No. 09-837

IN THE
Supreme Court of the United States

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

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

**BRIEF OF *AMICUS CURIAE* LOYOLA UNIVERSITY MEDICAL CENTER IN SUPPORT OF PETITIONER**

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## STATEMENT OF INTEREST[1]

Loyola University Medical Center ("LUMC"), part of the Loyola University Health System, is the teaching hospital of the last fully-integrated Catholic Jesuit academic medical center in America. Working with its affiliate, the Stritch School of Medicine of Loyola University Chicago, and with its 700-member faculty (collectively "Loyola"), LUMC annually educates in excess of 600 graduate medical students (medical residents),[2] treats patients, and conducts medical research. All entities are, or are components of, Illinois not-for-profit corporations.

The LUMC mission statement says:

> Loyola University Health System is committed to excellence in patient care and the education of health professionals. We believe that our Catholic heritage and Jesuit traditions of ethical behavior, academic distinction, and scientific research lead to new knowledge and advance our healing mission in the communities we serve. We believe that thoughtful stewardship,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

[2] LUMC also educates many other students, including (for example) nurses and emergency medical technicians.

> learning and constant reflection on experience improve all we do as we strive to provide the highest quality health care. We believe in God's presence in all our work. Through our care, concern, respect and cooperation, we demonstrate this belief to our patients and families, our students and each other. To fulfill our mission we foster an environment that encourages innovation, embraces diversity, respects life, and values human dignity. We are committed to going beyond the treatment of disease. We also treat the human spirit.

LUMC Mission Statement, *available at* http://www.loyolamedicine.org/Learn_About_Us/Mission_Brand/index.cfm (last visited August 12, 2010).

LUMC timely filed with the Internal Revenue Service ("IRS") its original Forms 941, Employer's Quarterly Federal Tax Returns. On these Forms 941, LUMC erroneously reported that certain amounts it paid its medical residents were wages subject to the Federal Insurance Contributions Act ("FICA" or "Act") under 26 U.S.C. §§ 3111(a) and (b) and 3101(a) and (b). Thereafter, LUMC timely filed claims for refund of the FICA taxes paid on behalf of itself and its resident physicians on the basis that those residents were students entitled to the exemption in 26 U.S.C. § 3121(b)(10). In 2009, LUMC filed suit in the United States District Court for the Northern District of Illinois against the United States to obtain these refunds under Case Number 1:09-cv-04977. On March 2, 2010, the IRS issued a public concession that residents were students not subject to FICA tax for the tax periods ending before April 1, 2005, the

effective date of the new regulation that is the subject of this case (Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii)). Due to the government's concession, LUMC and the U.S. Department of Justice, Tax Division executed and filed a stipulation to dismiss only the portion of the case dealing with the period before the effective date of the new regulation. LUMC's lawsuit for the new regulation period remains pending in the U.S. District Court for the Northern District of Illinois. This Court's decision in this case will likely have a dispositive effect on the remainder of LUMC's lawsuit and its ability to recover the FICA tax paid on behalf of LUMC and its residents for periods beginning after April, 2005.

Petitioner has capably marshaled the arguments against the IRS's position, and this brief will not repeat those arguments. Nonetheless, as a Jesuit educational institution, LUMC is uniquely positioned to challenge the IRS's conception that a medical resident's service ceases to be predominantly educational once the resident works 40 hours per week.

## SUMMARY OF ARGUMENT

After completing four years of medical school and receiving an M.D. degree, physicians cannot receive a permanent medical license from the Illinois Department of Professional Regulation until they complete a course of postgraduate medical education, commonly known as an internship and/or a residency. LUMC trains approximately 600 medical residents per year in dozens of medical specialties. These trainees work long hours, nights, weekends and holidays in pursuit of their education. Such long

hours do not make them employees – they remain students being trained in medicine within the Jesuit educational tradition. The IRS's raising the bar of a 40-hour per week beyond which medical residents cease to be students for purposes of the student exemption from FICA is contrary to the plain meaning of 26 U.S.C. § 3121(b)(10) and is arbitrary and capricious.

## ARGUMENT

The Federal Insurance Contributions Act requires both employees and employers to pay Social Security and Medicare Insurance taxes upon "wages . . . with respect to employment." 26 U.S.C. § 3101, 3111. "Employment" is in turn defined to mean any "service, of whatever nature, performed . . . by an employee for the person employing him" in the United States (or in other specially defined circumstances). *Id.* § 3121(b). The Act enumerates exceptions from the definition of covered employment, including "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).

The IRS has long interpreted subsection (b)(10) to encompass not all student employment, but only service that is "incident to and for the purpose of pursuing a course of study." Treas. Reg. § 31.3121(b)(10)-2(c) (2004); *see* Pet. App. 42a n.10 (noting that this approach has been reflected in IRS regulations since shortly after Congress enacted the student-employment exemption in the 1939 Social

Security Act amendments). Under its prior regulation,

> [t]he 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.

Treas. Reg. § 31.3121(b)(10)-2(c) (2004).

In late 2004, however, after court decisions holding that services performed by medical residents were incident to a course of study, *see, e.g.*, *Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998) (Social Security regulation); *United States v. Mayo Foundation for Medical Education and Research, et al.*, 282 F. Supp. 2d 997 (D. Minn. 2003) (IRS regulation), the IRS amended its regulation to overrule those decisions in the tax context. Student FICA Exception, 69 Fed. Reg. 76,404, 76,408-09 (Dec. 21, 2004). The IRS converted its "relationship" test into a general rule. The IRS retained the requirement that "[a]n 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," and declared that "[t]he 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." Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i). But the IRS declared a categorical exception from that test: the services of a student whose normal work schedule is 40 hours or more per week are "not incident to and for the purpose of pursuing a course of study," and at that threshold the person is considered a "full-time employee" and not a student. *Id.* § 31.3121(b)(10)-2(d)(3)(iii).

LUMC does not contest that, in its general rule, the IRS has properly interpreted the statutory term "service performed in the employ of . . . a school, college, or university . . . by a student," 26 U.S.C. § 3121(b)(10), to be limited to those students whose employment service is "incident to and for the purpose of pursuing a course of study" and for whom the "educational aspect" of the student's relationship with the university is "predominant." Treas. Reg. § 31.3121(b)(10)-2(d)(3). The statutory student exception of subsection 3121(b)(10) was not meant to encompass any university employee who happens to take regular classes.

But if the plain meaning of subsection (b)(10) is to exempt school employment of students when the predominant purpose of the relationship is educational, then medical residents should be exempt whenever predominance of an educational purpose can be proven (as it invariably can be). Moreover, even if *arguendo* the statutory text is ambiguous, the

IRS's amended regulation – which provides categorically that the services of a student whose normal work schedule is 40 hours or more per week are "not incident to and for the purpose of pursuing a course of study," Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) – is not entitled to deference because it is unreasonable. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). It is starkly unreasonable to decree that the educational aspect of the student-university relationship is *never* predominant in *any* circumstances when the student receives a stipend for 40 hours per week or more of service. Such an inflexible quantitative rule has no rational basis when the service is intrinsic to the student's course of study and inherently educational, as is true of medical residency. Medical residents must devote more than 40 hours per week to practical education in the healing arts under the supervision of attending physicians, which is generally required in order to learn about the evolution of a patient's disease or (for example) to participate in surgery. Residency is not a 9-to-5 job – it is often an around-the-clock lesson. The IRS's 40-hour rule effectively and arbitrarily means that by devoting more time to their education, residents cease to be students. Contrary to the IRS's interpretation, medical residents are in the heartland of the section 3121(b)(10) exemption that Congress created to immunize true students (and the schools and universities that create student employment to enable their education) from FICA taxation. This Court should reverse the judgment below.

## I. Aspiring Physicians Sacrifice Nearly A Decade Of Their Lives To Medical Education.

Residents are students. Moreover, they are students whose educations are costly; the average debt of indebted medical school graduates was $156,456 in 2009. *See* AMA-Medical Student Debt, *available at* http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/medical-student-section/advocacy-policy/medical-student-debt.shtml (last visited August 12, 2010). No mere "employee" with over $150,000 of medical school debt would work up to 80 hours per week (up to 88 in neurosurgery) and give up nights, weekends and holidays in exchange for $45,000-$60,000 per year.[3] The remuneration permits the education – it is not the purpose of the endeavor.

This is exactly the kind of employment that Congress intended to exempt from FICA taxation: school employment that enables the student to finance his education. FICA taxation is significant in amount. The 7.625% employer share that the medical school pays under the government's approach absorbs funds that would otherwise be used for better

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[3] The mean first-year stipend for a first post-MD year stipend was $47,458. American Association of Medical Colleges, *Survey of Resident/Fellow Stipends and Benefits 2009*, at 4, *available at* http://www.aamc.org/data/stipend/2009_stipendreport.pdf (last visited August 12, 2010). The stipend increases roughly $2,000 per year in ensuing years of the residency. *Id.* at 4 (Table 1).

medical education or patient care. The equivalent "employee" share paid by the resident means that there is that much less money to make ends meet, and at the margin some medical residents cannot withstand a wage loss of nearly 8%. The more financial pressure that is loaded upon medical residents, the more likely that (1) some residents may moonlight, potentially compromising their education and patient care; (2) residents will gravitate to higher paying specialties, rather than primary care; and (3) persons of limited means will choose to forego medical education to pursue fields which do not require such prolonged periods of poorly paid apprenticeships. *See AMA-Medical Student Debt*, *supra.* The IRS's imposition of FICA taxes upon medical residents is not only contrary to law, but it is also particularly detrimental when an acute physician shortage is on the horizon. *See* Center for Workforce Studies, American Association of Medical Colleges, *The Complexities of Physician Supply and Demand: Projections Through 2025* (Nov. 2008), *available at* http://services.aamc.org/publications/showfile.cfm?file=version122.pdf (last visited August 12, 2010) (projecting a shortage of between 125,000 and 159,300 physicians by 2025). Congress did not intend to tax income from school employment that is necessary to allow the student to pursue his or her education.

## II. The Medical Resident's Employment Is Intrinsic To The Resident's Education.

Medical residency employment is even more clearly within the subsection (b)(10) exemption than

most forms of student employment. Not only is it "incident to and for the purpose of pursuing a course of study," but it is in fact intrinsic to the resident's course of study. The essence of medical resident education is clinical hands-on patient care, supervised by attending physicians. This is the very educational care that a teaching hospital or medical school supports through a stipend. Indeed, what the IRS seeks to exclude from the subsection (b)(10) exemption is the experiential education that state governments require before a doctor can practice medicine, and that the federal government requires before permitting reimbursable Medicare services.

### A. The Essence Of Medical Residency Education Is The Direct, Supervised Patient Care That The Resident Provides.

Progressive experience in and responsibility for patient care is the essence of medical residency education. The Accreditation Council on Graduate Medical Education ("ACGME") is a private, non-profit body that accredits and monitors the educational effectiveness of residency programs. It does this through both common and specialty-specific requirements, as well as periodic site visits. The proposed introduction to the ACGME program requirements summarizes residency:

> Residency is an essential dimension of the transformation of the medical student to the independent practitioner along the continuum of medical education. It is physically, emotionally and intellectually demanding, and requires longitudinally-

> concentrated effort on the part of the resident.
>
> The specialty education of physicians to practice independently is experiential, and necessarily occurs within the context of the health care delivery system. Developing the skills, knowledge, and attitudes leading to proficiency in all the domains of clinical competency requires the resident physician to assume personal responsibility for the care of individual patients. For the resident, the essential learning activity is interaction with patients under the guidance and supervision of faculty who give value, context, and meaning to those interactions. As residents gain experience and demonstrate growth in their ability to care for patients, they assume roles that permit them to exercise those skills with greater independence. This concept – graded and progressive responsibility – is one of the core tenets of American graduate medical education. Supervision in the setting of graduate medical education has the goals of assuring the provision of safe and effective care to the individual patient; assuring the development of the skills, knowledge, and attitudes in the resident required to enter the unsupervised practice of medicine; and establishing a foundation for continued professional growth.

ACGME Common Program Requirements, Introduction, *available at* http://acgme-

2010standards.org/pdf/Proposed_Standards.pdf (last visited August 12, 2010).

Accordingly, ACGME requires each residency program to have an educational curriculum that contains (1) overall educational goals for the program; (2) competency-based goals and objectives for each residency assignment at each level of training; and (3) delineation of resident responsibility for patient care, including a plan for progressive responsibility for patient management and supervision of residents over the continuum of the program. In addition, all medical residency programs must comply with certain ACGME "competencies," which include ensuring that residents demonstrate (1) medical and clinical knowledge and the ability to apply this knowledge to patient care; (2) the development of skills to investigate and evaluate care of patients; (3) interpersonal and communication skills to be able to exchange information with patients, their families, and other health care professionals; and (4) a commitment to carrying out professional responsibilities and ethical principles. ACGME Common Program Requirements, effective July 1, 2007, § IV, *available at* http://www.acgme.org/acWebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf (last visited August 12, 2010).

Completion of a course of study in an ACGME accredited program is a prerequisite for a physician becoming "board certified" in a particular specialty. The specific standards for ACGME accreditation vary by specialty, but, as a general rule, it is necessary for an ACGME program to offer residents a sufficient number of patients with diverse disease

presentations in their designated specialty to assure a well-rounded education in the specialty.

There are over 400 ACGME-accredited programs in Illinois. LUMC operates over 43 such programs in Maywood in the specialties of urology; general surgery; vascular surgery; thoracic surgery; diagnostic radiology; radiation oncology; dermatology; vascular neurology; surgical critical care; pain medicine; anesthesiology; cardiovascular disease; family medicine; internal medicine; gastroenterology; endocrinology, diabetes and metabolism; infectious disease; nephrology; rheumatology; clinical cardiac electrophysiology; interventional cardiology; hematology and oncology; pulmonary disease and critical care medicine; neurological surgery; neurology; clinical neurophysiology; nuclear medicine; orthopedic surgery; ophthalmology; obstetrics and gynecology; otolaryngology; anatomic and clinical pathology; cytopathology; hematology; pediatrics; neonatal-perinatal medicine; plastic surgery; physical medicine and rehabilitation; psychiatry; adult cardiothoracic anesthesiology; geriatrics; and hand surgery.

LUMC does not employ medical residents to support this many accredited specialty programs to generate profits; rather, it supports these programs to educate the residents, consistently with its mission. For example, it would probably be impossible to deliver enough babies to cover the total cost of the obstetrics program. Yet students must complete a course in delivering babies in order to be fully trained – even if they do not ultimately become obstetricians. The educational aspect of the medical resident-academic hospital relationship far

predominates over the employment aspect. LUMC pays its residents limited remuneration to enable them to pursue this education, and Congress did not intend such payments to be subject to FICA taxation.

### B. Postgraduate Medical Education Is Necessary For Both State Licensing And Federal Medicare Practice.

What the IRS refuses to recognize as predominantly educational is the very education that the States require in order to license physicians to practice medicine. In Illinois and every other state, completion of medical school and receipt of an M.D. degree does not entitle a new physician to a permanent medical license. *See* Federation of State Medical Boards, *State Requirements for Initial Medical Licensure* (July 2010), *available at* http://www.fsmb.org/usmle_eliinitial.html (last visited August 12, 2010) ("FSMB Requirements"). It is only sufficient to allow a new physician to gain a temporary license to continue his or her education as a medical resident. New medical graduates, who have not been permanently licensed in another state, must complete two years of additional education to earn a permanent license. 225 ILCS 60/11(A). Ironically, two years of residency is less than the minimum requirement for virtually all of the more than 8,000 specialty training programs recognized by ACGME, including family medicine, internal medicine and obstetrics and gynecology (disciplines frequently called "primary care"). *See* ACGME Data Resource Book Academic Year 2008 – 2009, at 30-32, *available at*

http://www.acgme.org/acWebsite/dataBook/2008-2009_ACGME_Data_Resource_Book.pdf (last visited August 12, 2010).

Moreover, Medicare effectively requires medical residency education to serve patients. Physicians must have a Medicare provider number to bill the Federal government for treating one of the 45 million Medicare beneficiaries. The Centers for Medicare and Medicaid Services ("CMS") looks to State law to determine whether a physician has legal authorization to practice medicine. In order to obtain a provider number, practitioners must list their medical school and residency training program on CMS Form 855, *available at* http://www.cms.gov/cmsforms/cmsforms/itemdetail.asp?itemid=CMS019477 (last visited August 12, 2010), as well as the state medical license number. Every state in the Union requires at least one year of postgraduate education before it will issue a permanent medical license, and many require more. *See* FSMB Requirements, *supra.*

### C. The IRS's 40-Hour Rule Leads To Arbitrary Distinctions.

Medical residents put in long hours not for the pay, but because their education demands it. A resident must observe the progression of a patient's disease, which cannot be achieved by minding the clock. A medical resident has to develop the capacity to serve patients capably even when physically fatigued. Moreover, the problems of human health are so variegated that few students can take a "part-time" approach and emerge as a competent doctor in the few years allotted to medical residency.

The IRS's 40-hour rule is arbitrary. At 39 hours of education per week, a young doctor is a student, but at 41 hours, is she an employee? Neither the person nor the character of activity is different. There is no doubt that the medical resident who puts in 60 or 80 hours is more skilled, better educated, and ultimately the better doctor than a resident who would put in 30 hours. The IRS's rule that a medical resident ceases to be a student the more time that she devotes to her medical education is illogical. She remains a student, simply a more industrious one and consequently a more experienced medical practitioner.

### D. The Jesuit Mission Underscores The Arbitrariness Of The IRS's Stance.

The student-exemption of subsection (b)(10) does not apply any differently to Jesuit hospitals, but the mission and tradition of Jesuit education casts the error of the IRS's position in high relief.

The Society of Jesus, whose members are known as Jesuits, was founded by Ignatius of Loyola in the 16th century. From the inception of the order, Jesuit ministry has emphasized education and the founding of schools, as well as medical care. *See* Robert J. Araujo, *Legal Education and Jesuit Universities: Mission and Ministry of the Society of Jesus*, 37 Loy. L. Rev. 245, 245-46 (1991-1992); John W. O'Malley, *The First Jesuits* 171-72 (1993) (describing 16th century hospital service of Jesuits). By the early 17th century, the University of Pont-à-Mousson in France became the first Jesuit university to have established a medical school. *See* Jos V.M. Welie, *Ignatius of Loyola on Medical Education Or: Should Today's Jesuits Continue to Run Health Sciences Schools?*,

Early Science and Medicine, Vol. 8, No. 1 25-43, 35 (2003).

LUMC continues to educate residents according to the ideals of the Society of Jesus. It emphasizes five principles of Jesuit education: (1) a passion for quality, (2) a commitment to lifelong learning, (3) a focus on ethics and values, (4) a relationship between education and the religious experience, and (5) a person-centered approach. These principles embody "the heritage and mission of health care and medical education in the Jesuit tradition." *See* Loyola University Health System – Mission & Ministry, *available at* http://www.luhs.org/depts/ministry/education.htm (last visited August 12, 2010).

After 450 years, the Jesuit commitment is undiminished. *See* generally *Jesuit Health Sciences and the Promotion of Social Justice* (Jos V.M. Welie and J. Kissell, eds., 2005). Loyola and the other Jesuit teaching hospitals maintain residency programs, and fund the participation of residents in patient care, without regard to whether such education is profitable. They do so because their mission is to educate. Nor do they set an arbitrary number of hours per week for their educational mission or require their residents to work fewer hours than are necessary to learn how to be highly skilled doctors. Jesuit medical education seeks excellence, and the pursuit of excellence requires time and effort.

The IRS cannot interpret the term "student" in subsection 3121(b)(10) to mean a person whose educational relationship with the school or university

is predominant, and yet apply a categorical 40-hour workweek test to exclude those very students.

## CONCLUSION

For all the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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