No. 09-837

IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; AND REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Treasury Department can categorically exclude all medical residents and other full-time employees from the definition of "student" in 26 U.S.C. § 3121(b)(10), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings below.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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The court of appeals' opinion is reported at 568 F.3d 675. Pet. App. 1a. The order denying the petition for rehearing and rehearing en banc is unreported. *Id.* at 66a. The opinion of the United States District Court for the District of Minnesota in *Mayo Foundation for Medical Education & Research v. United States* is reported at 503 F. Supp. 2d 1164. *Id.* at 20a. The opinion of the district court in *Regents of the University of Minnesota v. United States* is unpublished but is electronically reported at 2008 WL 906799. *Id.* at 47a.

JURISDICTION

The court of appeals filed its opinion on June 12, 2009. It denied petitioners' timely petition for rehearing and rehearing en banc on September 17, 2009. On December 7, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 15, 2010. No. 09A545. The petition was filed on January 14, 2010, and granted on June 1, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Internal Revenue Code and the Treasury Department's implementing regulations are set forth in the appendix to this brief.

STATEMENT

The Student Exemption to the Federal Insurance Contributions Act exempts from Social Security taxes all compensation for "service performed in the

employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). In response to a series of judicial decisions holding that the Student Exemption can encompass medical residents, the Treasury Department promulgated a regulation that purports to narrow the statutory exemption by *categorically* excluding all full-time employees—including medical residents—from the Exemption. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii).

The Eighth Circuit upheld this so-called "full-time employee" regulation on the ground that the statutory term "student" is ambiguous and that the regulation is a reasonable interpretation of the Student Exemption. Pet. App. 12a, 18a. That decision disregards the plain and unambiguous language of the Student Exemption and fundamentally misapprehends the nature of medical residency programs. It should be reversed.

1. To fund the Social Security system, FICA imposes a payroll tax on "wages" that is assessed on both employers and employees. 26 U.S.C. §§ 3101, 3111. FICA defines "wages" as "remuneration for employment" (*id.* § 3121(a)), but excludes from the definition of "employment" "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." *Id.* § 3121(b)(10).

Congress enacted the Student Exemption in 1939. A year later, the Treasury Department adopted regulations that provided that "student" status would be determined "on the basis of the relationship of such employee with the organization for

which the services are performed" and that an employee who performs services "as an incident to and for the purpose of pursuing a course of study" is a "student" within the meaning of the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(c) (2004). That regulation, which remained substantially unchanged for the next six decades, permitted medical residents to qualify for the Student Exemption where they otherwise satisfied the Exemption's statutory criteria—even if they worked more than forty hours per week. Pet. App. 42a & n.12.

2. The medical education of a doctor begins, but does not end, in medical school. Students enrolled in medical school primarily attend lecture-based classes for two years and then begin two years of "generally all clinical experiences." J.A. 189a. In those final two years, they "interact with patients in the hospital wards as part of a system called 'rotations.'" *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 2008 WL 2940669, at *4, *36 (S.D. Fla. July 28, 2008); *see also id.* at *2-18 (examining an extensive factual record about medical education, in general, and the residency program at Mt. Sinai Medical Center, in particular). "Those patient care activities that occur in the third and fourth years of medical school[ ] are 'quite analogous' to what [later] happens for the period of residency training." *Id.* at *4-5. "The third-year medical student 'practices' medicine by rotating through various specialties such as medicine, surgery, pediatrics, psychiatry, and obstetrics and gynecology. The fourth-year medical student continues her clinical training by rotating through other specialties and subspecialties." Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Geo. L.J. 1749, 1793 (1995).

Upon graduation from medical school, "physicians are not deemed fully trained to independently practice medicine" (*Mt. Sinai*, 2008 WL 2940669, at *3) because "they have not fully learned how to safely perform medical procedures on patients." Pet. App. 62a. Although a "general practitioner" can theoretically obtain a license to practice medicine after one year of post-medical-school training, "the general practitioner has disappeared; indeed, it has not existed since the 1970s" because "it became unsafe to practice" without a specialty such as family medicine, internal medicine, or pediatrics. *Mt. Sinai*, 2008 WL 2940669, at *3 n.6. "In the modern practice of medicine, someone holding themselves out as a general practitioner would have no possibility of obtaining hospital privileges." *Id.* Accordingly, doctors seek to become "board certified" in a specialty by a standard-setting organization; those organizations uniformly require doctors to complete an accredited medical residency program as a prerequisite to certification. *Id.* at *3; *see also United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1007 (D. Minn. 2003) ("*Mayo I*") ("to practice medicine in a given field, and in most cases to be admitted to a hospital staff, an individual holding an M.D. degree typically must (1) complete an accredited residency training program of at least three years' duration in a clinical specialty field, and (2) become certified by a specialty board that is a member of the American Board of Medical Specialties").

As a result, recent medical school graduates continue their medical education by applying to accredited three-to-five-year residency programs like those offered by petitioners. They "apply to . . . a residency program for an educational purpose" (Pet. App. 38a

n.8) and based on a program's "ability to support their further education" through course offerings and mentoring opportunities. *Mt. Sinai*, 2008 WL 2940669, at *5. The aspiring resident "does not view the process to be one of picking his first 'job'"—in part because a resident is "not likely to stay on staff as an attending physician after completion of the[ ] residency." *Id.*; *see also Mayo I*, 282 F. Supp. 2d at 1001 n.8 ("when they began their residencies, they had no expectation of being hired by the [Mayo] Foundation as a staff physician upon completion of their programs"). Rather, the aspiring resident views the application process "in the same way high school students, when applying to college, judge whether a degree from college A or a degree from college B [is] going to help [them] more." *Mt. Sinai*, 2008 WL 2940669, at *5 (alterations in original; internal quotation marks omitted). In turn, schools admit residents based on exam scores, entrance applications, and interviews "similar to what . . . children would go through when they apply to college." J.A. 117a-18a.

Once admitted, residents are enrolled and registered each year in "a formal and structured educational program." Pet. App. 38a n.8; *see also id.* at 63a; J.A. 145a. Residency programs "undergo regular internal and external review to ensure that they abide by and comply with" the curricula and institutional requirements of an accrediting organization. *Mt. Sinai*, 2008 WL 2940669, at *7. The most prominent of these organizations is the Accreditation Council for Graduate Medical Education ("ACGME"), which accredits petitioners' programs. Failure to comply with the ACGME's strict academic requirements can result in the loss of accreditation, which has "serious consequences" for both schools and their

residents: "[P]rograms that lose ACGME accreditation are not eligible for Medicare [Graduate Medical Education] funding and, in addition, residents must complete ACGME-accredited residency programs in order to be eligible to take examinations for board certification in their specialties." ACGME, ACGME Duty Hours Standards Fact Sheet, http://www.acgme.org/acWebsite/newsRoom/newsRm_dutyHours.asp.

The ACGME is "a major driving force in the standardization of robust educational curricula across all teaching hospitals." *Mt. Sinai*, 2008 WL 2940669, at *7. First, it requires residents to attend conferences and lectures, and to engage in laboratory research and other scholarly activities. *Id.* at *8. Second, the ACGME requires faculty to undertake scholarly pursuits. *Id.* Third, it "requires sponsoring institutions to provide all residents with appropriate financial support," which in petitioners' programs consists of annual stipends of between $40,000 and $60,000; those stipends are intended to cover cost-of-living expenses, but are not "a competitive wage" or "bargained-for compensation" and "represent a far cry from the salaries drawn by fully trained and licensed physicians." *Id.* at *8, *34; *see also* Pet. App. 17a. Fourth, the ACGME prohibits hospitals from relying on medical residents for tasks that lack educational value. *See* J.A. 55a; *Mt. Sinai*, 2008 WL 2940669, at *9. For example, hospitals must use other individuals to draw blood, start an IV, or schedule tests in order to "free the residents up for more educational opportunities." J.A. 136a; *see also Mayo I*, 282 F. Supp. 2d at 1015 (the Mayo Foundation "seeks to ensure that allied healthcare personnel perform ancillary procedures that have no 'educational value'"). Those educational opportunities include "prepar[ing]

articles for publication (with faculty coauthors), mak[ing] presentations at lectures and seminars held for residents and faculty, present[ing] papers at state, regional and national medical meetings, and [being] sent on trips for general educational purposes." J.A. 208a.

The ACGME also requires that residency programs provide each medical resident with a "comprehensive . . . didactic core curriculum and written syllabus." *Mayo I*, 282 F. Supp. 2d at 1004. For each course (known as a "rotation"), medical residents are "assigned textbooks and journal articles relevant to the subject matter." *Id.* In addition, their regular attendance is mandatory at core curriculum conferences, primary care conferences, morbidity and mortality conferences, and journal clubs, as well as at grand rounds, where residents hear a lecture in a large group setting, followed by a question-and-answer session. *See* Pet. App. 41a n.10, 63a; *Mayo I*, 282 F. Supp. 2d at 1004.

Even though medical residents attend as many as "900 lectures and conferences" over the course of their residency programs (*Mayo I*, 282 F. Supp. 2d at 1004, 1016), their "principal classroom"—like that of third- and fourth-year medical students—is "the clinical setting," where "they learn by caring for patients in a medical specialty under the supervision of a [ ]faculty member." Pet. App. 62a-63a. Moving from patient to patient on "rounds," a faculty member "conduct[s] didactic sessions with the residents both during and/or after rounds that would draw out and explain the salient educational points of each patient's condition." *Mayo I*, 282 F. Supp. 2d at 1003. This "learning process . . . consist[s] largely of residents making suggestions to the staff physicians and the staff physicians correcting the residents." *Id.* at

1018. By spending, on average, forty or more hours per week caring for patients, "a resident learn[s] by doing a medical task under the direct and personal guidance" of a faculty member, who, "the whole time," is "looking over [the resident's] shoulder." *Id.* at 1003, 1018 (internal quotation marks omitted); *see also* Joseph H. King, *The Standard of Care for Residents and Other Medical School Graduates in Training*, 55 Am. U. L. Rev. 683, 697 (2006) ("Residencies are really preceptorships, in which the students learn by caring for patients under the watchful eye of a university faculty member or an attending private practitioner.") (internal quotation marks omitted). This method of education is "necessary" because "[a] future physician cannot adequately develop skills if not permitted to perform actual procedures on real patients." *Minnesota v. Chater*, 1997 WL 33352908, at *7 (D. Minn. May 21, 1997).

Through this hands-on learning process, "[r]esidents usually slow things down and cost [faculty physicians] time" (J.A. 73a), because faculty "could . . . easily provide[ ] patient-care services in a more efficient and quicker fashion if they didn't have residents." Pet. App. 65a (internal quotation marks and alterations omitted). "[L]arge portions of the patient-care services performed by residents—such as physical examinations and the review of test results—[are] repeated by the supervising staff physicians . . . ultimately responsible for the patients' care." *Mayo I*, 282 F. Supp. 2d at 1018.

"This inefficiency . . . is recognized by Medicare." *Mt. Sinai*, 2008 WL 2940669, at *4. In addition to providing reimbursement for "the cost of direct graduate medical educational activities" (42 C.F.R. § 413.75(a)(1)), Medicare "provides a payment to teaching hospitals over and above that which is typi-

cally provided for a given patient care service[,] in part, due to its recognition that teaching hospitals' efficiency is diminished by the presence of residents." *Mt. Sinai*, 2008 WL 2940669, at *4; *see also* 42 C.F.R. § 412.105.

As medical residents progress through their programs, they take written examinations—including "in-training" exams, national specialty exams, and exams designed for certain rotations—and faculty physicians evaluate and grade their performance in each rotation. *See* Pet. App. 63a-64a; *Mayo I*, 282 F. Supp. 2d at 1004. The "assessment of academic performance" includes a "careful and deliberate review" of "relevant exam scores, clinical diagnosis and judgment, medical knowledge, technical abilities, interpretation of data, patient management, communications skills, interactions with patients and other healthcare professionals, professional appearance and demeanor, and/or motivation and initiative." J.A. 213-14a.

"[L]ike nonresident students," a medical resident can be academically disciplined, required to repeat a course, or dismissed from the school if the resident's academic performance is at a failing level. *Chater*, 1997 WL 33352908, at *7; *see also* Pet. App. 64a n.17. When medical residents are dismissed from a state-sponsored residency program, they are not entitled to all the due process rights of a typical terminated state employee. *See Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001) (a medical resident dismissed from a state-sponsored program "can prevail . . . only . . . if the [teaching hospital] . . . failed to accord her the minimum procedural protections owed in cases of student dismissal"). Instead, "[t]he decision to terminate a resident from a hospital-based residency program is the same as any other decision

to fail a graduate student for inability to meet academic requirements." *Ross v. Univ. of Minn.*, 439 N.W.2d 28, 33 (Minn. Ct. App. 1989).

If medical residents successfully complete their educational programs, they "receive[ ] diplomas or certificates of completion . . . at a graduation ceremony." Pet. App. 64a n.17; *see also Mayo I*, 282 F. Supp. 2d at 1004. The graduation marks the end of their formal education and the beginning of their professional careers. For the first time, they are considered fully trained to practice medicine independently, having received a "graduate medical education" that "is absolutely vital" in molding them from "inexperience[d] doctors who graduate[d] from medical school" into "sophisticated and accomplished practitioners in a complex world of medical specialization." *Mt. Sinai*, 2008 WL 2940669, at *2. Other than universities, foundations, and teaching hospitals like petitioners, "[n]o other institutions in the United States . . . carry out this essential role and function." *Id.*

3. Petitioners Mayo Foundation for Medical Education and Research and Mayo Clinic ("Mayo"), and petitioner Regents of the University of Minnesota ("University") sponsor medical residency programs accredited by the ACGME. Pet. App. 22a, 48a; U.S. C.A. App. 300 (No. 08-2193).

In 1990, the Social Security Administration issued a formal notice of assessment to the University for unpaid Social Security taxes on its medical residents' stipends. *See Minnesota v. Apfel*, 151 F.3d 742, 743 (8th Cir. 1998). The Eighth Circuit overturned that assessment, holding that stipends paid to medical residents at the University were exempt from Social Security taxes because the residents

qualified for the Social Security Act's Student Exemption (42 U.S.C. § 410(a)(10)), which is identical to FICA's Student Exemption. *Apfel*, 151 F.3d at 748. The Exemption applied, the court explained, because "the primary purpose for the residents' participation in the program is to pursue a course of study rather than to earn a livelihood." *Id.*[1]

Several years later, the District of Minnesota held that Mayo's medical residents were also exempt from Social Security taxes. *Mayo I*, 282 F. Supp. 2d at 1018. Rejecting the government's argument that medical residents' long hours categorically disqualified them from the Student Exemption, the district court held that "[t]ime alone cannot be the sole measure of the relationship between services performed and a course of study." *Id.* The court concluded that, in contrast to the government's categorical approach, medical residents' eligibility for the Student Exemption depends on a "fact-specific, case-by-case examination" of whether the residents satisfy the criteria set forth in the statutory exemption. *Id.* at 1007. In the case of Mayo's medical residents, the

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[1] For the tax periods at issue in *Apfel*, the University's status as a state entity meant that it was covered under a Social Security coverage agreement between the State of Minnesota and the federal government. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 536 (2002) (the University is "an arm of the State of Minnesota"). Accordingly, the Eighth Circuit held both that medical residents were not "employees" under the coverage agreement and that, even if medical residents were "employees," they were statutorily excluded from coverage under the Social Security Act's Student Exemption. 42 U.S.C. § 410(a)(10). In 1987, Social Security taxation of state employees was transferred to the FICA provisions of the Internal Revenue Code. Pub. L. No. 99-509, § 9002(b)(1)(A), 100 Stat. 1874, 1971-72 (1986).

court found that the educational purpose of their patient care predominated over its service aspect and that they were accordingly students covered by the Student Exemption. *Id.* at 1018. The government filed a notice of appeal to the Eighth Circuit but subsequently dismissed that appeal.

Less than two months later, the Treasury Department attempted to create through the regulatory process what it had repeatedly failed to secure in court and had refused to seek from Congress: a categorical exclusion of medical residents and all other full-time employees from the Student Exemption. Explicitly acknowledging its desire to overturn the decisions holding that medical residents at Mayo and the University are students and therefore exempt from Social Security taxes, the Treasury Department proposed, and later adopted, amendments to its regulations interpreting the Student Exemption. Student FICA Exception, 69 Fed. Reg. 8,604 (Feb. 25, 2004); *see also* J.A. 219a ("the regulation was amended partly in response to the recent wave of litigation concerning the status of medical residents as 'students'"); Student FICA Exception, 69 Fed. Reg. 76,404 (Dec. 21, 2004) (final regulation).

One of the new regulations excludes all "full-time employees" from the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii). According to the full-time employee regulation, an employee whose "normal work schedule" is at least 40 hours per week is a full-time employee and categorically ineligible for the Student Exemption. *Id.* As a specific example of a full-time employee, the regulation lists a medical resident whose "normal work schedule, which includes services having an educational, instructional, or training aspect, is 40 hours or more per week." *Id.* § 31.3121(b)(10)-2(e), Ex. 4.

After promulgating the full-time employee regulation, and unsuccessfully contesting the tax-exempt status of medical residents under the preexisting regulations for more than twenty years, the government formally "*accept[ed]* the position . . . that medical residents are *exempt* from FICA taxes for tax periods" preceding April 1, 2005, the effective date of the full-time employee regulation. Br. in Opp. 14 n.2 (emphases added); *see also* IRS, Press Release, IRS to Honor Medical Resident FICA Refund Claims (Mar. 2, 2010).

4. Mayo and the University filed separate tax refund actions in the District of Minnesota that challenged the Treasury Department's attempt to use the full-time employee regulation to categorically exclude their medical residents from the Student Exemption for tax periods after March 31, 2005. The district court invalidated the regulation.

In Mayo's suit, the district court concluded "that the term 'student' is not ambiguous" because it "is well defined and commonly understood outside the context of the Student Exclusion." Pet. App. 39a. It found the government's contrary position to be "quite puzzling" because, "in *Mayo I*, this Court expressly determined that the Student Exclusion was not ambiguous and cited to an extensive factual record as to . . . why medical residents qualify for the 'student' exclusion from FICA taxation." *Id.* at 31a n.3 (citing *Mayo I*, 282 F. Supp. 2d at 1007, 1013-18). The district court explained that the "full-time employee exception arbitrarily narrows [the ordinary definition of 'student'] by providing that a 'full-time' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service aspect." *Id.* at 40a.

The district court applied that holding in the University's suit, and concluded that medical residents at the University, like those at Mayo, are "students" within the meaning of the Student Exemption. Pet. App. 65a.

5. The Eighth Circuit heard the government's appeals together and reversed in a single opinion. Acknowledging that the case presented a "difficult issue," the court of appeals held that the full-time employee regulation is valid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the term "student" is ambiguous and the full-time employee regulation is a reasonable interpretation of the statutory Student Exemption. Pet. App. 12a, 18a. In so holding, the panel expressly acknowledged that "four of our sister circuits have recently declared, in cases arising under the former regulations, that the student exception statute is unambiguous" and can include medical residents enrolled in medical residency programs and regularly attending classes. *Id.* at 9a (citing *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008); *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-56 (11th Cir. 2007)). The Eighth Circuit conceded that, "[i]f that interpretation of the statute is correct, we must affirm." *Id.*

The Eighth Circuit nevertheless expressly rejected the decisions of the Second, Sixth, Seventh, and Eleventh Circuits. Pet. App. 10a. According to the Eighth Circuit, those courts' "interpretation of [the Student Exemption] . . . cannot be correct" because the Student Exemption is ambiguous and can

reasonably be construed as categorically excluding all full-time employees, including medical residents. *Id.* "[W]hen the context is a provision of the Internal Revenue Code," the court asserted, "a Treasury Regulation interpreting the words is nearly *always* appropriate." *Id.* at 12a (emphasis added).

SUMMARY OF ARGUMENT

I. The Eighth Circuit's decision upholding the full-time employee regulation's categorical exclusion of medical residents from the Student Exemption cannot be reconciled with the unambiguous statutory language of the Exemption.

A. The Student Exemption to FICA exempts from Social Security taxes all compensation for "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). That language unambiguously exempts petitioners' medical residents from FICA taxation because the definition of "student"—one who engages in "study" by applying the mind "to the acquisition of learning" (*Oxford Universal Dictionary* 2049-50 (3d ed. 1955))—plainly encompasses petitioners' residents. If Congress had intended to exclude from the Student Exemption individuals engaged in hands-on, clinical education for more than forty hours per week, it would have said so. Its decision not to engraft such a restriction on the plain meaning of the statutory term "student" is controlling here.

B. Six factors establish that petitioners' medical residents are unambiguously "students" within the meaning of the Student Exemption.

1. Petitioners' medical residents are enrolled and regularly attending classes in petitioners'

graduate medical education programs. In addition to attending hundreds of lectures and conferences throughout their residencies, they participate in a series of clinical courses in which they develop their medical skills through hands-on patient care under the close supervision of faculty members.

2. The education that a medical resident receives through this combination of hands-on learning and classroom instruction is a requirement for medical school graduates, who are effectively ineligible to obtain hospital privileges to practice medicine without completing a residency program.

3. Aspiring medical residents thus apply to residency programs exclusively for an educational purpose. Indeed, they have no expectation of being hired by Mayo or the University upon completion of their residency programs, and they choose a residency program based not on salaries or typical career considerations but instead based on the schools' course offerings and mentoring opportunities.

4. Once accepted into petitioners' residency programs, ACGME academic accreditation requirements require that medical residents engage in patient care solely for educational purposes. Petitioners derive no financial benefit from the patient care provided by their residents. In fact, petitioners lose money from their training of medical residents, and receive Medicare reimbursements both for the direct costs of providing medical education and for the indirect costs attributable to the inefficiencies that arise when patient care is provided by residents acting under the supervision of attending physicians.

5. Moreover, the academic program of a medical resident is virtually indistinguishable from that of a third- or fourth-year medical student—both learn

through a combination of hands-on patient care and academic instruction—and this Court has already held that individuals in their third and fourth years of medical school are students. *See Bd. of Curators v. Horowitz*, 435 U.S. 78, 89 (1978).

6. Finally, Congress, academic accrediting organizations, and medical residents themselves have all used the term "student" to classify medical residents.

II. Because "Congress has directly spoken to the precise question at issue[,] . . . that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). But even if the Student Exemption did not unambiguously encompass petitioners' medical residents, the full-time employee regulation would still be an arbitrary and unreasonable interpretation of the statutory exemption.

A. The full-time employee regulation distinguishes between individuals based solely on the amount of time they are engaged in the pursuit of learning and on whether they spend the majority of their time learning from books and lectures or from clinics and observation. Those distinctions are entirely arbitrary because a person engaged in learning does not become any less of a student when he studies for long hours or through hands-on training rather than classroom instruction.

B. The full-time employee regulation also fails to satisfy any of the factors that, under *Chevron* and *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), determine the reasonableness of a revenue regulation.

1. The full-time employee regulation cannot be harmonized with the origin or purpose of FICA and the Student Exemption. Congress's decision to combine two earlier versions of the Exemption—one of which included explicit restrictions on the amount of remuneration that a student could earn—into a single statutory provision with *no* restrictions on wages or hours demonstrates that Congress did not intend to limit statutory eligibility to individuals who work less than full time. The full-time employee regulation is also inconsistent with FICA's purpose of collecting revenue to pay for Social Security benefits earned during a worker's career because the regulation requires the assessment of FICA taxes *before* doctors are eligible to embark on their careers.

2. The full-time employee regulation is not a contemporaneous construction of the Student Exemption. To the contrary, the only contemporaneous construction by the Treasury Department established a regulatory standard that, as the government now concedes (Br. in Opp. 14 n.2), would allow medical residents to qualify for the Student Exemption.

3. Moreover, the full-time employee regulation did not evolve in an authoritative manner. Instead, as the Treasury Department admits, the purpose of the newly promulgated regulation was to overturn adverse judicial decisions without seeking an amendment of the Student Exemption from Congress.

4. Nor has the full-time employee regulation been in effect long enough to generate significant reliance. In fact, far from relying on it, petitioners immediately challenged the validity of the regulation.

5. Finally, the government has adopted, and then discarded, a series of conflicting positions regarding the FICA tax status of medical residents. The government did not attempt to collect FICA taxes on the stipends paid to petitioners' medical residents until fifty years after the Student Exemption was enacted. When the government eventually embarked on its two-decades-long effort to collect those taxes, it adopted inconsistent litigation and regulatory positions on the issue—before finally conceding in 2010 that, prior to the promulgation of the full-time employee regulation, petitioners' residents were indisputably eligible for the Student Exemption.

ARGUMENT

I. THE STATUTORY TERM "STUDENT" UNAMBIGUOUSLY ENCOMPASSES PETITIONERS' MEDICAL RESIDENTS.

When reviewing an agency's construction of a statute, this Court first asks "whether Congress has directly spoken to the precise question at issue," because "[i]f the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In this case, Congress has chosen to exempt from FICA taxation "students" employed by schools where they are "enrolled and regularly attending classes." 26 U.S.C. § 3121(b)(10). Because the term "student" unambiguously encompasses medical residents enrolled and attending classes at petitioners' institutions, the Treasury Department's attempt to categorically exclude all residents from the Student Exemption is unlawful.

A. The Eighth Circuit Erred In Assuming That The Statutory Term "Student" Does Not Have A Plain Meaning.

As four circuits have held, the term "student" unambiguously encompasses medical residents who are enrolled in medical residency programs and regularly attending classes. *See United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008); *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-56 (11th Cir. 2007). The Eighth Circuit reached a contrary conclusion by employing a flawed premise—that words (like "student") that have a "common or plain meaning in other contexts" are "nearly always" ambiguous "when the context is a provision of the Internal Revenue Code." Pet. App. 10a, 12a. Thus, according to the Eighth Circuit, the first step of *Chevron* is categorically inapplicable in tax cases.

To the contrary, this Court, "[i]n interpreting the meaning of the words in a revenue Act, . . . look[s] to the 'ordinary, everyday senses' of the words." *Comm'r v. Soliman*, 506 U.S. 168, 174 (1993) (quoting *Malat v. Riddell*, 383 U.S. 569, 571 (1966)). The Eighth Circuit thus assumed the *opposite* of what "[c]ourts [should] properly assume"—that "absent sufficient indication to the contrary, . . . Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

None of the cases cited by the Eighth Circuit substantiates its position that commonly understood terms are infused with ambiguity simply because they appear in a provision of the Internal Revenue Code. Pet. App. 10a-11a. In each of those cases, this Court expressly held that the statutory term at issue did not have an ordinary, common meaning or was plainly being used as a legal term of art. In *National Muffler*, for example, the Court recognized that the "statute's term 'business league' has no well-defined meaning or common usage outside the perimeters of the" statute. 440 U.S. at 476, 488. Similarly, in *United States v. Correll*, 389 U.S. 299 (1967), the Court concluded that the "language of the statute—'meals and lodging . . . away from home'—is obviously not self-defining." *Id.* at 304 (alteration in original); *see also Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 561-62 (1991) (treating the statutory phrase "disposition of property" as a term of art that codified principles set forth in the Court's "landmark precedents" in the area, and holding that the Treasury Department had construed the phrase in a manner "consistent with" those precedents); *Magruder v. Washington, Balt. & Annapolis Realty Corp.*, 316 U.S. 69, 73 (1942) ("The crucial words of the statute, 'carrying on or doing business,' are not so easy of application to varying facts that they leave no room for administrative interpretation."); *Helvering v. Reynolds*, 313 U.S. 428, 430-31 (1941) (rejecting as "not tenable" the argument that the statutory phrase "at the time of such acquisition" had "a definite meaning").

The term "student," in contrast, does have an "ordinary, contemporary, common meaning" that can be found in the dictionaries on which both petitioners and the government rely. A "student" is a person

who engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment." *Oxford Universal Dictionary* 2049-50 (3d ed. 1955); *see also Webster's New International Dictionary* 2502 (2d ed. 1939) (a "student" is a "person engaged in study . . . esp[ecially], one who attends a school"). The *Random House Webster's Unabridged Dictionary*, cited by the government, similarly defines "student" as a "pupil" or "person formally engaged in learning, esp[ecially] one enrolled in a school or college." Br. in Opp. 10 (citing *Random House Webster's Unabridged Dictionary* 1888 (2d ed. 2001)); *see also Soliman*, 506 U.S. at 174 (relying on a dictionary to find the "commonsense meaning" of a term in a revenue statute).

The Student Exemption's requirement that students be "enrolled and regularly attending classes at [a] school, college, or university" (26 U.S.C. § 3121(b)(10)) underscores that an agency may not further narrow the "ordinary, contemporary, common meaning" of "student." As the district court below explained, "Congress already put its limitations on the word 'student'—those limitations only require a student to be enrolled and regularly attending classes. Congress did *not* put any limitation on 'student' with regard to how much that individual might be working in some ancillary capacity." Pet. App. 39a-40a. Congress's unambiguously expressed choice not to impose such hours-based limits is dispositive—and cannot be altered by the Treasury Department. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying the "*expressio unius*" canon of construction).

B. Six Factors Demonstrate That The Student Exemption Unambiguously Encompasses Petitioners' Medical Residents.

Six factors establish that the medical residents enrolled at Mayo and the University unambiguously fall within the plain meaning of the statutory term "student."

1. Petitioners' medical residents are "enrolled and regularly attending classes" in petitioners' graduate medical education programs. 26 U.S.C. § 3121(b)(10). Mayo's "[r]esidents are enrolled in [residency] programs" (Pet. App. 22a) when an administrative secretary "record[s] a 'Y' (for 'Yes') in the 'Enrolled' data field of the [record] system" for each medical resident. *United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1016 (D. Minn. 2003) ("*Mayo I*"). Through a similar process, "[p]rogram coordinators at the University [of Minnesota] register[ ] residents for courses." Pet. App. 63a n.16; *see also* J.A. 145a, 157a. Indeed, the government itself has conceded that medical residents are enrolled at petitioners' institutions. *See*, *e.g.*, *id.* at 18a (stating that residents' "enrollment" was "just the start . . . of the student status analysis").

During their three-to-five-year residency programs, residents participate in a series of required and elective four-week rotations, which each have a written curriculum. In addition to requiring attendance at lectures and the completion of reading assignments, rotations provide residents with an opportunity to develop their medical skills by treating patients under the supervision of attending physicians, who provide residents with feedback on their

proposed courses of treatment and patient care skills. *See* Pet. App. 38a n.8, 63a. As this Court has recognized, the fact that these rotations take place in a clinical setting does not diminish the fact that residents engage in patient care for an educational purpose. Graduate medical education programs, the Court has explained, give "residents clinical training in various medical specialties. Because participants learn both by treating patients and by observing other physicians do so, GME programs take place in a patient care unit (most often in a teaching hospital), rather than in a classroom." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507 (1994).

Moreover, the Treasury Department itself has long-recognized that student status does not require instruction in a traditional classroom setting. *See* Rev. Rul. 78-17, 1978-1 C.B. 306 (advanced graduate student no longer receiving classroom instruction qualified for the Student Exemption); IRS Gen. Couns. Mem. 37252, 1977 WL 46189 (Sept. 14, 1977) (an enrolled individual who attended no lectures but conducted "research and experimentation . . . under the supervision of a committee of faculty members" that are "part of the degree program" was "regularly attending classes" because the Student Exemption should not be "so narrowly construed as to limit the exception to one who actually attends a classroom lecture"). Even in this litigation, the government has equated clinical courses with other academic instruction, conceding that medical residents' "failure to meet academic standards . . . may, of course, include clinical performance." J.A. 19a.

2. Medical school graduates are effectively barred from practicing medicine without completing a medical residency program. "Unlike 'regular' doctors who must be licensed to practice medicine, resi-

dents in their first year are not eligible for licensure and residents beyond their first year need not obtain a license because they are considered 'students' under Minnesota law." *Minnesota v. Chater*, 1997 WL 33352908, at *7 (D. Minn. May 21, 1997) (citing Minn. Stat. § 147.09(5)). Even if a medical school graduate obtains a license after a year of residency, "licensure . . . is of no real significance" because a doctor cannot practice medicine in a hospital setting without completing a residency or, in an increasing majority of hospital facilities, without certification in a specialty, which requires the successful completion of a residency program. *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 2008 WL 2940669, at *3 n.6 (S.D. Fla. July 28, 2008); *see also* Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Geo. L.J. 1749, 1791 (1995) ("If a physician wishes to practice medicine, she has little choice but to seek a residency position . . . .").

Any doctor attempting to practice medicine in a hospital setting without a specialty obtained through a medical residency program "would have no possibility of obtaining hospital privileges" because it is considered "unsafe to practice" without a specialty. *Mt. Sinai*, 2008 WL 2940669, at *3 n.6. This distinguishes a recent medical school graduate from a recent law school graduate, who "can immediately sit for the bar examination after graduation from an accredited school, and may immediately begin the practice of law after passing that examination." *Ctr. for Family Med. v. United States*, 2008 WL 3245460, at *10 (D.S.D. Aug. 6, 2008).

3. Accordingly, aspiring medical residents "apply to . . . a residency program for an *educational* purpose." Pet. App. 38a n.8 (emphasis added). Indeed,

"[i]t is well-known that the primary purpose of a residency program is not employment or a stipend, but the academic training and the academic certification for successful completion of the program." *Davis v. Mann*, 882 F.2d 967, 974 (5th Cir. 1989); *see also Mayo I*, 282 F. Supp. 2d at 1017 ("former residents . . . consistently and credibly testified that their purpose in enrolling in a residency program at Mayo was education—to gain the knowledge and skill necessary to practice in a specialty area of medicine"). Unlike non-student employees, medical residents "ha[ve] *no* expectation of being hired" at Mayo or the University "upon completion of their programs" and are "not attracted to . . . residency programs because of the stipend" (*Mayo I*, 282 F. Supp. 2d at 1001 n.8, 1017 (emphasis in original))—which is substantially smaller than the amount most doctors will earn upon the completion of their residency programs.

Moreover, when selecting a medical residency program, applicants are unlikely to consider most of the factors relevant to those embarking on a career—salary and benefits, the opportunities for advancement, work hours, job security, and the long-term health of the company. Instead, residency applicants primarily assess a program's "ability to support their further education" through course offerings and mentoring opportunities, as well as the effect of the program's prestige on the career they will begin upon its completion. *Mt. Sinai*, 2008 WL 2940669, at *5 (internal quotation marks omitted).

4. Mayo and the University permit their residents to care for patients purely for *educational* purposes. That educational motive is made clear by several objective indicators—including the accreditation requirements established by the ACGME and the

fact that residents do not provide a net economic benefit to petitioners.

The ACGME only accredits institutions that, like petitioners, "priorit[ize] . . . education over service." *Mt. Sinai*, 2008 WL 2940669, at *10. In order to meet the ACGME's "elaborate accreditation scheme" (*McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 529-30 (3d Cir. 1994) (Becker, J., concurring)), a residency program is required to establish a comprehensive written curriculum with specified educational goals. Those goals include expanding the residents' medical knowledge and developing their ability to provide patient care, identify and improve weaknesses, and communicate with patients, doctors, and other health care professionals. *See* ACGME, ACGME Common Program Requirements § IV, http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf. In addition, the ACGME limits accreditation to institutions with faculty who engage in scholarly activities and that offer lectures, conferences, laboratory research, and other educational programs that supplement medical residents' clinical experiences. *See Mt. Sinai*, 2008 WL 2940669, at *8; *see also McKeesport Hosp.*, 24 F.3d at 530 (Becker, J., concurring) (noting that the ACGME cited the "lack of scholarly activity" as its first reason for withdrawing accreditation from a medical residency program).

The ACGME also prohibits institutions that sponsor medical residency programs from relying on medical residents for work that lacks educational value. "Sponsoring institutions must provide services and develop systems to minimize the work of residents that is extraneous to their educational programs." *Mt. Sinai*, 2008 WL 2940669, at *9 (internal

quotation marks omitted). As a result, "allied healthcare personnel perform ancillary procedures that have no 'educational value,' such as drawing blood, starting IVs, setting up electrocardiograms, and scheduling tests." *Mayo I*, 282 F. Supp. 2d at 1015.

Thus, while the government has, in the past, attempted to characterize medical residents as "a 'cheap' source of labor," the opposite is true: "Large portions of the patient-care services performed by residents . . . [are] repeated by the supervising staff physicians . . . ultimately responsible for the patients' care." *Mayo I*, 282 F. Supp. 2d at 1015, 1018. The "faculty could easily provide the services in a more efficient and quicker fashion if they didn't have residents, but [faculty] need to train them in the complete spectrum of educational opportunities," including opportunities only available through clinical education. J.A. 31a. In light of these inefficiencies, some institutions that sponsor medical residency programs actually *lose* money due to their training of medical residents. *See*, *e.g.*, *id*. at 206a-07a (residents at the University are responsible for a net loss of several million dollars each year); *Mayo I*, 282 F. Supp. 2d at 1014 ("on a net basis, the [Mayo] Foundation was spending more on clinical education and research during the years in question than it was receiving from patient care").

Medicare recognizes this net drain on time and resources, and compensates teaching hospitals not only for medical residents' stipends but also for costs attributable to the provision of patient care through inexperienced residents operating under faculty supervision. 42 C.F.R. §§ 412.105, 413.75(a)(1). As the government observed in its briefing below, "Medicare makes grants for Direct Medical Education (DME)

and Indirect Medical Education (IME), which are generally designed to allow hospitals to recoup the direct and indirect costs of *educating* medical residents." J.A. 23a n.2 (emphasis added). The "DME costs include residents' salaries, while IME costs include the higher operating costs of teaching hospitals, such as the cost of any superfluous tests ordered by residents and any redundant services performed." *Id.*

5. Furthermore, the educational program of a medical resident is indistinguishable in nearly all respects from the educational program of third- and fourth-year medical students—whom this Court has already held to be students.

Like a medical residency, the final two years of medical school consist of "generally all clinical experiences." J.A. 189a; *see also Mt. Sinai*, 2008 WL 2940669, at *5 (a medical school student's final two years "are quite analogous to what happens for the period of residency training") (internal quotation marks omitted). In addition to hands-on training, both medical residents and third- and fourth-year medical students receive reading assignments, conduct research, attend lectures, and take exams. *See* Pet. App. 41a n.10, 63a, 64a n.17; *Mayo I*, 282 F. Supp. 2d at 1004; *Mt. Sinai*, 2008 WL 2940669, at *7.

This Court has held that individuals in their third- and fourth-year of medical school are students. In *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), the Court concluded that an individual in her final year of medical school was not denied due process despite being dismissed from a state school without a full hearing, because "[a]cademic evaluations of a *student* . . . bear little resemblance to the judicial and administrative factfinding proceedings to which [the

Court] ha[s] traditionally attached a full-hearing requirement." *Id.* at 89. Notably, the plaintiff was deemed to be a "student" dismissed for "academic" reasons even though she "was dismissed because she was . . . deficient in her *clinical work*." *Id.* at 95 (Powell, J., concurring) (emphasis added). "Evaluation of [a medial student's] performance in [clinical work] is no less an 'academic' judgment because it involves observation of her skills and techniques in actual conditions of practice, rather than assigning a grade to her written answers on an essay question." *Id.*; *see also Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 215 (1985) (classifying as "student[s]" individuals engaged in "clinical training at hospitals affiliated with [a] University" during the final two years of medical school).

Courts have recognized that the "same factors that justified minimal procedural protections in the *Horowitz* medical school context apply with equal force to the paid residency situation." *Davis*, 882 F.2d at 974. Like nonresident students, residents who are performing poorly and not making sufficient progress may be dismissed from their program. *See Ross v. Univ. of Minn.*, 439 N.W.2d 28, 33 (Minn. Ct. App. 1989). When that occurs, the due process rights guaranteed to non-student public employees are inapplicable to medical residents dismissed from public universities because medical residents are entitled only to "the minimum procedural protections owed in cases of student dismissal." *Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001). "The decision to terminate a resident from a hospital-based residency program is the same as any other decision to fail a graduate student for inability to meet academic requirements." *Ross*, 439 N.W.2d at 33; *see also Sarkissian v. W. Va. Univ. Bd. of Governors*, 2008 WL

901722, at *2 (N.D. W. Va. Mar. 31, 2008) (rejecting an expelled medical resident's due process claim because the resident shared the rights of medical students, who lack a due process interest in continuing their medical education), *aff'd*, 332 F. App'x 113 (4th Cir. 2009).

6. Finally, medical residents are widely classified as students—by Congress, accrediting organizations, and numerous courts—and medical residents consider themselves students.

Most importantly, Congress itself has repeatedly referred to medical residents as students. *See* 5 U.S.C. § 5102 (referring to medical "residents-in-training . . . and *other* student employees"); *id.* § 5351 ("'student-employee' means . . . resident-in-training"); 15 U.S.C. § 37b(b)(1)(D) ("[t]he term 'student' means any individual who seeks to be admitted to a graduate medical education program" such as a medical residency program).

Moreover, it is undisputed that medical residents at Mayo and the University believe that, "as a resident, you're a student." J.A. 80a; *see also id.* at 102a ("I believe myself to be a student . . . [b]ecause my primary purpose in residency was to learn."); *id.* at 125a ("Q: When you were in the residency program, were you a student at the University of Minnesota? A: Yes."). Faculty and administrators share that understanding. As one staff surgeon explained, "if you talk to any staff surgeon at this site, residents are students. They're students learning an art, they're students learning some wisdom, they're students learning techniques, and that's why they're here, because we're simply educating them." *Id.* at 70a; *see also id.* at 156a-57a (testimony from residency coordinator that "I believe [residents] have

student status . . . [b]ecause I believe their activities are educational. I believe their rotations can be likened to courses. I believe this is the necessary education they need to be able to become practicing physicians.”).

Similarly, the ACGME has declared unequivocally that “residents are students.” ACGME, ACGME Duty Hours Standards Fact Sheet, http://www.acgme.org/acWebsite/newsRoom/newsRm_dutyHours.asp; *see also* ACGME, Institutional Review Committee, http://www.acgme.org/acWebsite/irc/extreme_emergent_faq.asp (same).

Courts have been equally clear about the student status of medical residents. Four circuits have held that medical residents enrolled and regularly attending classes at a sponsoring institution unambiguously qualify for the Student Exemption. *See Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27; *Detroit Med. Ctr.*, 557 F.3d at 417-18; *Univ. of Chi. Hosps.*, 545 F.3d at 567; *Mt. Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1251-56; *see also Minnesota v. Apfel*, 151 F.3d 742, 748 (8th Cir. 1998) (same); *Ctr. for Family Med.*, 2008 WL 3245460, at *8-11; *Mt. Sinai*, 2008 WL 2940669, at *36; *Mayo I*, 282 F. Supp. 2d at 1015-18; *Chater*, 1997 WL 33352908, at *10. Indeed, before the decision below, *no* court of appeals had reached a contrary conclusion.[2]

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[2] Moreover, outside the context of the Student Exemption, courts have repeatedly affirmed that a medical resident “must be viewed as a student.” *Ross*, 439 N.W.2d at 33; *see also Pierce v. Smith*, 117 F.3d 866, 874 (5th Cir. 1997) (calling a medical resident “both a student and an employee”); *McKeesport Hosp.*, 24 F.3d at 522 (referring to a medical residency program's “faculty and students”); *Davis*, 882 F.2d at 974 (“the primary purpose of a residency program is . . . the academic training and

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In light of the clear educational purpose of the medical residency programs at Mayo and the University, petitioners' medical residents unambiguously fall within the plain meaning of the term "student" in FICA's Student Exemption. The full-time employee regulation's categorical exclusion of *all* medical residents from the statutory exemption is therefore invalid because it contravenes "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

II. THE CATEGORICAL EXCLUSION OF PETITIONERS' MEDICAL RESIDENTS FROM THE STUDENT EXEMPTION IS ARBITRARY AND UNREASONABLE.

Even if the statutory term "student" did not unambiguously encompass petitioners' medical residents, the Treasury Department's categorical exclusion of all medical residents and other full-time em-

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the academic certification"); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (holding that a medical resident "was both an employee and a student"); *Halverson v. Univ. of Utah Sch. of Med.*, 2007 WL 2892633, at *11 (D. Utah Sept. 28, 2007) (holding that medical residents' due process rights are limited to those of "other medical students"); *Fenje v. Feld*, 301 F. Supp. 2d 781, 801 (N.D. Ill. 2003) ("the resident is both a student and an employee"), *aff'd*, 398 F.3d 620 (7th Cir. 2005); *Baldwin v. Univ. of Texas Med. Branch*, 945 F. Supp. 1022, 1028 (S.D. Tex.) (calling a medical resident "significantly behind the other students at her level"), *aff'd*, 122 F.3d 1066 (5th Cir. 1996); *Gul v. Ctr. for Family Med.*, 762 N.W.2d 629, 636 (S.D. 2009) ("medical residents are students").

ployees from the Student Exemption would still be arbitrary and unreasonable. The full-time employee regulation arbitrarily excludes individuals from the Student Exemption based on the *amount* of time they spend learning, not based on whether they are in fact pursuing a course of study. And, the regulation fails to satisfy *any* of the factors that indicate the reasonableness of a tax regulation under this Court's decisions in *Chevron* and *National Muffler*.

A. The Full-Time Employee Regulation Is Arbitrary.

The distinction that the full-time employee regulation draws between full-time employees and employees who work less than forty hours a week is blatantly arbitrary.

In determining whether an individual is a student, the relevant issue is *what* the person does and *why*—not *how long* the person does it. *See Oxford Universal Dictionary*, *supra*, at 2049-50 (defining a student as someone who engages in "study"); *Webster's New International Dictionary*, *supra*, at 2502 (same); *see also Detroit Med. Ctr.*, 557 F.3d at 417-18 ("To determine whether the doctors in Detroit Medical's residency program are students, we . . . need to know what the residents in the program do and under what circumstances."). If the purpose of an activity is "the acquisition of learning" (*Oxford Universal Dictionary*, *supra*, at 2049-50), then spending a large amount of time on the activity does not make the person who engages in it any less of a student than someone who undertakes the activity for only a short period of time. To the contrary, the more time one spends engaged in learning, the more reason there is to deem that person a student.

The arbitrary nature of the full-time employee regulation is underscored by its insupportable distinction between students who learn through hands-on training and students who learn through classroom instruction and textbooks. The full-time employee regulation irrationally divides individuals engaged in learning into two groups—those who are deemed eligible for the Student Exemption (regardless of the number of hours they study) because they primarily engage in "study . . . by means of books," and those, like medical residents, who are deemed ineligible for the Exemption merely because they primarily "study . . . by means of . . . observation[ ]" and hands-on training for more than forty hours a week. *Oxford Universal Dictionary*, *supra*, at 2049-50. That artificial distinction has no basis in the statutory text, in the realities of contemporary graduate education, or in common sense.

Only through the most arbitrary reasoning is it possible to exclude medical residents—who are pursuing their graduate medical education through a rigorous program of hands-on learning, lectures, and research—from the definition of "student" simply because residents pursue their education for long hours and do so predominantly in a clinical setting. Indeed, there is no question that the Treasury Department could not adopt a rule that purported to exclude from the Student Exemption individuals who are engaged in library research for more than forty hours per week. *See* Rev. Rul. 78-17, 1978-1 C.B. 306 (advanced graduate student no longer attending classroom courses qualifies as a student). The full-time employee regulation is no less arbitrary and irrational.

B. The Full-Time Employee Regulation Is Unreasonable.

In determining the reasonableness of a regulation interpreting a revenue statute, this Court has given special consideration to several factors identified in *National Muffler*. *See* 440 U.S. at 477; *Cottage Sav. Ass'n*, 499 U.S. at 560-61 (considering the validity of a tax regulation under *National Muffler*); *see also Boeing Co. v. United States*, 537 U.S. 437, 448 (2003); *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387-89 (1998). In *National Muffler*, the Court looked first "to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." 440 U.S. at 477. Second, it explained that "a regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." *Id.* Third, "[i]f the regulation dates from a later period, the manner in which it evolved merits inquiry." *Id.* "[O]ther relevant considerations" include "the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute." *Id.*

Each of these factors demonstrates that the full-time employee regulation is an unreasonable interpretation of the Student Exemption.

1. In addition to conflicting with the plain language of the Student Exemption (*see supra* Part I), the full-time employee regulation cannot be harmonized with the Exemption's origin or purpose. This is so for at least two reasons. First, Congress's decision in 1950 to combine two tax exemptions for stu-

dents—one that limited eligibility based on the amount of remuneration and one that did not—into a single exemption that includes no limitation on remuneration manifests an intent to exclude from FICA taxation *all* students enrolled and regularly attending classes, regardless of whether they are receiving remuneration for full-time employment. Second, the purpose of FICA is to assess taxation during a worker's career in order to fund the worker's Social Security benefits. Medical residents, however, are not permitted to begin their professional careers until they have completed their residency programs. In fact, there is some question as to whether medical residents are even eligible to receive Social Security benefits.

a. The full-time employee regulation disregards the Student Exemption's legislative origin.

In 1939, Congress enacted two FICA exemptions for students. One exempted students employed by tax-exempt schools. Pub. L. No. 76-379, § 1426(b)(10)(A)(iii), 53 Stat. 1360, 1374 (1939). The other exempted students at schools that were not tax-exempt so long as the student received less than $45 in pay per quarter. *Id.* § 1426(b)(10)(A)(i). Congress thus intended students at tax-exempt schools (like petitioners) to qualify for the Student Exemption, whether or not they worked enough hours to earn comparatively large amounts of money. Recognizing this congressional intent, the Treasury Department adopted regulations providing that, for "a student who is enrolled and is regularly attending classes at a [tax-exempt] school, college, or university, . . . the amount of remuneration for services performed by the employee" is "*immaterial*" to eligibility for the Student Exemption. Treas. Reg. § 402.217(d), 5 Fed. Reg. 785 (Feb. 27, 1940) (emphasis added).

Then, in 1950, Congress *eliminated* the remuneration limit for students at tax-paying schools and combined the two exemptions into a single statutory provision. Pub. L. No. 81-734, § 1426(b)(11)(B), 64 Stat. 477, 531 (1950). Congress thereby exempted *all* qualifying students from FICA taxation, and refused to limit the Student Exemption based on the amount of money earned or the quantity of time spent earning that money. *Id.*; *see also Chater*, 1997 WL 33352908, at *9 (the 1950 "amendment further supports the determination that the amount of remuneration received by an individual is immaterial to a determination of whether said individual qualifies for the student exemption").

The legislative history confirms that Congress intended the Student Exemption to apply beyond part-time work for nominal wages to full-time work by students employed by their schools. The House and Senate Reports that accompanied the 1939 enactment of the Student Exemption explained that service would be exempted from taxation if its compensation "does not exceed $45 . . . *or* . . . without regard to amount of remuneration, if service is performed by a student enrolled and regularly attending classes at a school, college, or university." H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939), *reprinted in* 1939-2 C.B. 538, 550 (emphasis added); *see also* S. Rep. No. 76-734, 76th Cong., 1st Sess. (1939), *reprinted in* 1939-2 C.B. 565, 577. Similarly, the House and Senate Reports accompanying the 1950 amendments explained that the Student Exemption covers "service performed for nominal amounts in the employ of tax-exempt nonprofit organizations . . . *and* service performed by students in the employ of colleges and universities." H.R. Rep. No. 1300, 81st Cong., 1st Sess. (1949), *reprinted in* 1950-2 C.B. 255,

260 (emphasis added); *see also* S. Rep. No. 81-1669, 81st Cong., 2nd Sess. (1950), *reprinted in* 1950-2 C.B. 302, 308 (same).

b. The full-time employee regulation also conflicts with the underlying purposes of FICA and the Student Exemption.

As the government conceded below, "FICA's purpose [is] requiring contributions to support coverage garnered during a worker's *career*." J.A. 23a (emphasis added). Doctors' careers do not begin, however, until they complete their medical residency programs and become board-certified in a specialty, because doctors without certification in a specialty generally "have no possibility of obtaining hospital privileges." *Mt. Sinai*, 2008 WL 2940669, at *3 n.6. It would be flatly inconsistent with FICA's purposes to tax individuals who have not yet embarked on their careers.

Indeed, while FICA requires contributions to support an employee's Social Security coverage, the full-time employee regulation imposes FICA taxation on employees who may not even be eligible to receive Social Security benefits. A longstanding Social Security Administration regulation interpreting a provision of the Social Security Act identical to the Student Exemption states that "[w]hether you are a student for purposes of this section depends on your relationship with your employer. If your main purpose is pursuing a course of study rather than earning a livelihood, we consider you to be a student and your work is not considered employment" for the purposes of earning Social Security benefits. 20 C.F.R. § 404.1028(c). When a substantially identical regulation was in place for FICA purposes, numerous courts held that medical residents were students.

See Apfel, 151 F.3d at 748; *Ctr. for Family Med. v. United States*, 2008 WL 3245460, at *8-11; *Mt. Sinai*, 2008 WL 2940669, at *36; *Mayo I*, 282 F. Supp. 2d at 1015-18; *Chater*, 1997 WL 33352908, at *10. If the Social Security regulation is interpreted in the same manner, medical residents will be subject to FICA taxation under the full-time employee regulation but will not earn Social Security benefit credits.

Such an anomaly is inconsistent with Congress's purpose of requiring FICA contributions to fund benefits earned by the taxpayer. Even the Treasury Department acknowledged in its explanation of the full-time employee regulation that the "integrity" of the Social Security system requires "symmetry" in the definitions of employment for benefits and taxation purposes, because, "[e]xcept in unusual circumstances, the Social Security Act, and the Internal Revenue FICA provisions, are to be read in pari materia." 69 Fed. Reg. 8,604, 8,605 (Feb. 25, 2004) (citing *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001)); *see also Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981) (holding that regulations defining "wages" differently for Social Security and unemployment tax purposes than for income tax withholding purposes were invalid because they "fail[ed] to implement the congressional mandate in a consistent and reasonable manner"). Such symmetry is impossible where medical residents are required to pay FICA taxes on employment that may not render them eligible for Social Security benefits.

2. Moreover, while "[a] regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent" (*Nat'l Muffler*, 440 U.S. at 477), the full-time employee regula-

tion was promulgated sixty-five years *after* the enactment of the Student Exemption. In fact, the Treasury Department's "contemporaneous construction of the statute" occurred in 1940 (Treas. Reg. § 31.3121(b)(10)-2(c) (2004)), when it promulgated regulations that the government has now conceded *permit* medical residents to qualify for the Student Exemption. *See* Br. in Opp. 14 n.2 (the Internal Revenue Service now "accept[s] the position . . . that medical residents are exempt from FICA taxes for tax periods covered by the prior regulations"). Those "presumed to have been aware of congressional intent" thus interpreted the Student Exemption to apply to medical residents. *Nat'l Muffler*, 440 U.S. at 477.

3. Because the full-time employee regulation "dates from a later period" than the Student Exemption, "the manner in which it evolve[d] merits inquiry" and further supports the conclusion that the regulation is unreasonable. *Nat'l Muffler*, 440 U.S. at 477.

The Treasury Department does not even claim to have adopted the new regulation to reflect evolving judicial authority or to apply general legal principles to new fact patterns. Instead, the Treasury Department acknowledged that the specific purpose of the new regulation was to overturn judicial decisions applying the Student Exemption to medical residents—and to do so without the need for seeking a statutory amendment from Congress. *See* 69 Fed. Reg. at 8605 ("additional clarification" of the term "student" is required in light of *Apfel*); J.A. 219a ("the regulation was amended partly in response to the recent wave of litigation concerning the status of medical residents as 'students'"). While agencies are not foreclosed from responding to adverse judicial decisions

through the regulatory process, the fact that the full-time employee regulation was avowedly promulgated for this result-oriented purpose further suggests that the Department was blinded by its own policy preferences when it adopted the regulation.

4. Among "[o]ther relevant considerations" in determining a regulation's reasonableness "are the length of time the regulation has been in effect, the reliance placed on it, . . . and the degree of scrutiny Congress has devoted to the regulation." *Nat'l Muffler*, 440 U.S. at 477. Each of these factors also weighs strongly in favor of invalidating the full-time employee regulation.

The full-time employee regulation has been in effect for only five years, has not been the subject of congressional consideration, and has not produced any significant reliance by taxpayers. Indeed, far from relying on the regulation, petitioners immediately challenged the regulation's validity in tax-refund actions. Those suits continued the twenty years of legal uncertainty surrounding the application of the Student Exemption to medical residents. Only after this Court authoritatively resolves the question in this case will schools, residents, and the Treasury Department have a stable regulatory backdrop on which to place reasonable reliance.

5. The absence of "consistency of the Commissioner's interpretation" is another "relevant consideration[ ]" that further underscores the unreasonableness of the full-time employee regulation. *Nat'l Muffler*, 440 U.S. at 477.

The government began collecting Social Security contributions from the University's non-student employees in 1955 but did not attempt to collect contributions from the stipends paid to the school's medi-

cal residents for the next thirty-one years. *Apfel*, 151 F.3d at 744. *But see* State and Local Coverage—Commissioner's Ruling—Monies Paid by a Hospital to a Resident Doctor—Arizona, SSR 78-3, 1978 WL 14050 (concluding that residents' "services were not excluded from coverage under the student exclusion"). Then, in 1989, the government triggered a now two-decades-old legal dispute by adopting the position that medical residents are categorically ineligible for the Student Exemption. *Apfel*, 151 F.3d at 744, 747-48.

Even as the government was pressing that categorical position in litigation, however, the Treasury Department was suggesting in administrative pronouncements that medical residents could be "students" under some circumstances. *See* Rev. Proc. 98-16, 1998-1 C.B. 403 (explaining that "the services performed by [medical residents] cannot be *assumed* to be incidental to and for the purpose of pursuing a course of study") (emphasis added); IRS CCA 200212029 (Jan. 24, 2002) ("whether medical residents are students depends upon the facts and circumstances in each case"); IRS CCA 200029030 (Apr. 19, 2000) (same). After its categorical litigating position proved unsuccessful, the Treasury Department promulgated the full-time employee regulation. Shortly thereafter, the Department conceded that residents *did* in fact qualify for the Student Exemption under the regulations adopted in 1940 and in place until 2005. *See* Br. in Opp. 14 n.2.

Because "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (*Thomas Jefferson Univ.*, 512 U.S. at 515 (internal quotation marks omitted)), the full-time employee regulation is inher-

ently suspect and should be subjected to exacting judicial scrutiny. That scrutiny is fatal to the regulation because the language, origin, and purpose of the Student Exemption—together with the absence of *any* factor supporting the regulation's validity—leave no doubt that the full-time employee regulation is patently unreasonable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

26 U.S.C. § 3121 provides in relevant part:

§ 3121. Definitions.

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

* * *

(b) Employment.—For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the

Social Security Act; except that such term shall not include—

* * *

(10) service performed in the employ of—

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

* * *

APPENDIX B

Treasury Regulations on Employment Tax (26 C.F.R.), as in effect for services performed prior to April 1, 2005:

§ 31.3121(b)(10)-2. Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.—

(a)(1) Services performed in the employ of a school, college, or university (whether or not such organization is exempt from income tax) is excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university.

* * *

(b) For purposes of this exception, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, * * * and (2) the status of the employee as a student enrolled and regularly attending classes at the school, college, or university by which he is employed or with which his employer is affiliated.

(c) The status of the employee as a student performing the services shall be determined on the

basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

* * *

(d) The term "school, college, or university" within the meaning of this exception is to be taken in its commonly or generally accepted sense.

* * *

APPENDIX C

Treasury Regulations on Employment Tax (26 C.F.R.), as in effect for services performed on or after April 1, 2005:

§ 31.3121(b)(10)-2. Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.—

(a) General rule. (1) Services performed in the employ of a school, college, or university within the meaning of paragraph (c) of this section (whether or not the organization is exempt from income tax) are excepted from employment, if the services are performed by a student within the meaning of paragraph (d) of this section who is enrolled and is regularly attending classes at the school, college, or university.

(2) Services performed in the employ of an organization which is—

(i) Described in section 509(a)(3) and § 1.509(a)-4;

(ii) Organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university within the meaning of paragraph (c) of this section; and

(iii) Operated, supervised, or controlled by or in connection with the school, college, or university; are excepted from employment, if the services are

performed by a student who is enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university. The preceding sentence shall not apply to services performed in the employ of a school, college, or university of a State or a political subdivision thereof by a student referred to in section 218(c)(5) of the Social Security Act (42 U.S.C. 418(c)(5)) if such services are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act. For the definitions of "operated, supervised, or controlled by", "supervised or controlled in connection with", and "operated in connection with", see paragraphs (g), (h), and (i), respectively, of § 1.509(a)-4.

(b) Statutory tests. For purposes of this section, if an employee has the status of a student within the meaning of paragraph (d) of this section, the amount of remuneration for services performed by the employee, the type of services performed by the employee, and the place where the services are performed are not material. The statutory tests are:

(1) The character of the organization in the employ of which the services are performed as a school, college, or university within the meaning of paragraph (c) of this section, or as an organization described in paragraph (a)(2) of this section, and

(2) The status of the employee as a student enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university within the meaning of paragraph (c) of this section by which the employee is employed or with which the employee's employer is

affiliated within the meaning of paragraph (a)(2) of this section.

(c) School, College, or University. An organization is a school, college, or university within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(d) Student Status—general rule. Whether an employee has the status of a student performing the services shall be determined based on the relationship of the employee with the organization employing the employee. In order to have the status of a student, the employee must perform services in the employ of a school, college, or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university. An employee who performs services in the employ of an affiliated organization within the meaning of paragraph (a)(2) of this section must be enrolled and regularly attending classes at the affiliated school, college, or university within the meaning of paragraph (c) of this section in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of

pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university.

(1) Enrolled and regularly attending classes. An employee must be enrolled and regularly attending classes at a school, college, or university within the meaning of paragraph (c) of this section at which the employee is employed to have the status of a student within the meaning of section 3121(b)(10). An employee is enrolled within the meaning of section 3121(b)(10) if the employee is registered for a course or courses creditable toward an educational credential described in paragraph (d)(2) of this section. In addition, the employee must be regularly attending classes to have the status of a student. For purposes of this paragraph (d)(1), a class is an instructional activity led by a faculty member or other qualified individual hired by the school, college, or university within the meaning of paragraph (c) of this section for identified students following an established curriculum. Traditional classroom activities are not the sole means of satisfying this requirement. For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes within the meaning of section 3121(b)(10). The frequency of these and similar activities determines whether an employee may be considered to be regularly attending classes.

(2) Course of study. An employee must be pursuing a course of study in order to have the status of a student. A course of study is one or more courses the completion of which fulfills the requirements necessary to receive an educational credential granted by a school, college, or university

within the meaning of paragraph (c) of this section. For purposes of this paragraph, an educational credential is a degree, certificate, or other recognized educational credential granted by an organization described in paragraph (c) of this section. A course of study also includes one or more courses at a school, college or university within the meaning of paragraph (c) of this section the completion of which fulfills the requirements necessary for the employee to sit for an examination required to receive certification by a recognized organization in a field.

(3) Incident to and for the purpose of pursuing a course of study.

(i) General rule. An employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student. Whether an employee's services are incident to and for the purpose of pursuing a course of study shall be determined on the basis of the relationship of the employee with the organization for which such services are performed as an employee. The educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study. The educational aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The service aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the employee's employment. The evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training

aspect. Except as provided in paragraph (d)(3)(iii) of this section, whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances. Relevant factors in evaluating the educational and service aspects of an employee's relationship with the employer are described in paragraphs (d)(3)(iv) and (v) of this section respectively. There may be facts and circumstances that are relevant in evaluating the educational and service aspects of the relationship in addition to those described in paragraphs (d)(3)(iv) and (v) of this section.

(ii) Student status determined with respect to each academic term. Whether an employee's services are incident to and for the purpose of pursuing a course of study is determined separately with respect to each academic term. If the relevant facts and circumstances with respect to an employee's relationship with the employer change significantly during an academic term, whether the employee's services are incident to and for the purpose of pursuing a course of study is reevaluated with respect to services performed during the remainder of the academic term.

(iii) Full-time employee. The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. An employee's normal work schedule is not affected by increases in hours worked caused by work demands unforeseen at

the start of an academic term. However, whether an employee is a full-time employee is reevaluated for the remainder of the academic term if the employee changes employment positions with the employer. An employee's work schedule during academic breaks is not considered in determining whether the employee's normal work schedule is 40 hours or more per week. The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

(iv) Evaluating educational aspect. The educational aspect of an employee's relationship with the employer is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The educational aspect of an employee's relationship with the employer is generally evaluated based on the employee's course workload. Whether an employee's course workload is sufficient in order for the employee's employment to be incident to and for the purpose of pursuing a course of study depends on the particular facts and circumstances. A relevant factor in evaluating an employee's course workload is the employee's course workload relative to a full-time course workload at the school, college or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes.

(v) Evaluating service aspect. The service aspect of an employee's relationship with the employer is evaluated based on the facts and circumstances related to the employee's employment. Services of an employee with the status of a full-time employee within the meaning of paragraph (d)(3)(iii) of this section are not incident to and for the purpose of pursuing a course of study. Relevant factors in

evaluating the service aspect of an employee's relationship with the employer are described in paragraphs (d)(3)(v)(A), (B), and (C) of this section.

(A) Normal work schedule and hours worked. If an employee is not a full-time employee within the meaning of paragraph (d)(3)(iii) of this section, then the employee's normal work schedule and number of hours worked per week are relevant factors in evaluating the service aspect of the employee's relationship with the employer. As an employee's normal work schedule or actual number of hours worked approaches 40 hours per week, it is more likely that the service aspect of the employee's relationship with the employer is predominant. The determination of an employee's normal work schedule and actual number of hours worked is not affected by the fact that some of the services performed by the employee may have an educational, instructional, or training aspect.

(B) Professional employee.

(1) If an employee has the status of a professional employee, then that suggests the service aspect of the employee's relationship with the employer is predominant. A professional employee is an employee—

(i) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

(ii) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) Licensed, professional employee. If an employee is a licensed, professional employee, then that further suggests the service aspect of the employee's relationship with the employer is predominant. An employee is a licensed, professional employee if the employee is required to be licensed under state or local law to work in the field in which the employee performs services and the employee is a professional employee within the meaning of paragraph (d)(3)(v)(B)(1) of this section.

(C) Employment Benefits. Whether an employee is eligible to receive one or more employment benefits is a relevant factor in evaluating the service aspect of an employee's relationship with the employer. For example, eligibility to receive vacation, paid holiday, and paid sick leave benefits; eligibility to participate in a retirement plan or arrangement described in sections 401(a), 403(b), or 457(a); or eligibility to receive employment benefits such as reduced tuition (other than qualified tuition reduction under section 117(d)(5) provided to a teaching or research assistant who is a graduate student), or benefits under sections 79 (life insurance), 127 (qualified educational assistance), 129 (dependent care assistance programs), or 137 (adoption assistance) suggest that the service aspect of an employee's relationship with the employer is

predominant. Eligibility to receive health insurance employment benefits is not considered in determining whether the service aspect of an employee's relationship with the employer is predominant. The weight to be given the fact that an employee is eligible for a particular employment benefit may vary depending on the type of benefit. For example, eligibility to participate in a retirement plan is generally more significant than eligibility to receive a dependent care employment benefit. Additional weight is given to the fact that an employee is eligible to receive an employment benefit if the benefit is generally provided by the employer to employees in positions generally held by non-students. Less weight is given to the fact that an employee is eligible to receive an employment benefit if eligibility for the benefit is mandated by state or local law.

(e) Examples. The following examples illustrate the principles of paragraphs (a) through (d) of this section:

Example 1. (i) Employee C is employed by State University T to provide services as a clerk in T's administrative offices, and is enrolled and regularly attending classes at T in pursuit of a B.S. degree in biology. C has a course workload during the academic term which constitutes a full-time course workload at T. C is considered a part-time employee by T during the academic term, and C's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term C works 40 hours or more during a week. C is compensated by hourly wages, and receives no other compensation or employment benefits.

(ii) In this example, C is employed by T, a school, college, or university within the meaning of paragraph (c) of this section. C is enrolled and regularly attending classes at T in pursuit of a course of study. C is not a full-time employee based on T's standards, and C's normal work schedule does not cause C to have the status of a full-time employee, even though C may occasionally work 40 hours or more during a week due to unforeseen work demands. C's part-time employment relative to C's full-time course workload indicates that the educational aspect of C's relationship with T is predominant. Additional facts supporting this conclusion are that C is not a professional employee, and C does not receive any employment benefits. Thus, C's services are incident to and for the purpose of pursuing a course of study. Accordingly, C's services are excepted from employment under section 3121(b)(10).

Example 2. (i) Employee D is employed in the accounting department of University U, and is enrolled and regularly attending classes at U in pursuit of an M.B.A. degree. D has a course workload which constitutes a half-time course workload at U. D is considered a full-time employee by U under U's standards and practices.

(ii) In this example, D is employed by U, a school, college, or university within the meaning of paragraph (c) of this section. In addition, D is enrolled and regularly attending classes at U in pursuit of a course of study. However, because D is considered a full-time employee by U under its standards and practices, D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 3. (i) The facts are the same as in Example 2, except that D is not considered a full-time employee by U, and D's normal work schedule is 32 hours per week. In addition, D's work is repetitive in nature and does not require the consistent exercise of discretion and judgment, and is not predominantly intellectual and varied in character. However, D receives vacation, sick leave, and paid holiday employment benefits, and D is eligible to participate in a retirement plan maintained by U described in section 401(a).

(ii) In this example, D's half-time course workload relative to D's hours worked and eligibility for employment benefits indicates that the service aspect of D's relationship with U is predominant, and thus D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 4. (i) Employee E is employed by University V to provide patient care services at a teaching hospital that is an unincorporated division of V. These services are performed as part of a medical residency program in a medical specialty sponsored by V. The residency program in which E participates is accredited by the Accreditation Counsel for Graduate Medical Education. Upon completion of the program, E will receive a certificate of completion, and be eligible to sit for an examination required to be certified by a recognized organization in the medical specialty. E's normal work schedule, which includes services having an educational, instructional, or training aspect, is 40 hours or more per week.

(ii) In this example, E is employed by V, a school, college, or university within the meaning of paragraph (c) of this section. However, E's normal work schedule calls for E to perform services 40 or more hours per week. E is therefore a full-time employee, and the fact that some of E's services have an educational, instructional, or training aspect does not affect that conclusion. Thus, E's services are not incident to and for the purpose of pursuing a course of study. Accordingly, E's services are not excepted from employment under section 3121(b)(10) and there is no need to consider other relevant factors, such as whether E is a professional employee or whether E is eligible for employment benefits.

Example 5. (i) Employee F is employed in the facilities management department of University W. F has a B.S. degree in engineering, and is completing the work experience required to sit for an examination to become a professional engineer eligible for licensure under state or local law. F is not attending classes at W.

(ii) In this example, F is employed by W, a school, college, or university within the meaning of paragraph (c) of this section. However, F is not enrolled and regularly attending classes at W in pursuit of a course of study. F's work experience required to sit for the examination is not a course of study for purposes of paragraph (d)(2) of this section. Accordingly, F's services are not excepted from employment under section 3121(b)(10).

Example 6. (i) Employee G is employed by Employer X as an apprentice in a skilled trade. X is a subcontractor providing services in the field in which G wishes to specialize. G is pursuing a certificate in the skilled trade from Community

College C. G is performing services for X pursuant to an internship program sponsored by C under which its students gain experience, and receive credit toward a certificate in the trade.

(ii) In this example, G is employed by X. X is not a school, college or university within the meaning of paragraph (c) of this section. Thus, the exception from employment under section 3121(b)(10) is not available with respect to G's services for X.

Example 7. (i) Employee H is employed by a cosmetology school Y at which H is enrolled and regularly attending classes in pursuit of a certificate of completion. Y's primary function is to carry on educational activities to prepare its students to work in the field of cosmetology. Prior to issuing a certificate, Y requires that its students gain experience in cosmetology services by performing services for the general public on Y's premises. H is scheduled to work and in fact works significantly less than 30 hours per week. H's work does not require knowledge of an advanced type in a field of science or learning, nor is it predominantly intellectual and varied in character. H receives remuneration in the form of hourly compensation from Y for providing cosmetology services to clients of Y, and does not receive any other compensation and is not eligible for employment benefits provided by Y.

(ii) In this example, H is employed by Y, a school, college or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Y in pursuit of a course of study. Factors indicating the educational aspect of H's relationship with Y is predominant are that H's hours worked are significantly less than 30 per week, H is not a professional employee, and H is

not eligible for employment benefits. Based on the relevant facts and circumstances, the educational aspect of H's relationship with Y is predominant. Thus, H's services are incident to and for the purpose of pursuing a course of study. Accordingly, H's services are excepted from employment under section 3121(b)(10).

Example 8. (i) Employee J is a graduate teaching assistant at University Z. J is enrolled and regularly attending classes at Z in pursuit of a graduate degree. J has a course workload which constitutes a full-time course workload at Z. J's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term J works more than 40 hours during a week. J's duties include grading quizzes and exams pursuant to guidelines set forth by the professor, providing class and laboratory instruction pursuant to a lesson plan developed by the professor, and preparing laboratory equipment for demonstrations. J receives a cash stipend and employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b). In addition, J receives qualified tuition reduction benefits within the meaning of section 117(d)(5) with respect to the tuition charged for the credits earned for being a graduate teaching assistant.

(ii) In this example, J is employed by Z, a school, college, or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Z in pursuit of a course of study. J's full-time course workload relative to J's normal work schedule of 20 hours per week indicates that the educational aspect of J's relationship with Z is predominant. In addition, J is not a professional

employee because J's work does not require the consistent exercise of discretion and judgment in its performance. On the other hand, the fact that J receives employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b) indicates that the employment aspect of J's relationship with Z is predominant. Balancing the relevant facts and circumstances, the educational aspect of J's relationship with Z is predominant. Thus, J's services are incident to and for the purpose of pursuing a course of study. Accordingly, J services are excepted from employment under section 3121(b)(10).

(f) Effective date. Paragraphs (a), (b), (c), (d) and (e) of this section apply to services performed on or after April 1, 2005.

(g) For provisions relating to domestic service performed by a student in a local college club, or local chapter of a college fraternity or sorority, see § 31.3121(b)(2)-1.