

No. 09-837

IN THE
Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION
AND RESEARCH, ET AL.,
Petitioners,

v.
UNITED STATES,
Respondent.

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

BRIEF OF UNIV. OF ALABAMA AT BIRMINGHAM, UNIV.
OF ARKANSAS, BOSTON MED. CENTER, BRIGHAM AND
WOMEN'S HOSP., UNIV. OF CHICAGO MED. CENTER,
CHRISTIANA CARE HEALTH SERVICES, CLEVELAND
CLINIC FOUNDATION, DARTMOUTH-HITCHCOCK
MED. CENTER, EMORY UNIV., FRANKLIN SQUARE
HOSP., GEORGE WASHINGTON UNIV., GEORGETOWN
UNIV. HOSP., GOOD SAMARITAN HOSP., HARBOR
HOSP., JOHNS HOPKINS UNIV., MCGAW MED.
CENTER OF NORTHWESTERN UNIV., MAINE MED.
CENTER, MASSACHUSETTS GENERAL HOSP.,
MICHIGAN STATE UNIV., MONTEFIORE MED.
CENTER, MOUNT SINAI SCHOOL OF MED./MOUNT
SINAI HOSP., NATIONAL REHABILITATION HOSP.,
NEW YORK MED. COLLEGE, NEW YORK UNIV.
SCHOOL OF MEDICINE, UNIV. OF NORTH DAKOTA,
UNIV. OF PITTSBURGH MED. CENTER, UNIV. OF
ROCHESTER, SAINT LOUIS UNIV., UNIV. OF
SOUTHERN CALIFORNIA, MED. UNIV. OF SOUTH
CAROLINA, SPAULDING REHABILITATION HOSP.,
STANFORD UNIV., THOMAS JEFFERSON UNIV., UNION
MEMORIAL HOSP., VANDERBILT UNIV., WASHINGTON
HOSP. CENTER, AND YALE-NEW HAVEN HOSP. AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Treasury Department may categorically exclude all medical residents and other fulltime 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.”

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT	4
SUMMARY OF THE ARGUMENT.....	8
ARGUMENT	13
I. The Treasury Department’s Regulations Are Invalid Because They Are Contrary To The Plain Language Of The Statute.....	14
II. The Treasury Department’s Regulations Are Invalid Because They Impermissibly Exclude Medical Residents From The Student Exemption.....	18
A. Medical Residents Satisfy The Statutory Requirements For The Student Exemption.....	19
1. Medical Residents Are Enrolled At A School Or University.....	19
2. Medical Residents Regularly Attend Classes.....	21

B. The Regulations Unreasonably Exclude Medical Residents From The Student Exemption.....	26
1. The Regulations' Treatment Of Medical Residents Is Inconsistent With The Accreditation Standards For Residency Programs.....	27
2. The Regulations Fail To Account For the Educational Value Of Treating Patients.	33
3. The Regulations Unreasonably Exclude Medical Residents From The Student Exemption Regardless Of How Much Time They Spend On Educational Activities.....	37
CONCLUSION.....	44

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	passim
<i>United States v. Detroit Medical Center</i> , 557 F.3d 412 (6th Cir. 2009).....	4
<i>United States v. Mayo Foundation for Medical Educational & Research</i> , 282 F. Supp. 2d 997 (D. Minn. 2003)	passim
<i>United States v. Memorial Sloan-Kettering Cancer Center</i> , 563 F.3d 19 (2d Cir. 2009).....	4
<i>United States v. Mount Sinai Medical Center of Florida, Inc.</i> , No. 02-22715, 2008 WL 2940669 (S.D. Fla. May 28, 2008).....	3, 14, 15, 18, 24, 25
<i>United States v. Mount Sinai Medical Center of Florida, Inc.</i> , 486 F.3d 1248 (11th Cir. 2007).....	4
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STATUTES AND REGULATIONS	
26 U.S.C. § 3121(b)(10)	2, 4, 6, 11, 13
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“Internal Medicine Residency,” http://www.gwumc.edu/edu/medicine/residency/Administration/ProgramDirector.htm	29
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INTEREST OF *AMICI CURIAE*¹

Amici curiae are 37 of the nation's leading universities, teaching hospitals, and other institutions that sponsor residency programs: University of Alabama at Birmingham, University of Arkansas, Boston Medical Center, The Brigham and Women's Hospital, Inc., The University of Chicago Medical Center, Christiana Care Health Services, The Cleveland Clinic Foundation, Dartmouth-Hitchcock Medical Center, Emory University, Franklin Square Hospital, The George Washington University, Georgetown University Hospital, Good Samaritan Hospital, Harbor Hospital, Johns Hopkins University, McGaw Medical Center of Northwestern University, Maine Medical Center, The General Hospital Corporation d/b/a/ Massachusetts General Hospital, Michigan State University, Montefiore Medical Center, Mount Sinai School of Medicine/The Mount Sinai Hospital, National Rehabilitation Hospital, New York Medical College, New York University Medical School, University of North Dakota, University of Pittsburgh Medical Center, University of Rochester, Saint Louis University, University of Southern California, Medical University of South Carolina, The Spaulding

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

Rehabilitation Hospital Corporation, Stanford University, Thomas Jefferson University, Union Memorial Hospital, Vanderbilt University, Washington Hospital Center, and Yale-New Haven Hospital.

This case presents a question of great importance to *amici*: whether the Treasury Department has interpreted a provision of the Federal Insurance Contribution Act (“FICA”) contrary to the statute’s plain language. FICA generally imposes a tax on the wages paid to employees, but it provides an exemption 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). Under the Treasury Department’s interpretation of this provision, medical residents are categorically excluded from this exemption if they are on duty more than 40 hours per week. Pet. App. 18a-19a.

Amici have a significant interest in the question presented because they sponsor medical residency programs. In total, *amici* sponsor more than 1,600 residency programs comprising more than 20,000 medical residents. Thus, the Court’s resolution of the issue presented in this case will directly affect *amici* because it could determine whether they are required to pay FICA taxes for the residents enrolled in their programs. *Amici* believe that their participation in this case will benefit the Court by offering the perspective of a broad range of universities and teaching hospitals that are subject to the regulations at issue in this case.

STATEMENT

Sir William Osler, one of the most respected physicians at the turn of the twentieth century, revolutionized medical education by emphasizing the importance of treating patients as part of the learning process. As Osler famously said: “To study the phenomenon of disease without books is to sail an uncharted sea, while to study books without patients is not to go to sea at all.” Michael Bliss, *William Osler: A Life In Medicine* 293-94 (Oxford 1999).

Osler’s approach to medical education forms the foundation of today’s medical residency programs. Residency programs provide education and training in various medical specialties (for example, internal medicine) or subspecialties (for example, cardiology) for recent medical school graduates. Although medical school graduates have already earned a Doctor of Medicine degree, “[i]t is generally accepted that physicians are not deemed fully trained to independently practice medicine in a specialty or subspecialty without completing a residency program.” *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715, 2008 WL 2940669, at *3 (S.D. Fla. July 28, 2008).

Despite the essential role that residency programs play in educating physicians, the Treasury Department has issued regulations that interpret the term “student” in the Federal Insurance Contribution Act (“FICA”) to exclude medical residents. FICA generally imposes a tax on wages paid to employees, but it contains numerous exemptions. As relevant here, FICA taxes are not

assessed 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) (“Student Exemption”). This statutory exemption has existed since 1939. Pet. App. 34a.

The Treasury Department first issued regulations interpreting the Student Exemption in 1940. *Id.* at 35a n.4. These regulations, which remained largely unchanged until 2004, provided that a person who performed services “as an incident to and for the purpose of pursuing a course of study” qualified for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(c) (2004). As the government now concedes, medical residents qualify for the Student Exemption under these regulations. *See* U.S. Brief In Opp. 14 n.2 (citing I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf).²

In 2004, the Treasury Department amended its regulations interpreting the Student Exemption. 69 Fed. Reg. 76,404 (Dec. 21, 2004). The amended regulations continue to provide that “the employee’s

² The government changed its position on this issue in March 2010, after federal courts repeatedly rejected its argument that medical residents did not qualify for the Student Exemption under the pre-2005 regulations. *See United States v. Mem’l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009); *Univ. of Chicago Hosps. v. United States*, 545 F.3d 564 (7th Cir. 2008); *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007).

services must be incident to and for the purpose of pursuing a course of study” in order to qualify for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(c). Under the new regulations, however, whether an individual meets this requirement generally is determined by comparing the “educational aspect” of the employee’s relationship with the employer with the “service aspect” of the relationship. *Id.* § 31.3121(b)(10)-2(d)(3)(i). The regulations require that the “educational aspect” predominate in order for the employee to be considered a student. *Id.*

Although “student” status generally is determined by comparing the educational and service aspects of an individual’s relationship with the school, college, or university, the regulations state that this balancing approach does not apply for “full-time employees.” *Id.* § 31.3121(b)(10)-2(d)(3)(iii). Instead, employees who typically work 40 hours or more per week are excluded from the Student Exemption regardless of whether the educational aspect of their relationship predominates over the service aspect. *Id.* The regulations expressly identify medical residents as persons who are categorically excluded from the Student Exemption for this reason. *Id.* § 31.3121(b)(10)-2(e), Ex. 4.

SUMMARY OF THE ARGUMENT

I. The Treasury Department’s regulations are invalid because they define “student” in a way that is contrary to its ordinary meaning. The term “student” ordinarily means a person who attends a school for the purpose of obtaining an education. Students frequently are employed while they are

attending school, but the ordinary meaning of “student” does not depend in any way on the fact of employment. A person who must work to earn enough money to pay tuition is no less a “student” than one who receives a scholarship. Despite this ordinary meaning, the regulations define “student” by reference to the amount of time that the person devotes to employment. Because this approach is contrary to the plain language of the statute, it is invalid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

II. The regulations are also invalid because they unreasonably exclude medical residents from the Student Exemption. The regulations interpret the Student Exemption to apply only if the services provided by the student are “incident to and for the purpose of pursuing a course of study.” 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(i). The regulations further provide that whether this requirement is met is determined by comparing the educational and service aspects of the person’s relationship with the school, college, or university. The Treasury Department has made a categorical determination that the services provided by medical residents are never “incident to and for the purpose of a course of study,” even though there is no basis for the determination that the service aspect of a residency always predominates over the educational aspect.

A. Medical residents satisfy the statutory requirement that they must be “enrolled and regularly attending classed at a school, college, or university.” 26 U.S.C. § 3121(b)(10).

The application and enrollment process for medical residencies is similar to the process for other higher education programs. Prospective residents submit applications, letters of recommendations, and transcripts. The applications are reviewed by faculty members, and the program director ultimately decides which applicants to admit. Residents view selecting a residency program as choosing where to enroll in school, not as picking a first job.

Medical residents also attend a significant number of classes. In addition to classes specific to the particular specialties, most residency programs include a range of other classes. Common classes include: (1) core curriculum conferences; (2) grand rounds; (3) morbidity and mortality conferences; and (4) journal clubs. These classes provide lectures, discussion seminars, and case studies that educate medical residents on core concepts in their specialty, interesting and unusual patient conditions and complications, and the most recent developments in the medical literature. Like other students, residents are evaluated on how well they perform in class.

B. The Treasury Department's regulations interpret the phrase "incident to and for the purpose of pursuing a course of education" to require that the educational aspect of the relationship between a student and his or her school must predominate over the service aspect of the relationship. This interpretation provides no justification for the categorical exclusion of medical residents from the Student Exemption because there is no basis for determining that the educational aspect of a medical

residency *never* predominates over the service aspect. *See Chevron*, 467 U.S. at 843-44.

The regulation's exclusion of medical residents is inconsistent with the accreditation standards for residency programs. The vast majority of residency programs sponsored by Petitioners and *amici* are accredited by the Accreditation Council for Graduate Medical Education ("ACGME"). ACGME sets minimum educational requirements that residency programs must meet in order to be accredited. The standards require that didactic and clinical education must be the primary focus of a resident's time and energy. To be accredited, a residency program must have a program director in charge of ensuring that the program focuses on education, and a faculty that devotes sufficient time to fulfill their supervisory and teaching responsibilities. An accredited program must also have a formal curriculum that sets forth the educational requirements for the program.

The regulations' refusal to consider the educational value of patient care is unreasonable. Medical residents spend a significant amount of time treating patients because it is essential to their education. The educational nature of residents' treatment of patients is confirmed by the fact that hospitals do not charge for services performed by residents. Residents treat patients only under the supervision of staff physicians. Because staff physicians must review and approve the resident's diagnoses and treatment decisions, a hospital operates less efficiently with residents, than it would without them. Accordingly, for-profit hospitals generally choose not to offer residency programs.

The “full-time employee” rule is unreasonable because it excludes medical residents from the Student Exemption regardless of the educational content of their residency program, based solely on the fact that they are on duty for 40 or more hours per week. Other examples in the regulations illustrate that the relative significance of the “educational” and “service” aspects is not determined based solely on the number of hours spent on each activity. A Ph.D. student who works as a teaching assistant for 20 hours per week can qualify for the Student Exemption even if his or her course-load is less than 20 hours per week. In addition to the educational value of patient care, many residency programs require a significant amount of time (frequently 10-15 hours) to be spent each week on other educational activities. Moreover, residents are often required to spend significant amounts of time conducting research. Because residents spend a substantial amount of time on educational activities, there is no basis for categorically excluding them from the Student Exemption based solely on the fact that their typical schedule exceeds 40 hours per week.

ARGUMENT

I. The Treasury Department’s Regulations Are Invalid Because They Are Contrary To The Plain Language Of The Statute.

Congress did not define “student” when it enacted the Student Exemption, and therefore the term must be given its “ordinary, contemporary, common meaning.” *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (internal quotation marks omitted). The

Treasury Department's regulations, however, do not give "student" its ordinary meaning. Instead, they interpret the term by reference to the amount of time that a person devotes to his or her employment. Because the amount of time that a person devotes to employment does not determine whether he or she is a "student," the regulations are invalid. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (When "the intent of Congress is clear, that is the end of the matter.").

The ordinary meaning of the term "student" is an individual who attends a school for the purpose of acquiring knowledge. *See, e.g., Webster's New Int'l Dictionary* 2268 (3d ed. 1981) (defining "student" as "an individual who engages in 'study' and is 'enrolled in a class or course in a school, college, or university,'" and defining "study" as "the application of the mental faculties to the acquisition of knowledge"); *Ninth New Collegiate Dictionary* 1170 (1990) (defining "student" as "one who attends a school," and "one who studies"); *Oxford Universal Dictionary* 2049-50 (3d ed. 1955) (defining "student" as one who engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment"). None of these dictionaries defines "student" by reference to the person's employment or amount of time that the person spends working.

According to one recent study, "[w]orking students are ubiquitous in American higher education." American Council on Education, "Working Their Way Through College," at 2 (May 2006), <http://www.nsea.info/docs/services/resources/ACEBrief.pdf>. During the 2003-04 academic year,

between 70 and 80 percent of undergraduate students held jobs, and more than a third worked at least 35 hours per week. *Id.* at 7. Indeed, “it has become increasingly the norm that students are working while pursuing college study. Most students (both full-time and part-time) are working, and the trend is toward students working for a considerable number of hours each week.” Susan R. Komives, Dudley B. Woodard, Jr., *Student Services: A Handbook for the Profession* 55 (4th ed. 2003). Students who work while attending a school, college, or university are no less “students” than their classmates who do not work.³

Many students work in order to pay for their education. For others, including the medical residents at issue in this case, employment is an integral part of their education. As discussed below, *see* Part II.B.2 *infra*, patient care is an essential part of a medical resident’s education. Medical residents are not unique in this regard. For example, Ph.D. students are often required to work as teaching assistants as part of their formal curriculum. *See, e.g.,* Yale University, *Graduate School of Arts and Sciences, Program and Policies 2010-2011* 63 (July

³ Many working students are not eligible for the Student Exemption, but that is not because they are not “students.” Rather, they are excluded from the Student Exemption because that exemption applies only to “service performed in the employ of a school, college, or university.” 26 U.S.C. § 3121(b)(10). Thus, students who work at fast food restaurants do not qualify for the Student Exemption because they are not employed by a school, college or university, but they are still “students.”

15, 2010), <http://www.yale.edu/printer/bulletin/htmlfiles/grad/graduate-school-of-arts-and-sciences-programs-and-policies-2010-2011.pdf>. As with medical residents, the Ph.D. candidate's "[t]eaching experience is regarded as an integral part of the graduate training program." *Id.*

In short, the ordinary meaning of a "student" is an individual who engages in study and is enrolled in a class or course in a school, college, or university. A student who works is nonetheless a "student" within the ordinary meaning of that term. Because the Treasury Department's regulations interpret the term "student" in a way that is contrary to its ordinary meaning, they are invalid. *See Chevron*, 467 U.S. at 842.

II. The Treasury Department's Regulations Are Invalid Because They Impermissibly Exclude Medical Residents From The Student Exemption.

The Treasury regulations are also invalid because they incorrectly state that services provided by medical residents "are not incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) & (e), Ex. 4. Under the regulations, this requirement is met if the "educational aspect" of an individual's relationship with the school predominates over the "service aspect" of the relationship. *Id.* § 31.3121(b)(10)-2(d)(3)(i). The Treasury Department had no basis for adopting a categorical determination that the educational aspect of a medical residency *never* predominates over the service aspect. Accordingly, the regulations are also invalid because they are

unreasonable. *See Chevron*, 467 U.S. at 843-45 (Even if the statutory language is ambiguous, agency's interpretation may not be arbitrary, capricious, or unreasonable).

A. Medical Residents Satisfy The Statutory Requirements For The Student Exemption.

According to the terms of the statute, the Student Exemption applies to “students” who are “enrolled and regularly attending classes at [a] school, college, or university.” 26 U.S.C. § 3121(b)(10). This statutory requirement provides no justification for the regulations’ categorical exclusion of medical residents because residents are enrolled and regularly attend classes at a school, college, or university.

1. Medical Residents Are Enrolled At A School Or University.

The district court determined that the residents at the Mayo Foundation for Medical Education and Research (“Mayo Foundation”) and University of Minnesota were enrolled at their respective schools. Pet. App. 38a n.8, 60a-62a. The district court’s summary of the application and enrollment process at the University of Minnesota demonstrates that the admissions process for residency programs is similar to the process for other higher education programs. The court noted that applicants are required to submit “residency applications, letters of recommendation, medical-student performance evaluations, transcripts, and other supporting credentials.” *Id.* at 61a. The

residency program directors and faculty review the applications and interview applicants. *Id.* The Mayo Foundation gives its program director “the ultimate authority in determining which applicants it intends to admit and in what order of preference.” *Id.*

Another district court recently reached the same conclusion after a trial. *See Mount Sinai*, 2008 WL 2940669, at *29. According to the court, “the application and admission process . . . closely resemble[s] that of a traditional school, college, or university.” *Id.* “The medical student/aspiring resident looks at residency training as an element in his or her education 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.” *Id.* at *5 (internal quotations marks, citations, and brackets omitted). As a result, “[w]hen a resident is picking residency programs, he does not view the process to be one of picking his first ‘job.’” *Id.* Instead, residents “think of residencies as education and not ‘on-the-job training.’” *Id.*; *see also* Pet. App. 38a n.8 (“The Government’s characterization of a residency program as ‘on-the-job’ training misses the mark and ignores the fact that residents apply to and enroll in a residency program for an education purpose.”).

Thus, both the residency program sponsors and the program applicants regard the acceptance of medical school graduates into a residency program as enrollment in an educational program as opposed to acceptance in a traditional employment setting.

2. Medical Residents Regularly Attend Classes.

Medical residents regularly attend classes. Although curricula vary according to the requirements of the medical specialty areas of the residency programs, most residency programs include certain basic types of classes. Common classes include: (1) core curriculum conferences; (2) grand rounds; (3) morbidity and mortality conferences; and (4) journal clubs. Petitioners' residency programs included all four types of classes. Pet. App. 41a n.10, 63a; *see also Mount Sinai*, 2008 WL 2940669, at *30 (“[R]esidents attended core curriculum conferences, grand rounds, lectures, morbidity and mortality conferences, and journal clubs.”). Attendance for the courses is typically mandatory. *See, e.g., id.* at *30 (“Attendance at conferences and lectures was mandatory across all residency programs, and each program monitored attendance, typically through sign-in sheets.”).

Core Curriculum Conferences

The core curriculum conferences typically comprise a lecture series covering the core concepts for the program's specialty. For example, the general surgery residency at *amicus* Stanford University includes a “Core Course” that is a weekly, 90-minute class. *See* “Stanford University School of Medicine,” <http://med.stanford.edu/gensurg/education/core.html>. For each class, the residents are assigned required reading from the “Sabiston Textbook of Surgery” and optional reading from “Greenfield's Textbook of Surgery.” *Id.* During the first 30 minutes of the lecture, a resident presents the key points of the

week's reading. *Id.* Each resident is assigned to make the presentation at a specific lecture and is expected to prepare slides for the presentation. *Id.* For the last 60 minutes of the class, a faculty member presents a case-based lecture on the topic. *Id.*

Grand Rounds

“Grand rounds” is typically a formal lecture series in which the lecturers “present clinical problems in medicine by focusing on current or interesting cases.” *Webster’s New World Medical Dictionary* (3d ed. 2008). For example, the surgical grand rounds at *amicus* Boston Medical Center “are held weekly for surgical faculty, residents, and medical students. A subject of surgical importance is presented and discussed in depth by experts in the field. Time is left after each presentation for questions.” “Teaching Conferences & Rounds,” <http://www.bumc.bu.edu/generalsurgery/teaching-conferences-rounds/>.

Morbidity and Mortality Conferences

Morbidity and Mortality Conferences are case studies involving patient complications and deaths. One of *amici’s* programs, the gynecology and obstetrics residency at Emory University, informs its residents that the purpose of these conferences “is to provide a safe venue for residents to identify areas of improvement, and promote professionalism, ethical integrity and transparency in assessing and improving patient care.” “Morbidity and Mortality Conference,” [http://www.gynob.emory.edu/education/Conferences/Morbidity and Mortality Conference.html](http://www.gynob.emory.edu/education/Conferences/Morbidity%20and%20Mortality%20Conference.html). For each conference, a resident is assigned

responsibility for selecting a patient for the case study and providing a 30-minute presentation. *Id.* For the remaining portion of the conference, a faculty member moderates a discussion of the case. *Id.* All residents are required to attend the conference; faculty members are invited and expected to attend. *Id.*

Journal Clubs

Journal clubs have been described as “an integral part of most training programs.” Patrick C. Alguire, “A Review of Journal Clubs in Postgraduate Education,” 13 *J. of Gen. Internal Med.* 347, 351 (May 1998). “Initially, journal clubs served to help practitioners stay abreast of scientific developments, but more recently they have been used as a vehicle to teach critical appraisal skills, research design, medical statistics, clinical decision theory, and clinical epidemiology.” *Id.* at 347. Like many of *amici*’s programs, the journal club for the neurosurgery residency at Mount Sinai School of Medicine selects journal articles on a particular topic, and the articles are “presented by the residents with open discussion about the merits of that paper.” “Mount Sinai School of Medicine,” <http://www.mssm.edu/departments-and-institutes/neurosurgery/programs-and-services/neurosurgery-residency/conferences>. The discussion “is directed by an attending with a particular interest and expertise in the area under discussion.” *Id.*

* * *

Like students in other higher education programs, residents are evaluated on how well they perform in these classes. At the University of

Minnesota, for example, residents take examinations and their “performance in each subject-matter rotation [is] evaluated, graded, and recorded on the resident’s transcript.” Pet. App. 63a-64a; *see also United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1017 (D. Minn. 2003) (“*Mayo I*”); *see also Mount Sinai*, 2008 WL 2940669, at *30 (“[R]esident performance was monitored through regular evaluations, quizzes, and tests.”).

The district court therefore correctly determined that residents at both the Mayo Foundation and University of Minnesota regularly attended classes. Pet. App. 38a n.8, 62a-64a.

B. The Regulations Unreasonably Exclude Medical Residents From The Student Exemption.

The regulations interpret the phrase “incident to and for the purpose of pursuing a course of education” to require that the educational aspect of a person’s relationship with his or her school, college, or university to predominate over the service aspect of the relationship. Because there is no basis to make a categorical determination that the educational aspect of a medical residency *never* predominates over the service aspect, the regulations are unreasonable and therefore invalid. *See Chevron*, 467 U.S. at 843-44.

1. The Regulations' Treatment Of Medical Residents Is Inconsistent With The Accreditation Standards For Residency Programs.

By categorically excluding medical residents from the Student Exemption, the Treasury Department's regulations effectively presume that the service aspect of every residency program predominates over the educational aspect. If this presumption were actually true, no residency program could satisfy the requirements for accreditation set by the Accreditation Council for Graduate Medical Education ("ACGME"). Yet the vast majority of residency programs sponsored by Petitioners and *amici* are accredited by ACGME.⁴ In total, more than 109,000 residents participated in 8,734 ACGME-accredited residency programs during the 2008-09 academic year. See ACGME, "ACGME At A Glance," <http://www.acgme.org/acWebsite/newsroom/ataglance.pdf> ("*ACGME At A Glance*").

ACGME was established in 1981 to evaluate and accredit medical residency programs in the United States. *Id.* It is a private, non-profit organization that was formed by the American Board of Medical Specialties, American Hospital Association, American Medical Association, Association of American Medical Colleges, and the Council of Medical Specialty Societies. *Id.* Each of these organizations appoints four members to

⁴ Accreditation is not available for some subspecialty programs. See *Mount Sinai*, 2008 WL 2940669, at *12.

ACGME's board of directors. *Id.* The board of directors also includes "two resident members, three public directors, the chair of the Council of Review Committees, one to four at large directors, and a non-voting federal representative." *Id.*

ACGME's mission "is to improve health care by assessing and advancing the quality of resident physicians' education." *Id.* Its standards are intended to ensure that "[d]idactic and clinical education must have priority in the allotment of the resident's time and energy." ACGME, *Common Program Requirements*, at 11 (July 1, 2007), http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf ("*Common Program Requirements*"). To achieve these goals, ACGME has adopted minimum educational requirements that apply to all residency programs. *ACGME At A Glance* at 1. It has also established a Residency Review Committee for 26 different medical specialties. *Id.* These committees adopt additional requirements for their specialties, and they evaluate the programs within their specialties to determine whether they qualify for accreditation. To ensure that residency programs follow these standards, ACGME maintains a Department of Field Activities that conducts site visits to ensure compliance with ACGME standards. It made approximately 2000 site visits during the 2008-09 academic year. See ACGME, *2008-09 Annual Report* at 5, http://www.acgme.org/acWebsite/annRep/an_2008-9AnnRep.pdf.

An accredited residency program must have a program director in charge of ensuring that the program focuses on educating its residents. See ACGME, *Common Program Requirements*, at 1 (July

1, 2007), http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf (“*Common Program Requirements*”). Under the accreditation standards, a program director must “administer and maintain an educational environment conducive to educating the residents.” *Id.* at 2. The director must also “oversee and ensure the quality of didactic and clinical education.” *Id.*

The accreditation standards set specific requirements for the faculty of a residency program. Each program must have a sufficient number of faculty members “to instruct and supervise all residents.” *Id.* at 4. Moreover, “faculty must devote sufficient time to the educational program to fulfill their supervisory and teaching responsibilities; and to demonstrate a strong interest in the education of residents.” *Id.* In addition to supervising residents in treating patients, faculty are required to participate in the other educational aspects of the residency program, including clinical discussions, journal clubs, and conferences. *Id.*⁵

The accreditation standards also require that a residency program have a formal curriculum. *Id.* at 6. The curriculum must set forth:

- “Overall educational goals for the program”;

⁵ Some specialties expressly require faculty to be involved in “continuing scholarly activity,” by serving on editorial boards or as reviewers for peer-reviewed journals. *See, e.g.*, ACGME, Program Requirements for Graduate Medical Education in Emergency Medicine, at 9, http://acgme.org/acWebsite/downloads/RRC_progReq/110emergencymed07012007.pdf.

- “Competency-based goals and objectives for each assignment at each educational level”; and
- “Regularly scheduled didactic sessions.” *Id.*

Residents in accredited programs should participate in “scholarly activity.” *Id.* at 9. To fulfill this requirement, “[t]he curriculum must advance residents’ knowledge of the basic principles of research.” *Id.* Moreover, the program should provide “adequate educational resources” to make this possible. *Id.* For example, the Mayo Foundation provides its residents with “one of the largest medical libraries in North America, computer facilities, laboratories, and classrooms.” *Mayo I*, 282 F. Supp. 2d at 1001.

The accreditation standards limit the number of hours that residents can be on duty to ensure that their education has priority. Under the current standards, a resident’s schedule is limited to 80 hours per week (not including reading and preparation time spent outside of the institution). *See Common Program Requirements* at 12. This limitation was adopted to ensure that the program’s “learning objectives” are not “compromised by excessive reliance on residents to fulfill service obligations.” *Id.* at 11.

2. The Regulations Fail To Account For the Educational Value Of Treating Patients.

The Treasury regulations acknowledge that the time medical residents spend treating patients

has “an educational, instructional, or training aspect.” 26 C.F.R. § 31.3121(b)(10)-2(e), Ex. 4. The regulations nevertheless categorically exclude medical residents from the Student Exemption without considering, as they do for other activities, whether the educational aspect of patient care predominates over the service aspect. The Treasury Department’s categorical refusal to consider the educational value of patient care is unreasonable.

Medical residents spend a significant amount of time treating patients because doing so is vitally important to their education. As the district court recognized, the clinical setting is the “principal classroom” for medical residents. Pet. App. 64a-65a. In many respects, there is simply no substitute for the experience gained in a clinical setting. No matter how many lectures a surgical resident attends, he or she cannot become a competent surgeon without spending time in the operating room.

In *Mayo I*, the district court recognized that “it is impossible to separate ‘education’ from ‘patient care.’” 282 F. Supp. 2d at 1015. The court explained that “[a]ctual care in the service of patients is inherent in the educational process. It really cannot be separated from that. Playing just an observational role in this is not the same as actually being involved directly in patient care.” *Id.* at 1014-15 (internal quotation marks and citations omitted).

Medical residents spend “the majority of their time learning how to care for patients under the watchful eye of a faculty physician.” Pet. App. 64a. Residents treat patients, but their diagnoses and

treatment decisions must be approved by a staff physician. *Id.* Residents also learn in the clinical setting by “making rounds” with the staff physicians. “On rounds, the staff physician and residents would move from patient to patient; the staff physician would conduct 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.

Many residency programs increase the educational value of patient care by minimizing the amount of administrative work that a resident must do. The *Mayo I* court explained:

It is significant that the Foundation . . . seeks to ensure that allied healthcare personnel perform ancillary procedures that have no “educational value,” such as drawing blood, starting IVs, setting up electrocardiograms, and scheduling tests. Residents at Mayo are not treated as a “cheap” source of labor, as the government has implied. By reducing the non-educational components of the residency programs to a minimum, [Mayo] sought to ensure that education, not service, was the focus of the residents’ experience.

Id. at 1015 (internal citations omitted).

Universities and teaching hospitals recognize that a resident’s primary purpose for treating patients is educational. They do not bill for the patient care provided by residents. *Mount Sinai*,

2008 WL 2940669, at 4. Nor will Medicare reimburse them for services performed by residents. *Id.* Indeed, if a hospital were concerned only with treating patients as efficiently as possible, it would not sponsor residency programs. As the district court noted, staff physicians could treat patients “in a more efficient and quicker fashion if they didn’t have residents.” Pet. App. 65a (internal quotations and citation omitted); *see also Mount Sinai*, 2008 WL 2940669, at *4 (“Faculty uniformly believe they can perform medical tasks more easily alone than while training the resident.”). As a result, “[o]nly a minority of hospitals nationwide offer residency programs,” and “[a]s a general matter, for-profit hospitals do not offer residency programs.” *Id.* at *11 n.12.

In sum, having medical residents treat patients under the supervision of staff physicians is inefficient for hospitals but indispensable to the residents’ education. As a result, the district court properly determined that residency programs are designed to “meet the educational needs of the resident, not the service needs of the hospital.” Pet. App. 64a (internal quotation marks and citation omitted).

3. The Regulations Unreasonably Exclude Medical Residents From The Student Exemption Regardless Of How Much Time They Spend On Educational Activities.

If medical residents were on duty for only 39 hours per week, they would qualify for the Student Exemption under the Treasury Department’s

regulations so long as the educational aspect of the residency program predominated over the service aspect. Once their schedule exceeds 39 hours, however, the regulations categorically exclude them from the Student Exemption. A medical residency program is primarily educational regardless of whether it takes more than 40 hours per week of the resident's time. The regulations are therefore invalid because they unreasonably exclude medical residents from the Student Exemption regardless of the educational content of their residency program, based solely on the fact that they are on duty for 40 or more hours per week. *See Chevron*, 467 U.S. at 843-44.

The unreasonableness of the regulations' categorical full-time employee rule is illustrated by other examples in the regulations. These examples demonstrate that the relative significance of the "educational" and "service" aspects of the relationship is not determined by comparing the number of hours spent on each activity. The regulations state that a graduate student with a "full-time course work-load" who works 20 hours per week as a teaching assistant qualifies for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(e), Ex. 8. This is true regardless of how many hours are required for a "full-time course work-load." In fact, a full-time course work-load for a graduate program is commonly *less* than 20 hours per week. For example, many of the Ph.D. programs offered by the Yale University Graduate School of Arts and Sciences require three or four courses (usually one or two hours per class) each semester during the students first two years of the program, and often no classes

after that point. See Yale University, *Graduate School of Arts and Sciences, Program and Policies 2010-2011* (July 15, 2010), <http://www.yale.edu/prINTER/bulletin/htmlfiles/grad/graduate-school-of-art-s-and-sciences-programs-and-policies-2010-2011.pdf>. As a result, graduate students who work as teaching assistants often spend more time working than attending classes, but they nevertheless qualify for the Student Exemption. 26 C.F.R. § 31.3121(b)(10)-2(e), Ex. 8.

Even if a student were required to spend more time on educational activities than on service activities, the full-time employee rule would still be unreasonable. There is no basis for imposing a categorical presumption that medical residents spend more time on service activities than on educational activities. As discussed above, the time spent on patient care is properly categorized as education, not service. See Part II.B.2 *supra*. But even if patient care were treated as service, the regulations cannot presume that the service aspect necessarily predominates simply because a resident treated patients for 40 hours per week. Residents may be on duty for up to 80 hours per week, not including reading and preparation time spent outside of the institution. See *Common Program Requirements* at 12. Thus, a resident could spend 40 hours per week on service activities, while spending more than 40 hours per week on educational activities. As a result, the service aspect does not necessarily predominate simply because a resident spends 40 hours or more providing patient care.

Many of *amici's* programs require a significant amount of time to be spent each week on educational

activities other than patient care. For example, residents in the internal medicine program at *amicus* Dartmouth-Hitchcock Medical Center devote between 10 and 15 hours per week to educational conferences. See “Educational Conferences,” http://gme.dartmouth-hitchcock.org/im/educational_conferences.html. The conferences include:

- Rotational rounds (five hours per week);
- Residents’ “morning report” (four hours per week);
- “Noon Conference Series” with lectures on core topics in general internal medicine (two hours per week);
- Journal Club (one hour per week);
- Morbidity and Mortality Conference (one hour per week); and
- Medical Grand Rounds (one hour per week).
*Id.*⁶

⁶ This weekly schedule is not unusual for the residency programs sponsored by *amici*. The pathology residency at Johns Hopkins University requires residents to attend: (1) daily autopsy gross conferences; (2) daily and weekly multiheaded microscope and didactic conferences in autopsy and surgical pathology and in specialty areas; (3) twice weekly work rounds and weekly seminars in clinical pathology; (4) weekly didactic sessions in both Anatomic and Clinical Pathology; (5) weekly surgical pathology case conference; (6) weekly grand rounds; (continued...)

In addition to these courses, residents in *amici's* programs also spend significant amounts of time conducting research. For example, *amicus* The George Washington University requires all residents in its primary care program and the vast majority of residents in its internal medicine program to complete a research project before graduation. See "Internal Medicine Residency," <http://www.gwumc.edu/edu/medicine/residency/Administration/ProgramDirector.htm>. Residents decide on a research topic during their first year. *Id.* During their second year, they work closely with their faculty advisors to refine their topic; they also gather data for their study. *Id.* During the final year, residents present their "work in progress" papers to the faculty and other residents, and prepare the papers for publication. *Id.*

In short, medical residents spend a substantial amount of time each week on educational activities. The fact that their schedule typically exceeds 40 hours per week provides no basis for categorically excluding them from the Student Exemption.

and (7) research seminars. "Pathology Residency Programs," <http://pathology.jhu.edu/department/training/residency.cfm>.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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