question from the one I'm asking.

19 I'm just saying look at this thing,
20 stock options, and say why -- why would
21 Congress want it to be taxable in FICA but not
22 taxable in the railroad system?

23 MR. DUPREE: Because the railroad
24 system -- retirement system is fundamentally
25 different in key respects from Social Security.

1 It has much higher tax rates. I mean, the
2 railroad combined tax rate is north of
3 30 percent, whereas FICA is about 14 percent.
4 The railroad retirement system also provides
5 for much more generous benefits to retirees.

6 So they are two fundamentally
7 different retirement systems. Are there
8 similarities? Yes. Is there overlap? Yes.
9 And in places --

10 JUSTICE KAGAN: I guess I'm still
11 waiting for a difference that would -- would --
12 would match why Congress would make this
13 different treatment of stock options.

14 MR. DUPREE: Well, I -- I think the
15 different treatment of stock options traces
16 back to the original decision that Congress
17 made and that it has maintained now in the
18 statutory text for 70-plus years, the
19 distinction between a broad wage-based tax
20 system in FICA that encompasses pretty much
21 everything the employee gets and the far
22 narrower tax base that the railroad system
23 utilizes.

24 So I think it's just a natural
25 function that when Congress designed the tax

1 basis for these two retirement systems, among
2 many other differences between the two regimes,
3 it formulated the tax base in a much narrower
4 manner. That's why today there are different
5 treatments for certain things, such as the
6 stock options in this case. It's a --

7 JUSTICE SOTOMAYOR: I thought -- I
8 thought that the railroad pension system in the
9 1930s was at risk. That was one of the reasons
10 why this scheme was developed.

11 Why would you base a new scheme
12 completely on the old scheme that was
13 underfunded to start with? It seems
14 counterintuitive to me that Congress would want
15 to copy the old -- the old system, stock and
16 barrel, when it, as you say, already knew that
17 stock options were a part of -- of
18 remuneration.

19 MR. DUPREE: Right. The reason it
20 could address that concern, Justice
21 Sotomayor -- in other words, mirror the
22 existing cash-based pension structure in the
23 federal regime, is it could address questions
24 of solvency simply by adjusting benefits and
25 tax rates.

1 In other words, it wanted to preserve
2 the overall structure, but it would adjust
3 benefit levels, it would adjust tax rates, and,
4 of course, there would be an underlying federal
5 guarantee.

6 JUSTICE SOTOMAYOR: So what's going to
7 happen now? Every railroad is going to not
8 pay -- if we buy your argument, not pay taxes,
9 payroll taxes, on stock options. Why don't
10 railroads move to giving out more stock options
11 and less cash?

12 MR. DUPREE: Well, I -- I -- I don't--

13 JUSTICE SOTOMAYOR: And wouldn't that
14 put the system into economic difficulty?

15 MR. DUPREE: It would not, Your Honor.
16 And a number of points. I guess with regard to
17 the last point about putting the system in
18 economic difficulty, the railroad system
19 actually has a statute, a provision, that
20 self-adjusts based on the money coming in and
21 the benefits going out, to ensure that the
22 system remains solvent. So the short answer to
23 Your Honor's question is the statute --

24 JUSTICE SOTOMAYOR: The pensioners get
25 less, is what you're saying to me? This

1 self-adjusting system means that pensioners
2 will get less.

3 MR. DUPREE: Well, no, no, not
4 necessarily. I mean, the rate could go up. In
5 other words --

6 JUSTICE SOTOMAYOR: Someone pays no
7 matter --

8 MR. DUPREE: Someone pays. I'm not
9 quarreling with you there. But my point is
10 that the system hasn't --

11 JUSTICE SOTOMAYOR: So who pays is the
12 Joe Blow who gets minimum wage or something
13 close to it, and the people who receive a lot
14 more in stock options pay less?

15 MR. DUPREE: I -- I -- well, no, I
16 don't -- I don't think that's right. In other
17 words, the -- the stock options in this case,
18 first of all, were not confined to a narrow
19 group of senior executives. They were issued
20 to rank-and-file employees, as well as senior
21 executives.

22 The other point is that the RRTA has a
23 wage cap, much like Social Security does. So
24 only the first portion of an employee's
25 remuneration is actually subject, for the most

1 part, to this tax.

2 So, as a practical matter, it doesn't
3 have a dramatic impact on overall tax revenues.
4 In this case, the amount of tax --

5 JUSTICE SOTOMAYOR: I don't understand
6 that. If you get less money into the system,
7 how are you going to pay out the same benefits?

8 MR. DUPREE: Oh, and -- and my point
9 is that it may not be the -- less money going
10 into the system, as Your Honor is positing, and
11 that's because, if you have an executive who is
12 receiving a large salary and stock options,
13 they already exceed the compensation cap by
14 virtue of their salary alone. So the fact that
15 they are getting stock on top of that makes no
16 difference because they're already maxing out
17 on the tax. That's the point.

18 I think also, just as a practical
19 matter, I don't think railroads could move to a
20 pure stock-based compensation system for a
21 number of reasons. One is you have collective
22 bargaining agreements in place. But more
23 broadly than that, the stock would have to come
24 from somewhere. If a corporation said we are
25 now going to start printing more shares in

1 order to compensate our employees in stock,
2 that would massively dilute the value of the
3 share, and there's no way shareholders would
4 ever tolerate something like that. I think as
5 a practical --

6 JUSTICE KENNEDY: Can -- can you tell
7 me, just as an empirical matter, in -- in this
8 case, are these stocks always listed so that
9 there's a list price that everyone knows?

10 MR. DUPREE: Yes. These are publicly
11 traded stocks. That's right.

12 JUSTICE KENNEDY: Could there be
13 instances where there might be small satellite
14 corporations that are not listed, so the --

15 MR. DUPREE: I --

16 JUSTICE KENNEDY: Because -- because
17 you always know the value if it's publicly
18 traded.

19 MR. DUPREE: That's -- that's right,
20 Justice Kennedy. And actually, it's a great
21 question because the BNSF railroad, one of the
22 nation's largest employers, stock is no longer
23 publicly traded. So you could have a situation
24 where a railroad that is not publicly traded
25 issues stock, and then you would have extremely

1 thorny valuation problems, because it's one
2 thing to say, well, we can calculate the value
3 of the stock based on market price, but if it's
4 not publicly traded, as any accounting textbook
5 will tell you, it can be a very difficult
6 endeavor.

7 JUSTICE KENNEDY: Is it ever
8 backdated? If I get a bonus or the employee
9 gets a bonus for today, April 16, is it ever
10 backdated so that you can buy it as -- as of
11 the -- April 16, 2017?

12 MR. DUPREE: I -- I'm not aware of
13 that, Your Honor. The way that the options in
14 this case worked is that the exercise price is
15 determined at the moment the option is issued.
16 So, if in year zero the stock is trading at
17 \$100, that's the so-called strike price that
18 you can purchase the stock for five, six,
19 seven, eight years down the road.

20 And I think, frankly, that also --

21 JUSTICE KENNEDY: But is the strike
22 price always equivalent to the price on the day
23 that the option is issued?

24 MR. DUPREE: Yes, yes. The day the
25 option is issued, that's when they set the

1 strike price. And I think -- just to conclude
2 my answer to one of Justice Kagan's earlier
3 questions, I think that's yet another respect
4 in which stock is fundamentally different from
5 money.

6 It's an investment property. The
7 value fluctuates. When these options were
8 issued, no one had any idea what they would be
9 worth. Maybe they'd be worth nothing five, 10
10 years down the road when the option has vested
11 and it's exercised. Stocks are investment
12 property with fluctuating value, stands in
13 sharp contradistinction to cash, which has a
14 fixed value.

15 For those reasons, we ask the Court to
16 reverse the judgment below. I'll reserve my
17 time.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Ms. Kovner.

21 ORAL ARGUMENT OF RACHEL P. KOVNER

22 ON BEHALF OF THE RESPONDENT

23 MS. KOVNER: Mr. Chief Justice, and
24 may it please the Court:

25 Three parts of this statute

1 demonstrate that the phrase "any form of money
2 remuneration" refers to those payments that can
3 be readily valued in or converted to cash. The
4 first is the statute's text. The RRTA contains
5 exclusions for particular kinds of stock
6 options and for in-kind benefits that only make
7 sense if the statute's money remuneration
8 language is given a broad scope.

9 Second are the contemporaneous
10 interpretations of the statutes. Both
11 predecessor legislation and the agency's
12 earlier regulations construed "any form of
13 money remuneration" broadly to reach non-cash
14 benefits like the stocks here.

15 And the third is the statute's
16 objective of providing a financially stable,
17 self-supporting retirement system for railroad
18 workers. That objective would be undermined if
19 employers could avoid taxes by paying employees
20 in stock, a highly liquid asset that serves as
21 the functional equivalent of cash for
22 employees.

23 JUSTICE GINSBURG: How does it -- how
24 does it work? When does the -- the railroad
25 worker get the remuneration? When he gets the

1 stock option or only when he cashes it?

2 MS. KOVNER: It's only -- only when he
3 exercises it. And I think it's a really
4 important point that goes to what Mr. Dupree
5 was just discussing, which is that stock
6 options are only treated as compensation at the
7 moment when they have a readily discernible
8 cash value.

9 So not at the moment that they're
10 issued, but only at the moment that the
11 employee exercises them. And at that moment,
12 they have a 100 percent certain cash value.
13 And you can see that by looking at the record
14 in this case.

15 An employee at the company in this
16 case, when they exercised the stock option,
17 there's a one-page form, which is Exhibit 78 in
18 the record below. If they simply want cash
19 instead of stock, they just check a box on the
20 form and say: Please deposit the cash value of
21 this option to my bank account.

22 So these options are only valued at
23 the moment when they have a readily discernible
24 cash equivalent.

25 If I can just go to a few of the

1 issues that Mr. Dupree discussed. I mean, the
2 first is the qualified stock option exemption.
3 And this exemption was added to the statute by
4 Congress, and it exempts one particular type of
5 stock option. So it -- it is obviously
6 signaling that Congress was understanding that
7 other kinds of stock options were going to be
8 subject to taxation under the RRTA.

9 JUSTICE KAGAN: Ms. -- Ms. Kovner, in
10 what circumstances do you think we are allowed
11 to look at what is clearly the natural import
12 of that exemption? In other words, that
13 exemption came about later, so do we have to
14 find that "money remuneration" is an ambiguous
15 phrase in order to look at it, or do we take
16 the statute as a whole just generally?

17 MS. KOVNER: I think, you know, what
18 this Court has said about this in West Virginia
19 University Hospitals versus Casey is that the
20 Court adopts the permissible meaning that fits
21 most logically and comfortably with both the
22 previously enacted and the subsequently enacted
23 provisions.

24 So here we think the only meaning that
25 fits with both -- I mean, Mr. Dupree

1 acknowledged when he stood up that money can
2 have this broader reading that readily
3 encompasses stock. And that's the only meaning
4 that fits with the qualified stock option
5 exemption.

6 It's also the only meaning that fits
7 with many other exemptions that Congress added
8 for things that just aren't cash, like for
9 lodging, like for healthcare benefits, like for
10 employee achievement awards, intangible
11 property. These exceptions only make sense if
12 the statute extends beyond cash.

13 JUSTICE SOTOMAYOR: May -- may I ask:
14 Was Mr. Dupree right about the history, that it
15 wasn't -- from 1938 to 1994, railroads were not
16 paying on -- cash on options?

17 MS. KOVNER: I don't --

18 JUSTICE SOTOMAYOR: Or not paying
19 payroll taxes on cash -- cash options?

20 MS. KOVNER: I haven't seen any
21 authority on one side or the other regarding
22 very early in the statute's history. I think
23 we do know, and you can see, you know, page 7
24 of our brief is where we discuss cases that
25 recount this history.

1 We do know that some employees have
2 been paying taxes on stock options for quite
3 some time. So Union Pacific is one example.
4 They start issuing options in 1981, and they
5 pay taxes until 2007, when they file suit.

6 So 2011 is the first time that we see
7 a suit challenging whether stock options are
8 taxable under the RRTA and -- and Union Pacific
9 and other railroads were filing --

10 JUSTICE SOTOMAYOR: How -- what do I
11 do with the fact that where I'm having
12 difficulty making the leap in your argument is
13 Congress did use "money remuneration" in one
14 statute and "wages" defined very broadly in
15 another. That was in 1938.

16 Generally, when you have two different
17 descriptions of words, you have to give them
18 two different meanings of some sort.

19 MS. KOVNER: Sure.

20 JUSTICE SOTOMAYOR: So what do I do
21 with that?

22 MS. KOVNER: So --

23 JUSTICE SOTOMAYOR: You're now
24 equating money remuneration with wages as it
25 appears in FICA, but there -- why weren't

1 identical words used?

2 MS. KOVNER: Sure. So -- and we agree
3 that money has to be given some meaning. And
4 we think that Congress was doing something
5 deliberate when it used money in the RRTA but
6 didn't include parallel language in FICA.

7 And at the time that the RRTA was
8 enacted, railroad workers -- and it's discussed
9 in the history and the hearings leading up to
10 the enactment of the RRTA -- they received a
11 variety of benefits that were sort of hard to
12 value, couldn't readily be assigned a monetary
13 value. And these included things like the
14 right to have certain safety gear on the job
15 and an unlimited but non-transferable sort of
16 lifetime use of the rail's travel benefit.

17 So these are things that would have
18 been hard to value, and we think the use of
19 money carves those out of the RRTA, whereas
20 they weren't carved out with FICA.

21 CHIEF JUSTICE ROBERTS: You -- you
22 would agree, wouldn't you, that not every form
23 of stock qualifies under your definition?

24 Justice Kennedy mentioned non-publicly
25 traded stock. I suppose there are some

1 entities in which their stock is particularly
2 volatile, I mean, you can expect it to change
3 between the time you get the options or the
4 actual stock and -- and when you liquidate it.

5 How are we supposed to tell which
6 stock counts and which doesn't?

7 MS. KOVNER: Sure. So this is an easy
8 case and the Court obviously needs not go
9 further than publicly-traded stock.

10 But as with respect to
11 privately-traded stock, we think that's covered
12 too, and here's why. So it's true that public
13 -- private --

14 CHIEF JUSTICE ROBERTS: When you say
15 covered too, you mean that counts as money
16 remuneration?

17 MS. KOVNER: It's -- that's right.
18 And it counts as money remuneration only at the
19 time that you exercise the option. So it might
20 be that that stock is more volatile than a
21 publicly-traded stock, but it has a certain
22 value on the date you exercise the option, and
23 that's the only value that you look to.

24 Somebody's going to have to value that
25 privately-traded asset for the purpose of

1 income tax. They're going to have to declare
2 income that's equal to the value of that stock.
3 And so we think once they're valuing it for
4 income, it also has a readily discernible
5 market value for the purpose of the RRTA.

6 JUSTICE GORSUCH: Why would you wait
7 until the day of exercise, though, if it -- why
8 not the date of vesting, and -- and what -- I'm
9 still not clear on what you do with
10 privately-held stock that is not readily --
11 there's no liquid market value that you can
12 look to at any point in time.

13 MS. KOVNER: Sure. So, with respect
14 to the first point, we think that options like
15 those that are issued in this case only have a
16 readily ascertainable market value at the time
17 that they are exercised. And that's because
18 there tend to be limitations on the options,
19 like --

20 JUSTICE GORSUCH: Almost anything can
21 be valued, though. I mean, anything can be
22 reduced to money. So why -- why -- why wait,
23 other than it's convenient for the government?

24 MS. KOVNER: No, we think it's a
25 matter of whether it has a readily

1 ascertainable market value. And there's a
2 pretty big body of law on the issue of when
3 options satisfy that. It starts with this
4 Court's decision in Commissioner versus LoBue,
5 and it's also the same set of principles that
6 are applied for valuing options under the
7 income tax code.

8 And that sort of body of law says, for
9 the kinds of options that are issued here in
10 the employment context, there are just too many
11 conditions and conditions -- contingencies on
12 whether you're going to be able to exercise the
13 option at all and what its value will be at the
14 time of exercise. To assign it --

15 JUSTICE GORSUCH: No, no, once it
16 vests, it's different. There's no question
17 that you will be able to exercise it. It's
18 just when. You may choose to exercise it years
19 later, but it vests, so you immediately at that
20 point in time have the right to exercise it on
21 that day.

22 I'm still not clear what your answer
23 to the Chief Justice would be.

24 MS. KOVNER: As -- as to a
25 publicly-traded stock?

1 JUSTICE GORSUCH: Sure.

2 MS. KOVNER: I think our -- our view,
3 you know, so there's a sort of pretty
4 established body of IRS law about this, and it
5 looks to, first, the point of issuance and,
6 second, the point of -- the point at which you
7 exercise the option.

8 I think the IRS has sort of made the
9 determination, applying this Court's decision
10 in Commissioner versus LoBue, that those are
11 the two points that you look to.

12 And the IRS has generally said at the
13 point that the option is issued --

14 JUSTICE GORSUCH: So more regulations.
15 Okay. Fine. And what do we do about the more
16 general problem, though, that lots of companies
17 issue lots of things to their employees that
18 are forms of compensation that can be reduced
19 readily to money?

20 You mentioned lifetime passes for
21 riding the rails, for example. Sports tickets
22 might be another. Home technology might be
23 another. Why aren't all those kinds of
24 benefits -- child care -- why don't all those
25 qualify as money remuneration in the

1 government's view, or do they?

2 MS. KOVNER: So I think there are --
3 our definition of money remuneration basically
4 has two pieces: First, can it be readily
5 valued into cash and, second, can it be readily
6 converted into cash?

7 We think that either suffices, but at
8 a minimum, we think the second, which is what
9 you have here and not in those other cases,
10 suffices.

11 So, if it's something that you can
12 easily convert into cash, here just by sort of
13 checking a box on the form when you exercise
14 the option, we think at a minimum those kinds
15 of things qualify as money remuneration, which
16 is sort of what the Court of Appeals said.

17 JUSTICE GORSUCH: A home computer?

18 CHIEF JUSTICE ROBERTS: What about
19 bushels -- bushels of wheat? It's readily
20 convertible into cash on the Chicago
21 Commodities Exchange. So, if somebody gave you
22 20 bushels of wheat, you would count that as
23 money remuneration?

24 MS. KOVNER: Well, I don't think
25 that's readily convertible to cash for the

1 person who receives it. It's true that there
2 are certain circumstances in which a person
3 could buy or sell bushels of wheat.

4 But, certainly, the employee who
5 receives a bushel of wheat in their
6 compensation, if that were to occur, can't
7 readily convert it into cash in the same way
8 that they can convert an option.

9 JUSTICE KAGAN: I mean, I suppose your
10 answer would --

11 CHIEF JUSTICE ROBERTS: Well, okay,
12 they give you a little -- they say, okay, here,
13 you're entitled to buy 20 bushels of wheat on
14 the commodity exchange. Does that count as
15 money remuneration?

16 MS. KOVNER: Well, a voucher for
17 bushels of wheat? I'm not --

18 CHIEF JUSTICE ROBERTS: Sure.

19 MS. KOVNER: Right. I think the
20 problem is that that voucher for bushels of
21 wheat is not going to be something that you --
22 that the employee can readily convert into
23 cash.

24 If you -- if you do get to the point
25 where we're talking about vouchers that -- that

1 do have a readily ascertainable market value, I
2 think it's a pretty helpful example to us
3 because, if you look to the 1938 regulation
4 that Justice Gorsuch was alluding to, it gives
5 a pretty expansive definition of money
6 remuneration and it indicates that it includes
7 things like merchandise orders, which I think
8 is perhaps somewhat equivalent to the bushels
9 of wheat voucher. It's something that you
10 could exchange for -- for a commodity at the
11 company's store.

12 I mean, that kind of thing is less
13 liquid than -- than stock, which anybody can
14 convert to cash and which is used as a means of
15 exchange in a variety of circumstances. It's a
16 predominant medium of exchange now in many
17 corporate contexts and employee compensation
18 matters.

19 JUSTICE KAGAN: Ms. Kovner, would your
20 answer to the Chief Justice's question be
21 different if a -- if a company said you can
22 take a bushel of wheat or its equivalent in
23 cash value?

24 MS. KOVNER: Yes, Your Honor. I mean,
25 I think there it's -- it's -- and that's, I

1 think, more analogous to here, where
2 essentially the employee can check a box on a
3 form and they're just receiving cash. It's
4 essentially instantaneous conversion into cash.

5 It -- I mean, and I think going to the
6 purpose of the statute and what I think, you
7 know, this Court has indicated in United States
8 versus Silk is how this statute should be
9 construed. I mean, this is a statute that's
10 intended to provide a self-sustaining system of
11 retirement benefits for railroad workers, and
12 if an employer --

13 JUSTICE GINSBURG: Except Mr. Dupree
14 told us that there -- there isn't any real
15 jeopardy to the system if these stock options
16 were not subject to the -- to the tax.

17 MS. KOVNER: So I don't think -- with
18 respect, I don't think that the points that Mr.
19 Dupree was making are exactly correct, and if I
20 could explain why.

21 Mr. Dupree's first response was that
22 the tax rate self-adjusts under the RRTA.
23 That's true for the second tier of the RRTA,
24 the sort of supplemental pension benefit
25 system. It's not true for Tier 1, which is the

1 fundamental equivalent of Social Security.

2 For Tier 1, you've got the same tax
3 rate as FICA, and you're guaranteed the same
4 benefits level as FICA. So I think it's very
5 strange to imagine that Congress would have
6 thought you could have the same tax rate and
7 the same benefits but a much smaller tax -- tax
8 base.

9 And I think the other thing that Mr.
10 Dupree said as to why it's not going to
11 undermine the RRTA's system is that high-level
12 employees are going to max out on their
13 compensation. So it's not really going to
14 matter how their options or how stock-based
15 compensation is treated.

16 And I don't think that's exactly right
17 for two reasons.

18 The first is only part of the RRTA tax
19 maxes out. The part that funds Medicaid does
20 not max out. And the second is that there's
21 nothing to stop an -- an employer from
22 converting all of their railroad's compensation
23 of a high-level executive to cash. I mean,
24 it's not uncommon for a CEO to get \$1 in cash
25 and the rest of their payment in stock.

1 JUSTICE KENNEDY: Is a third -- a
2 third possibility that the employee waits until
3 after he or she retires and doesn't receive the
4 big salary and then exercises the option?

5 MS. KOVNER: The --

6 JUSTICE KENNEDY: Or -- or is that
7 unrealistic?

8 MS. KOVNER: You know, it's -- it's
9 possible that there are some options that don't
10 get taxed for that reason, but, obviously, if
11 the Court were to say that any payment that a
12 company makes to its employees over the
13 duration of their career that takes the form of
14 stock is not taxable, that's posing a -- a
15 threat to the railroad retirement system.

16 You know, I think if the Court has
17 doubts about how the term "any form of money
18 remuneration" is -- is construed, ambiguity in
19 the word "money," I think the surrounding
20 language is helpful. There's -- "any form of"
21 suggests that the -- the Congress was intending
22 a broader meaning of the term "money." And
23 then the -- and then the exceptions that
24 Congress added to the statute are really
25 incompatible with Petitioners' definition.

1 And then the contemporaneous
2 interpretations of the statute by both the RRB
3 and the Treasury Department are both broad.
4 And Congress amends the statute repeatedly
5 against the backdrop of those interpretations.

6 So whatever doubt one has about the --
7 you know, whether those interpretations were
8 too broad to begin with, once Congress
9 repeatedly amends the statute and doesn't
10 change that base definition of compensation --

11 JUSTICE GORSUCH: I guess I'm not sure
12 how the regulations help you. I mean, the more
13 recent regulation says, effectively, that money
14 is whatever money is under the statutes.

15 That -- that doesn't do much work, it
16 seems to me. And the fact that -- that the IRS
17 chose to replace the 1938 regulation, that
18 might or might not be more helpful to the
19 government, we can debate that, seems to me a
20 lost opportunity for the government. No?

21 MS. KOVNER: I mean, I think that if
22 -- if the regulation had provided a lot greater
23 clarity and discussed stock in particular,
24 obviously, that would have been helpful. We
25 think the regulations are still helpful in two

1 ways.

2 JUSTICE GORSUCH: How is the existing
3 regulation helpful to the government?

4 MS. KOVNER: Sure. So the existing
5 regulation talks about specific limitations in
6 the statute as -- as being the way in which the
7 RRTA and FICA differ today. And we think the
8 only reasonable way to read "specific
9 limitations" is that it's talking about the
10 enumerated exceptions, which are different
11 under the statute.

12 If you look at the preamble, I mean,
13 that's what the agency explains that it's
14 doing. It's saying that now that all these
15 exceptions have come into the statute, which
16 deal with the kinds of hard-to-value benefits
17 that were being addressed by money in the first
18 instance, the statutes really have parallel
19 meaning.

20 And I think the agency also points out
21 that the statutes now function in parallel in
22 that they guarantee the same level of benefits
23 under Tier 1 and have the same tax rate under
24 -- under Tier 1. So it makes sense to construe
25 those things in tandem.

1 JUSTICE SOTOMAYOR: I don't know.
2 That doesn't help me because, if you're
3 equating, as the current regulations do, the
4 railroad money remuneration with FICA's wages,
5 what do we do -- FICA requires you to value a
6 hard-to-value stock option, and you're telling
7 me it's not required under money remuneration.

8 MS. KOVNER: No, we think --

9 JUSTICE SOTOMAYOR: So I'm not quite
10 sure how you can equate it when you yourself
11 have recognized the major difference.

12 MS. KOVNER: So we think that options
13 would be treated the same under FICA as they
14 are under the RRTA --

15 JUSTICE SOTOMAYOR: That's easy
16 because it's publicly traded, it's the known
17 value. But the way the regulation is reading,
18 it seems to be equating money remuneration
19 completely with wages. But you're suggesting
20 -- you're not.

21 MS. KOVNER: And we think "money" does
22 some work, we think -- but we think the work
23 that "money remuneration" is doing in FICA --
24 in the RRTA is now basically covered by
25 enumerated exemptions under FICA.

1 So, basically, Congress comes in
2 and they add exceptions for things like de
3 minimis benefits and fringe benefits. The
4 kinds of things that were generally falling in
5 that money bucket under the RRTA, Congress sort
6 of acknowledges that there's a lack of clarity
7 about how those things are going to be treated
8 under FICA, and it enacts a variety of very
9 specific provisions that handle those things.
10 So that's why we think the agency was
11 reasonable in construing those statutes in
12 tandem.

13 But, of course, the Court doesn't need
14 to reach the question of whether all kinds of
15 in-kind benefits are treated exactly the same
16 under FICA and the RRTA. All this case
17 presents is whether stock options, which are a
18 form of remuneration that are readily
19 convertible to cash, qualify as money
20 remuneration.

21 JUSTICE KAGAN: And --

22 CHIEF JUSTICE ROBERTS: If we were --

23 JUSTICE KAGAN: -- and, Ms. Kovner --

24 CHIEF JUSTICE ROBERTS: If we were to
25 agree with you, we would have to assume that

1 whoever wrote this statute was told we want you
2 to include money remuneration and stock
3 remuneration; and he said, well, a good way to
4 do that would be to say "money remuneration."
5 Right? You're -- you're asking us to accept
6 that, aren't you?

7 MS. KOVNER: I -- I don't think
8 exactly. I mean, I think, as my friend on the
9 other side acknowledged, "money" has -- has,
10 and had at the time of the statute's enactment,
11 a broader use as well as a narrow one. And the
12 broader use, we think, encompasses stock. And
13 I think some ways the Court can see that that
14 broader use existed is looking, not only to
15 dictionary definitions, but also to the
16 predecessor versions --

17 CHIEF JUSTICE ROBERTS: Well --

18 MS. KOVNER: -- of the statute.

19 CHIEF JUSTICE ROBERTS: -- I'm not --
20 I'm not saying there isn't a broader use and
21 someone might understand it, but I think if you
22 wanted to be even close to being clear, or
23 reasonably clear, and you want to include both
24 money and stock, you wouldn't pick the phrase
25 "money."

1 MS. KOVNER: I think --

2 CHIEF JUSTICE ROBERTS: You would
3 either say "money and stock," or you might say,
4 as you suggested, is something readily
5 reducible -- ascertainable value readily
6 reducible to cash.

7 MS. KOVNER: It's not clear that
8 "stock" was, you know, necessarily at the
9 forefront of the drafters' mind. I do think
10 that the drafters used "money" in the phrase
11 "any form of money remuneration" in a broader
12 sense. And you can see that through the text
13 of the provisions that Congress put forward in
14 -- in sort of the various versions.

15 So there were versions that included a
16 carveout for various in-kind benefits. And the
17 enacted 1935 version of the statute also
18 included a carveout for one kind of in-kind
19 benefits, for free transportation. So I think
20 it's clear from those sort of versions of the
21 language that Congress put forward that it
22 understood "money" was being used in a broad
23 sense. And --

24 JUSTICE KENNEDY: I thought -- I
25 thought you might have answered the Chief

1 Justice by saying it means any form of money
2 remuneration. But that still just gives you
3 about a C minus on the drafting.

4 MS. KOVNER: You know, obviously --
5 (Laughter.)

6 MS. KOVNER: -- if -- if Congress had
7 spoken directly to stock one way or the other,
8 either said it's in or it's out, we wouldn't be
9 here today, but I think the only reasonable
10 interpretation of the word "money" as it was
11 used in the statute, particularly given the
12 regulations and Congress's ratification of
13 those regulations and all of the exceptions
14 that Congress has added since, is that it
15 reaches by --

16 CHIEF JUSTICE ROBERTS: You -- you
17 think that's the only reasonable -- I -- I
18 didn't think your argument went that far.

19 MS. KOVNER: Well, I -- I'd be happy
20 to accept that it's the most reasonable reading
21 of the statute --

22 CHIEF JUSTICE ROBERTS: I thought in
23 some places where you're talking about the
24 regulations, your idea was it was "a"
25 reasonable one.

1 MS. KOVNER: And -- and we think
2 that --

3 CHIEF JUSTICE ROBERTS: Saying it's
4 the only reasonable one is a bit of a stretch.

5 MS. KOVNER: Fair enough. We think
6 it's -- it's certainly the most reasonable
7 reading of the statute in light of its
8 language, in light of what happened since, and
9 in light of Congress's objective in providing a
10 self-sustaining employment system.

11 JUSTICE KAGAN: But if I --

12 JUSTICE ALITO: Do you -- do you think
13 the later adopted exemptions change the meaning
14 of "money remuneration"?

15 MS. KOVNER: I -- I don't think --

16 JUSTICE ALITO: How can they do that?

17 MS. KOVNER: So I think what this
18 Court has said -- I mean, it said it in Casey,
19 it said it in Fausto, it's in the Scalia and
20 Garner treatise, is that when this Court
21 interprets statutes, if there's an ambiguous
22 term in the early statute and then later
23 provisions get enacted that shed light and make
24 clear that Congress is acting on the
25 understanding that it's the broader form of --

1 of the term that was used, then you construe
2 the statutes together. You adopt a reading
3 that makes sense of both provisions, rather
4 than adopting a reading that would make the
5 second enactment make no sense.

6 JUSTICE ALITO: So the -- what is the
7 answer to my question? Does it change the
8 meaning or not?

9 MS. KOVNER: It resolves an ambiguity
10 in the meaning of the prior provision.

11 JUSTICE KAGAN: If you could just go
12 back to some answers you gave to prior
13 questions about how to work this on privately
14 listed companies, did -- did I get it right
15 that you're just saying that -- that the how
16 and exactly -- the -- the method by which this
17 is understood as taxable in this context is the
18 same as in the income tax context? Is that
19 right?

20 MS. KOVNER: That's right. These --
21 these are going to be valued for purposes of
22 the income tax. Nobody disputes that. And we
23 think that once they're valued for purposes of
24 the income tax, they're -- they're also -- that
25 value should be ascribed to them for purposes

1 of the RRTA tax.

2 If there are no further questions, I
3 would ask that the Court affirm.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Four minutes, Mr. Dupree.

7 REBUTTAL ARGUMENT OF THOMAS H. DUPREE, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. DUPREE: Thank you. Just a few
10 points. The first is this Court obviously
11 needs to construe this tax provision in the
12 context of the code as a whole. We identify
13 numerous provisions in the code, both as it
14 existed during the Great Depression but also as
15 it exists today, that makes clear that when
16 Congress uses the word "money" in a tax
17 statute, it does not mean stock.

18 I think that if this Court were to
19 reach the conclusion that, in the context of a
20 tax statute, the word "money" can encompass
21 stock, I think that could have pretty
22 significant spill-over effects to the dozens,
23 if not hundreds, of places in the code today
24 that use the word "money."

25 The second --

1 JUSTICE SOTOMAYOR: How many of those
2 other code provisions use the words "money
3 remuneration" as opposed to just "money"?

4 MR. DUPREE: They -- they don't,
5 Justice Sotomayor, but at the same time, I
6 think "money remuneration" can simply be
7 understood as remuneration in money, which, of
8 course, begs the question as to, well, what's
9 money?

10 And our point is that when Congress
11 puts the word "money" in a tax statute, it
12 unambiguously excludes stock. There's no
13 question about that in the current code and the
14 code as it existed back in the Great
15 Depression.

16 The second point is to the extent the
17 government argues that anything that can be
18 valued and sold for cash falls within this
19 capacious definition of money is wrong because
20 I can think of many things that can be sold
21 faster for cash at a much lower transaction
22 cost, for example, baseball tickets.

23 If I have two tickets to the Nationals
24 and Rockies game, I can sell those and change
25 those into cash a lot faster than I could find

1 a broker and sell my shares of stock on a
2 market.

3 The third point I would make, and I
4 think it's apropos since Tax Day is almost upon
5 us, is the government, the IRS, requires that
6 we taxpayers pay our taxes in money. It will
7 not let taxpayers pay their taxes in stock.

8 Unless there are further questions, we
9 ask the judgment below be reversed.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 10:55 a.m., the hearing
13 concluded.)

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Official

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