American Bar Association
www.supremecourtpreview.org

No. 09-837

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

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

BRIEF OF THE UNIVERSITY OF TEXAS SYSTEM AS *AMICUS CURIAE* SUPPORTING PETITIONER

BARRY D. BURGDORF
Vice Chancellor and General Counsel
KYLE R. ZUMBERGE
Attorney
THE UNIVERSITY OF TEXAS SYSTEM
201 W. 7th Street, 6th Floor
Austin, TX 78701
(512) 499-4462

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
The Willard Office Building
1455 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20004
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

DONALD F. WOOD
J. GRAHAM KENNEY
DOUGLAS D. GEYSER
VINSON & ELKINS LLP
2801 Via Fortuna
Suite 100
Austin, TX 78746
(512) 542-8400

HARRY M. REASONER
VINSON & ELKINS LLP
First City Tower
1001 Fannin Street
Suite 2500
Houston, TX 77002
(713) 758-2222

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Regulations:

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 09-837

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNIVERSITY OF TEXAS SYSTEM AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE[1]

Amicus the University of Texas System (the "UT System") is a public higher education system comprising nine academic universities and six health in-

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

stitutions. The UT System health institutions (the "Medical Centers") operate medical schools as well as graduate medical education programs for medical school graduates to complete medical residencies and fellowships. UT System medical schools granted 819 medical degrees in 2009, representing over 70% of the physicians graduated from Texas's public medical schools that year. Approximately 3,455 medical residents were enrolled in the UT System in September 2009, representing almost 80% of physicians being educated at public health-related institutions in Texas.

Texas law requires the State's public universities to compensate their medical residents while they are "being educated, trained, developed, and prepared for a career in medicine." Tex. Educ. Code § 58.001(b). Those stipends would be subject to Federal Insurance Contribution Act ("FICA") tax unless they come within an applicable exemption under 26 U.S.C. § 3121(b). The exemption at issue in this case, 26 U.S.C. § 3121(b)(10) (the "Student Exemption"), provides one basis for exempting the wages of the UT Medical Centers' residents from FICA tax. As set forth below, their wages also are exempt on a second basis, because they are excluded from the group of state employees who are covered by an agreement to provide Social Security benefits entered into under 42 U.S.C. § 418 (a "Section 418 agreement"). See 26 U.S.C. § 3121(b)(7)(E), (F). The Internal Revenue Code ("I.R.C.") recognizes that Section 418 agreements control the collection of FICA tax with respect to such employees.

On behalf of five of its Medical Centers, the UT System is currently seeking a refund of over $10.2 million in FICA taxes that it paid and withheld from its medical residents in 2005. See *Univ. of Tex. Sys.* v. *United States*, No. 1:09-cv-665 (W.D. Tex. filed Sept. 9, 2009). The UT Medical Centers also have filed with the Internal Revenue Service ("IRS") requests for refunds of additional FICA taxes paid in later years. The UT System and its Medical Centers thus have a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

Residents in the UT Medical Centers' residency programs are "students" in every sense of the word. They are enrolled in an accredited course of study in graduate medical education, which has a formal academic curriculum and which requires reading assigned texts, attending lectures, and participating in teaching rounds, grand rounds, morbidity and mortality conferences, and journal clubs. Residents must perform adequately on rigorous, regular examinations to be promoted and to complete the program. Underscoring that they participate in the residency program to pursue a course of study rather than to earn a livelihood, residents' stipends represent a fraction of what physicians outside such programs earn. The Texas Legislature has formally concluded that residents in state programs are "undergoing education" to practice as physicians. Tex. Educ. Code § 58.0001(a).

The I.R.C. Student Exemption is only one possible FICA exception applicable to medical residents at

public universities. The wages of UT Medical Center residents also are exempt from FICA taxes under the I.R.C. exemption for state employees whom a State has not voluntarily included in the Social Security system under an agreement entered into under 42 U.S.C. § 418. Section 418 specifically provides that such agreements "shall, if the State requests it, exclude * * * service performed by a student." The implementing Social Security regulations are substantively identical to the pre-amendment Treasury regulations, which have uniformly been construed to make medical residents eligible for the Student Exemption. Even the IRS now acknowledges those regulations exempt medical residents from FICA taxation. Although the IRS disparages residencies as "on-the-job training," residencies are not designed to train the resident on the day-to-day duties of the current rotation, but to broadly educate the resident to prepare for autonomous, unsupervised practice. The Amended Regulation, which by its terms construes the I.R.C. rather than the Social Security Act, does not affect residents' eligibility for the Section 418 exemption. Courts have concluded that the States determine what groups are exempt under Section 418 agreements and agencies lack authority to affect their choices by regulation.

The Amended Regulation is an unreasonable interpretation of I.R.C. § 3121(b)(10). It abruptly departed from the consistent interpretation given to virtually identical language by both the IRS and the Social Security Administration for over a half-century, and ignores Congress's purposeful deletion of an income cap for the Student Exemption, con-

firming its application is not limited to minor, incidental services. Congress's decision to allow States to exclude students from their Section 418 agreements, which came in the wake of an influential decision holding that the Section 418 student exclusion applies to medical residents, *Minnesota* v. *Apfel*, 151 F.3d 742 (8th Cir. 1998), underscores Congress's agreement with that conclusion. Finally, Medicare reimbursement rules, which provide teaching institutions graduate medical education payments to offset the higher costs of providing care in connection with residency programs, recognize such programs principally serve an educational rather than patient-care function. The rules recognize supervising faculty as "teaching physician[s]," and with limited exceptions, do not permit reimbursement unless services were personally furnished by a physician who is not a resident, or the physician was physically present to supervise during the critical portion of the procedure.

ARGUMENT

The Federal Insurance Contributions Act, 26 U.S.C. § 3101 *et seq.*, requires employers and employees to pay taxes on "wages" from "employment" in order to fund the Social Security and Medicare programs. *Id.* §§ 3101, 3102, 3111. This case involves the proper interpretation of 26 U.S.C. § 3121(b)(10) and the validity of the 2004 amendment to the Treasury regulation interpreting that provision, see 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) (the "Amended Regulation"). The Student Exemption in the Internal Revenue Code excludes from FICA taxes "service performed in the employ of a

school, college, or university." I.R.C. § 3121(b)(10)(A). The Amended Regulation categorically excludes medical residents from eligibility for the Student Exemption by denying it to individuals who normally work 40 or more hours per week. *Amicus* the UT System broadly agrees with petitioners that medical residents in accredited residency programs qualify for the FICA Student Exemption and that the Amended Regulation categorically excluding them from eligibility is invalid.

The Student Exemption is, however, only one of two exemptions potentially applicable to medical residents in *public* university graduate medical education programs. When considering the (b)(10) exemption, it is useful to consider the context of a *separate* I.R.C. exemption applicable to medical residents in State-run programs. As discussed below, the wages of UT System medical residents are exempt from FICA taxes under the I.R.C. exemption for state employees who are not voluntarily included within the Social Security system under agreements entered into pursuant to 42 U.S.C. § 418. See I.R.C. § 3121(b)(7)(E), (F).

I. UT Medical Center Residents Are Students

A. Article VII of the Texas Constitution of 1876 provided that "[t]he Legislature shall, as soon as practicable, establish, organize, and provide for the maintenance, support, and direction of a university of the first class, to be * * * styled 'The University of Texas.'" Tex. Const., § 10, art. VII. In 1881, the Legislature established the University of Texas as "an institution of learning," to include a "medical de-

partment." At the time, the need for medical education in Texas was acute; 80% of doctors there had less than one year of formal medical education. The Medical Department opened in October 1891 with thirteen faculty members and twenty-three students. The University added a school of pharmacy in 1893 and assumed responsibility for the John Sealy Hospital Training School for Nurses in 1896. By the time Abraham Flexner published his seminal 1910 study of American medical education, he concluded that the University's medical school was the only one in Texas "fit to continue in the work of training physicians." Abraham Flexner, *Medical Education in the United States and Canada* 312 (1910) ("Flexner Report"), available at http://www.carnegiefoundation.org/sites/default/files/elibrary/Carnegie_Flexner_Report.pdf

Today, the UT System comprises six Medical Centers with 8,403 faculty teaching 15,715 students, including residents. Through more than a century of change, the education of physicians, nurses, and other health professionals has remained the central mission of the UT Medical Centers, which have been recognized for excellence in teaching and research.

B. One central aspect of the UT System's graduate medical education program is the education of medical residents. The Accreditation Council for Graduate Medical Education ("ACGME"), the accrediting body for all UT System residency programs (and most U.S. medical residencies), defines a "residency program" as "a structured educational activity comprising a series of learning experiences in [graduate medical education] designed to conform to

the program requirements of a particular specialty." ACGME, *Policies & Procedures* 96 (Feb. 10, 2010). The UT Medical Centers operate residency programs in a host of fields. While the precise requirements of residency programs vary somewhat based on specialty and school, residents in the UT System—like residents in accredited residency programs nationwide—are not simply "full-time employee[s] who learn[] by doing," as the government contends. Br. in Opp. 10. While residency programs necessarily involve a clinical education component that entails the treatment of patients, UT System residencies are rigorous academic courses of study and the residents who undertake them are "students" in every sense of the word. See, *e.g.*, *Webster's Third New International Dictionary* 2268 (1971) ("**1.** a person engaged in study: one devoted to learning; as **a:** one enrolled in a class or course in a school, college, or university: pupil").

1. ACGME establishes exacting common accreditation standards for all residency programs (supplemented by standards for particular specialties), which rest on the basic principle that "[d]idactic and clinical education *must have priority* in the allotment of the resident's time and energy" and "[t]he learning objectives of the [residency] program must not be compromised by excessive reliance on the residents to fulfill [non-physician] service obligations." ACGME, *Common Program Requirements* 11 (effective July 1, 2007) (emphasis added), available at http://www.acgme.org/acwebsite/dutyhours/dh_dutyhourscommonpr07012007.pdf. The standards require each program to set "[c]ompetency-based goals

and objectives" for each educational level, *id.* at 6, and the program must ensure that residents develop required competencies in "established and evolving biomedical, clinical, epidemiological and social behavioral sciences, as well as the application of this knowledge to patient care," *id.* at 7, that they develop a demonstrated "ability to investigate and evaluate their care of patients, to appraise and assimilate scientific evidence," *ibid.*, and learn to "communicate effectively with patients, families, and the public." *Id.* at 8.

In addition to clinical education, the standards require formal instruction through "[r]egularly scheduled didactic sessions." *Id.* at 6. To further the educational process, the "faculty must evaluate resident performance in a timely manner during each rotation or similar educational assignment" using objective assessments from multiple evaluators. *Id.* at 10. The ACGME standards are enforced through exacting accreditation requirements and periodic program reviews. Failure to fulfill these standards can result in loss of accreditation. Many residency programs have lost accreditation (or been granted only conditional accreditation) over the years.

In June of this year, ACGME released new proposed standards for comment that underscore residency programs' principal focus on education. See ACGME, *Draft Common Program Requirements* (June 23, 2010), available at http://acgme-2010standards.org/pdf/Proposed_Standards.pdf; see also Thomas J. Nasca et al., *The New Recommendation on Duty Hours from the ACGME Task Force*, 363 New Eng. J. of Med. e3(2), e3(6) (2010), available

at http://content.nejm.org/cgi/reprint/363/2/e3.pdf. Those revised standards, which are expected to go into effect in July 2011, also emphasize the "necessity of effective and well-tailored supervision" by faculty to oversee clinical education. Pauline W. Chen, M.D., *Someone to Watch Over Me*, N.Y. Times, June 24, 2010, available at http://www.nytimes.com/2010/06/24/health/24chen.html.

2. The UT Medical Centers' residency programs are rigorous courses of clinical and didactic education. They are accredited by ACGME and subject to thorough periodic reviews. Like other students, residents in the programs are enrolled as students at the UT Medical Centers and subject to a formal curriculum.[2] They read assigned texts,[3] receive regular didactic lessons, including teaching rounds,[4] attend

---

[2] See UT Health Science Ctr. at Houston Med. Sch., Dep't of Internal Med. Residency Program Curriculum, Rotation Educational Goals and Objectives ("UTHSC Houston Internal Medicine Residency Curriculum"), available at http://www.uth.tmc.edu/schools/med/imed/Assets/pdf/internal_medicine_curriculum_acgme.pdf.

[3] See, *e.g.*, UT Southwestern Med. Ctr., Ob/Gyn Residency – Educational Curriculum, available at http://www8.utsouthwestern.edu/utsw/cda/dept22001/files/46301.html; UTMB Dep't of Orthopaedic Surgery and Rehabilitation, Orthopaedic Residency Program, available at http://www.utmb.edu/ortho/residency/didactics.htm.

[4] See, *e.g.*, UT Health Science Ctr. at Tyler, Family Med. Residency Program Curriculum, available at http://www.uthct.edu/education/medicaled/gme/family/curriculum.asp; UT Health Science Ctr. San Antonio, Pediatrics Residency Program Overview, available at http://www.pediatrics.uthscsa.edu/residency/program.asp.

lectures, grand rounds,[5] and morbidity and mortality conferences,[6] and participate in journal clubs to learn about medical advances reported in current academic literature.[7] Some programs also involve residents in research.[8]

---

[5] See, *e.g.*, UT Health Science Ctr. San Antonio, Anesthesia Residency Didactic Program ("UTHSCSA Anesthesia Residency Didactic Program"), available at http://anesthesia.uthscsa.edu/Education/Residency/DidacticProgram.aspx; UT Med. Sch. at Houston, Dep't of Neurology Residency Training Program, available at http://neurology.uth.tmc.edu/residency/index.htm; UT Southwestern Med. Ctr., Neurology Residency Didactic Curriculum, available at http://www.utsouthwestern.edu/utsw/cda/dept21330/files/304694.html ("The Neurology residency didactic curriculum consists of 20 courses (4 weeks each). Each course consists of 10 to 12 lectures."); UT Southwestern Med. Ctr., Dep't of Neurology: Grand Rounds Schedule, available at http://www.utsouthwestern.edu/utsw/cda/dept14802/files/97263.html.

[6] See, *e.g.*, UT Southwestern Med. Ctr., Neurological Surgery Residency Program, available at http://www4.utsouthwestern.edu/swneurosurg/body_residency_program.html; UTMB Obstetrics and Gynecology Resident Handbook 112 (2009-2010), available at http://www.utmb.edu/obgyn/residency/ObGynHandbook2009_2010.pdf.

[7] See, *e.g.*, UT Med. Sch. at Houston, Emergency Med. Residency Program Didactic Curriculum, available at http://www.uth.tmc.edu/uth_orgs/emer_med/residency/didactic-curriculum.html; UT Southwestern Med. Ctr., Physical Med. & Rehabilitation Residency Program Overview, available at http://www.utsouthwestern.edu/utsw/home/resfellow/pmr/index.html.

[8] See, *e.g.*, UT Southwestern Med. Ctr., Pathology Residency Program: Goals and Objectives by Level of Training, available at http://www.utsouthwestern.edu/utsw/cda/dept25107/files/400858.html; UT M.D. Anderson Cancer Ctr., Radiation Oncology Residency Program, available at http://www.mdanderson.org/education-and-research/education-

Grand rounds and teaching rounds are particularly valuable tools of graduate medical education. Grand rounds are a type of intensive classroom education, a regularly scheduled

> interactive presentation or series of educational seminars that focus on clinical cases, recent biomedical or behavioral research results, or a review of scientific research methods and findings in a specific field, with supporting basic and clinical science information, that are conducted * * * to evaluate outcomes of patient treatment decisions, * * * discuss clinical decision making, and * * * impart updates in diagnosis, treatment, therapy, and research.

5 C.F.R. § 5501.109(b)(6) (2010). The case-study format is effective "because doctors remember facts and principles that are linked to patients, especially their own patients, more easily than facts disconnected from their own experience." Arthur S. Elstein, *Teaching Medicine: Process, Habits, and Actions*, 342 New Eng. J. Med. 1058, 1059 (2000) (book review). Grand rounds are therefore a more effective teaching method than topical lectures disconnected from actual cases.

Teaching rounds provide a similarly intensive educational experience in the clinical context. During teaching rounds, the resident (in the company of other residents and often medical students) presents

---

and-training/schools-and-programs/medical-education/graduate-medical-education/residency-and-fellowship-programs/radiation-oncology-radiation-oncology-residency-program.html.

individual cases to the attending faculty member, including information about the patients' history, physical examination, clinical data, and pathophysiology. The attending physician then leads the resident through a differential diagnosis and discusses an appropriate management plan for the patient. Teaching in this context has several distinct advantages. First,

> [t]he presence of the patient strengthens the learning possibilities. As opposed to listening to a presentation or reading off a blackboard, learners have the opportunity to use nearly all of their senses * * * to learn more about the patient and [his] problems. The sterile facts and descriptions from a sterile presentation come alive and are tangible. These characteristics alone can help the learner remember the clinical situation. * * * These experiences create hooks upon which a great deal of clinical learning can be hung for long-term storage and ready recall.

Mountain Area Health Education Center, *Teaching at the Bedside* (2001), available at www.mahec.net/celt/acroread/Teaching-Bedside.pdf; accord Cindy Lai, "Teaching as a Team," in *Hospital Medicine: Just the Facts* 622 (Sylvia C. McKean et al. eds., 2008). In addition, the resident is able to learn interview and physical examination techniques from the faculty member. Second, faculty typically employ the Socratic method to develop the resident's reasoning ability, "not telling them the answers[,] but asking questions that cause them to think about the causes of disease manifestations, and seriously fostering the development of their clinical skills,"

Elstein, *supra*, at 1059, and also allowing faculty to assess the resident's knowledge. Teaching rounds are "perhaps the most important teaching activity" in a teaching hospital because they "challenge trainees to translate their medical knowledge into the care of the patient in a humane manner." J.W. Hurst, *Thoughts About Teaching Ward Rounds on a Medical Service,* Resident & Staff Physician (Dec. 2007), available at http://www.hcplive.com/general/publications/Resident-and-Staff/2005/2005-03/2005-03_03.

Under the direction of experienced attending physician faculty members, medical residents interact with that physician's patient to provide a didactic experience the faculty member uses to educate the resident about particular conditions and general principles of treatment. Patient interaction is undertaken to educate the resident sufficiently to enable him or her to operate independently as an unsupervised physician once the residency is finished. Underscoring the educational value of patient treatment, the attending physician frequently teaches the residents alongside medical school students.

Residents are regularly subject to rigorous examination to test their knowledge—in morbidity and mortality conferences,[9] during rounds,[10] through

---

[9] See, *e.g.*, UT Southwestern Med. Ctr., Neurological Surgery Residency Program, *supra* note 6; UTHSCSA Anesthesia Residency Didactic Program, *supra* note 5.

[10] See, *e.g.*, UTHSC Houston Internal Med. Residency Curriculum, *supra* note 2, at 8, 11, 14, 15.

mock oral examinations,[11] and through formal examinations.[12] Promotion to the residency's next level is "based on achievement of the program-specific competence and performance parameters," including "specific cognitive, clinical, and technical skills." Department of Anesthesiology, Univ. of Texas Health Science Center San Antonio, "Policy on Promotion." Residents who do not achieve the required academic standards will be required to undergo additional education to obtain full credit towards completion of the residency program. *Id.* Residents who persistently fail to satisfy the required standards may be asked to leave the program.

Texas has recognized that graduate medical education is essential for a practicing physician; Texas law requires physicians to have at least one year of graduate medical education to be eligible for full licensure, which is a prerequisite to practicing medicine in the State. See 22 Tex. Admin. Code § 163.2(a)(5).[13] When the Texas Legislature enacted legislation in 1981 requiring its public universities to

---

[11] See, *e.g.*, UTHSCSA Anesthesia Residency Didactic Program, *supra* note 5; UT Health Science Ctr. San Antonio, General Surgery Residency Program, available at http://www.surgery.uthscsa.edu/education/residencies/generalsurgery/index.asp.

[12] See, *e.g.*, UT Southwestern Med. Ctr., PM&R Resident Didactics, Research, and Evaluations, available at http://www.utsouthwestern.edu/utsw/cda/dept126096/files/126156.html; UTMB Obstetrics and Gynecology Resident Handbook, *supra* note 6, at 115.

[13] In addition, to sit for exams to attain board certification, a physician must have completed an accredited residency program in the relevant field.

pay medical residents stipends, it recognized that residents were "undergoing education, training, development, and preparation" to work as physicians. Tex. Educ. Code § 58.001(a), (b). As the legislative history of that law reflects, "[t]he medical schools and teaching hospitals are the training ground for doctors who serve 254 Texas counties." House Study Group, Bill Analysis, H.67, Reg. Sess. at 2. (Tex. 1981), available at http://www.lrl.state.tx.us/scanned/hroBillAnalyses/67-0/SB89.pdf.

II. The Section 418 Regime Permits States To Exclude Residents At State Institutions From FICA Taxes

The Student Exemption created by I.R.C. § 3121(b)(10) is only *one* basis for exempting the wages of medical residents in State-operated programs from FICA taxes. When considering the (b)(10) exemption, it is useful to consider the context of a *separate* I.R.C. exemption applicable to medical residents in State-run programs, and under which UT System medical residents are exempt from FICA taxation: the exemption for "service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby." I.R.C. § 3121(b)(7). Wages from such service are exempt unless they are made subject to taxation as "service included under an agreement entered into pursuant to section 218 of the Social Security Act [42 U.S.C. § 418]." *Id.* § 3121(b)(7)(E).

A. Section 418 Authorizes States' Voluntary Participation In Social Security

When originally enacted, "'[t]he Social Security Act of 1935 excluded from coverage all employment for States and localities,'" principally because "Congress faced questions as to whether it could compel the States and their political subdivisions to include their employees in the [Social Security] System." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 44 & n.4 (1986) (quoting Staff of Subcomm. on Soc. Sec. of H. Comm. on Ways and Means, *Termination of Soc. Sec. Coverage for Emps. of State & Local Gov'ts & Nonprofit Grps.*, 97th Cong., 2d Sess., at 20 (Comm. Print 1982)). Thus, the Social Security Act—mirroring the language of I.R.C. § 3121(a)(7)—generally exempts from the definition of "employment," for purposes of federal old-age, survivors, and disability insurance benefits, "[s]ervice performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby." 42 U.S.C. § 410(a)(7).

In 1950, responding to States that wished to obtain Social Security coverage for their employees, Congress enacted 42 U.S.C. § 418. *Bowen*, 477 U.S. at 44-45; Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 106, 64 Stat. 477, 514-17. That provision "authorizes voluntary participation by States in the Social Security System." *Bowen*, 477 U.S. at 45. "[A]t the request of any State," the Commissioner of Social Security "shall" execute an agreement providing for Social Security coverage,

whose provisions shall be "not inconsistent with the provisions of" Section 418. 42 U.S.C. § 418(a)(1). Section 418 essentially creates an "opt-in" system under which employees covered by a Section 418 agreement are furnished Social Security and Medicare benefits and pay corresponding FICA taxes. Though I.R.C. § 3121(b)(7) and 42 U.S.C. § 410(a)(7) generally exclude from FICA taxation and Social Security benefits "service performed in the employ of a State," those provisions do not apply to "service included under an agreement entered into pursuant to" Section 418. I.R.C. § 3121(b)(7)(E); 42 U.S.C. § 410(a)(7)(A).

Section 418 permits States generally to identify which groups of employees they wish to cover under the agreement. 42 U.S.C. § 418(c)(1); *Bowen*, 477 U.S. at 45. All States, Puerto Rico, the Virgin Islands, and approximately 60 interstate instrumentalities have entered Section 418 agreements with the Social Security Administration ("SSA"). See SSA, *Section 218 Agreements*, available at https://www.ssa.gov/slge/sect_218_agree.htm (last visited July 21, 2010). During the late 1970s, when Congress became concerned that States were terminating coverage for employees at rates that caused concern about the "integrity of the System," *Bowen*, 477 U.S. at 46-47, it amended the Social Security Act to provide that no Section 418 agreement "may be terminated, either in its entirety or with respect to any coverage group, on or after [April 20, 1983]." Social Security Amendments of 1983, Pub. L. 98-21, § 103, 97 Stat. 71-72.

B. Section 418 Allows States To Exclude Student Employees From FICA

The Social Security Act specifically provides that a Section 418 agreement "shall, if the State requests it, exclude * * * service performed by a student." 42 U.S.C. § 418(c)(5). Most States have excluded student services under their Section 418 agreements. See U.S. Gov't Accounting Office, B-284947, *Social Security: Coverage for Medical Residents* 12 (2000). However, that provision is applicable only if that student service is excluded from the definition of "employment" by "any provision of [42 U.S.C.] section 410(a) other than [§ 410(a)](7)," the general exclusion for "[s]ervice performed in the employ of a State." See 42 U.S.C. § 418(c)(5). An obvious basis is the Social Security Act's own student exemption, 42 U.S.C. § 410(a)(10)(A), which exempts from the definition of "employment" "[s]ervice performed in the employ of a school, college, or university."

The SSA's regulations implementing § 410(a)(10)(A)—like both the old and new regulations implementing I.R.C. § 3121(b)(10)—exempt from the definition of "employment" "any work you do as an employee of a school, college, or university * * * , if you are enrolled in and regularly attending classes [there]." 20 C.F.R. § 404.1028(b) (2009). The regulations explain 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." *Id.* § 404.1028(c). That language is substantively iden-

tical to that contained in the corresponding Treasury regulations before the 2004 amendment. See 26 C.F.R. § 31.3121(b)(10)-2(c) (2004).

Federal courts of appeals uniformly have interpreted the SSA and pre-amendment Treasury regulations to make medical residents eligible for "student" exemptions. See, *e.g.*, *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, 414 (6th Cir. 2009); *Univ. of Chi. Hosps.* v. *United States*, 545 F.3d 564, 568-69 (7th Cir. 2008); *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 (11th Cir. 2007); *Minnesota* v. *Apfel*, 151 F.3d 742, 747-48 (8th Cir. 1998). Indeed, the seminal case of *Minnesota* v. *Apfel* concerned the eligibility of medical residents for exemption under Minnesota's Section 418 agreement.

By 2000, the IRS took the position that a resident could qualify as "a student depend[ing] upon examination of all the facts and circumstances," and that the student FICA exemption was available "with respect to students who are enrolled and regularly attending classes," Memorandum from Mary Oppenheimer, Assistant Chief Counsel, for Steven T. Miller, Director, Exempt Organizations, IRS, at 30 (Apr. 19, 2000) ("Oppenheimer Memo"), available at http://www.irs.gov/pub/irs-wd/0029030.pdf, defined broadly to include "demonstrations, tutorials, and teaching rounds at which a faculty member plays a leadership role." *Id.* at 27. Earlier this year, the IRS announced that it would "accept the position that medical residents are excepted from FICA taxes based on the student exception for tax periods end-

ing before" the effective date of the Amended Regulation. See Press Release, Internal Revenue Service, *IRS to Honor Medical Resident FICA Refund Claims* (Mar. 2, 2010), available at http://www.irs.gov/pub/irs-tege/nr-2010_ 25.pdf.

C. Texas's Section 418 Agreement Excludes The UT Medical Centers' Residents From FICA Taxation

When originally signed in 1951, Texas's Section 418 agreement (the "Agreement") did not provide any State employees Social Security coverage. See Texas Section 418 Agreement (1951). In 1955, the State modified the Agreement generally to cover State employees, including employees of Texas's public colleges and universities. See *id.*, Modification No. 130 (1955). In late 1998, Congress temporarily authorized the States to modify their Section 418 agreements, notwithstanding the prohibition on terminating "any coverage group," 42 U.S.C. § 418(f), so any States that had not already done so could "exclude service performed in the employ of a school, college, or university" by an enrolled student who is attending classes. Pub. L. No. 105-277, § 2023(a), 112 Stat. 2681, 2681-904 (1998). Texas modified its Agreement to "exclude from coverage service performed after June 30, 2000, in the employ of a school, college or university if such service is performed by a student who is enrolled and regularly attending classes at said school, college or university." See Texas Section 418 Agreement, Modification No. 1496 (1999). That modification specifically excludes from Social Security coverage "student em-

ployees of * * * [t]he University of Texas System" and its Medical Centers. *Ibid.*

Medical residents at UT Medical Centers are "students" within the meaning of the Agreement, Section 418, and its implementing regulations. Under those regulations, the touchstone of the inquiry is the medical resident's relationship with the employer. It is clear that a resident's "main purpose" for participating in the UT Medical Centers' residency program "is pursuing a course of study rather than earning a livelihood." 20 C.F.R. § 404.1028(c). To begin with, residents' stipends—which average $50,000 per year or less—are well below the market rate physicians of the same medical school class could command practicing outside residency programs.[14] See generally U.S. Gov't Accountability Office, *supra* note 14, at 33 (noting that median income for primary care physicians is $182,322, and $332,450 for procedural and surgical specialties). The students are drawn to residencies not for their relatively modest stipends, but for the educational experience they offer. The stipends simply provide "a minimum standard of living during the period of time that [they] are engaged in their education."

---

[14] See, *e.g.*, Southwestern Med. Ctr., Otolaryngology Resident Benefits & Compensation, available at http://www8.utsouthwestern.edu/utsw/cda/dept28151/files/118190.html; UTMB, Graduate Med. Educ., Resident Salary, available at http://www.utmb.edu/gme/salary/default.htm; U.S. Gov't Accountability Office, GAO-09-438R, *Graduate Medical Education: Trends in Training & Student Debt* 4, 32 (May 4, 2009) (nationally, average first-year resident stipend is $44,748 annually), available at http://www.gao.gov/new.items/d09438r.pdf.

United States v. *Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669, at *6 (S.D. Fla. July 28, 2008) (internal quotation marks omitted). The Medical Centers' residents also are enrolled as students. They participate in substantial and rigorous academic coursework, reading assigned texts, participating in journal clubs to learn of recent developments in medicine, participating in teaching rounds, grand rounds, and morbidity and mortality conferences, and attending lectures. The curriculum for one typical UT residency, for example, runs nearly *150 pages*. UTHSC Houston Internal Medicine Residency Curriculum, *supra* note 2. Like students in other programs, residents are regularly examined to test their mastery of the subject, and are subject to removal from the program if they fail to achieve academic goals. See *supra*, at 10-15. Their entire course of study, including specifically their interaction with patients, is supervised by the UT Medical Centers' faculty.

In arguing that residents are simply "full-time employees," the government emphasizes their role in providing patient care. But as explained above, the attending physician is responsible for patient care, and the residents' interaction with patients is in the context of a didactic exercise. "[T]he principal classroom for residents must be the clinical setting because patient care in a medical specialty is what residents are receiving training for." *United States* v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1015 (D. Minn. 2003). The education of physicians necessarily involves interaction with patients to develop the skills, knowledge, and habits

needed to engage in the unsupervised practice of medicine outside the residency program. Residents are "still in school" and need "3 to 6 years of training * * * to attain the skills to function alone." Hurst, *supra*. As Abraham Flexner wrote a century ago, in his influential study of medical education:

> The student no longer merely watches, listens, memorizes; he *does*. His own activities in the laboratory and in the clinic are the *main factors* in his instruction and discipline. An education in medicine nowadays involves both learning and learning how; the student cannot effectively know, unless he knows how.

Flexner Report 53 (second emphasis added). Those words are just as true in 2010, as the ACGME's Draft Common Program Requirements confirm: "The specialty education of physicians to practice independently is experiential, and necessarily occurs within the context of the health care delivery system." *Draft Common Program Requirements, supra,* at 1; see also Oppenheimer Memo at 27 (stating "teaching rounds" "may be considered classes" for Student Exemption).

Although the government has at times disparaged residency as mere "on-the-job training," see Br. in Opp. 5, that characterization is baseless. "[O]n-the-job training" is designed narrowly to prepare permanent employees to perform their present and immediate future duties. The residency curriculum is not narrowly focused to train the resident in the day-to-day duties of the resident's current rotation, but is broadly designed to educate him or her on the

entire field of study to prepare for autonomous, unsupervised practice. Employers hope to retain employees so they can recoup the expense of "on-the-job training"; the whole point of a residency is to prepare residents to leave the program and begin practicing independently. Only a small fraction of the doctors educated in a residency program are retained as faculty in that program or as staff physicians at the hospital where they did their residency. By design, the vast majority of the education imparted by a residency's faculty will not be "captured" by the program itself.

The Fifth Circuit has held in another context that "[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) (holding that dismissal from residency program is an academic rather than employment dismissal for due process purposes); accord *Fenje* v. *Feld*, 398 F.3d 620, 624-27 (7th Cir. 2005); *Ezekwo* v. *N.Y. City Health & Hosps. Corp.*, 940 F.2d 775, 783-85 (2d Cir. 1991). The Texas legislature similarly has concluded that, during their residency, medical residents are "being educated * * * for a career in medicine." Tex. Educ. Code § 58.001(b). Medical Residents are "students" in every relevant sense.

Moreover, Congress's legislative action suggests its intent to include residents within the scope of the Social Security Act's student exemption. In *Apfel*, the Eighth Circuit held that the University of Minnesota's medical residents were "students" under the

SSA regulations and the State's Section 418 agreement and thus were not subject to FICA taxes because "the primary purpose for the residents' participation in the program is to pursue a course of study rather than to earn a livelihood." 151 F.3d at 748. Several months after the decision in that influential case, Congress enacted legislation permitting States to amend their Section 418 agreements to exclude "service performed [by a student] in the employ of a school, college, or university." See § 2023(a), 112 Stat. at 2681-904. That amendment was roughly contemporaneous with IRS action recognizing the eligibility of residents for the Social Security Act's FICA exemption. See Oppenheimer Memo, *supra*. This enactment thus suggests that Congress ratified the understanding of the student exemption reflected in *Apfel* and the then-existing Treasury and SSA regulations. See*, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006).

D. The Amended Regulation Does Not Affect Texas's Decision To Exclude Medical Residents From Its Section 418 Agreement

The Amended Regulation does not affect whether medical residents are covered by Texas's Section 418 Agreement, because the regulation is not used in applying the relevant I.R.C. exemption. The I.R.C. exemption for Section 418 agreements does not turn on the I.R.C.'s meaning of "student," which is the subject of the Amended Regulation. Rather, the exemption requires only that the "service [be] performed in the employ of a State, or any political subdivision thereof," and the service is not made subject to FICA

tax "under an agreement entered into pursuant to section [4]18." I.R.C. § 3121(b)(7)(E). Neither the I.R.C. nor the Treasury regulations bears on either of those issues, which are instead addressed by the Social Security Act, the SSA regulations, and Texas's Section 418 Agreement.

Indeed, the Amended Regulation, by its own terms, does not purport to interpret the Social Security Act or to affect the meaning of Section 418 agreements. The Federal Register notice for the final rule explicitly states that it amends the Treasury regulations interpreting the I.R.C. See 69 Fed. Reg. 76,404, 76,404 (Dec. 21, 2004). Nowhere in the Amended Regulation or the Federal Register notice accompanying it is there an indication—implicit or otherwise—that the Secretary of the Treasury intended to interpret the Social Security Act or affect Section 418 agreements.

Moreover, even if the IRS or the SSA *wished* to amend their regulations to affect the scope of student exemptions under States' Section 418 agreements, they lack authority to do so. As this Court recognized in *Bowen*, Congress initially excluded state employees from the Social Security system because of questions regarding its constitutional authority to expand the Social Security system over unwilling States. Though those questions have largely been resolved, the Social Security Act and I.R.C. continue to reflect Congress's sensitivity to state sovereignty. Thus, so long as certain requirements are satisfied, the I.R.C. and the Social Security Act conspicuously honor States' choices about

which coverage groups to include and exclude from Section 418 agreements.

As this Court has recognized, Section 418 "authorizes *voluntary* participation by States in the Social Security System." *Bowen*, 477 U.S. at 45 (emphasis added). The Social Security Act makes clear that, while a State may no longer *withdraw* groups from Social Security coverage, each State alone had authority to determine the scope of public employees' coverage in the first instance. The Social Security Act provides that if a State asks to enter a section 418 agreement, "[t]he Commissioner of Social Security *shall* * * * enter into [such] an agreement." So long as the State's proposal satisfies the minimal requirement of not being "inconsistent with the provisions of this section," "[e]ach such agreement *shall* contain such provisions * * * *as the State may request*." 42 U.S.C. § 418(a)(1) (emphasis added). And, of course, it provides that "[s]uch agreement *shall*, *if the State requests it*, exclude * * * any agricultural labor, or service performed by a student, designated by the State." *Id.* § 418(c)(5). As the IRS has acknowledged, Section 418 "gives each state the right to decide which coverage groups to include in its" Section 418 agreement. Oppenheimer Memo at 17.

Once a State has entered into (or validly modified) a Section 418 agreement, the State's choices about which coverage groups are to be included and excluded are set, and neither the SSA nor the IRS has the authority to alter the coverage group. To begin with, the statute explicitly indicates that a Section 418 agreement will reflect the choices of the State so long as they are not "inconsistent with the

provisions of this section." 42 U.S.C. § 418(a)(1) (emphasis added). Thus, the State's coverage decisions are to be honored unless inconsistent with the Social Security Act *itself*.

As this Court has observed, "Congress expressly reserved to itself '[t]he right to alter[or] amend * * * any provision of' the [Social Security] Act." *Bowen*, 477 U.S. at 44 (quoting 42 U.S.C. § 1304). It is telling that the Social Security Act contains no corresponding provision authorizing any federal agency to make changes by regulation. Cf. *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2288 (2010); *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."). Thus, as the Eighth Circuit concluded in *Apfel*, "the meaning of section 418 agreements cannot be altered through ruling by the * * * [SSA]." 151 F.3d at 747 (internal quotation marks omitted). Rather, "[t]he power to alter the terms of section 418 agreements lies exclusively with Congress."[15] *Ibid.*

---

[15] Indeed, it is telling that, nearly six years after the Department of the Treasury issued the Amended Regulation, SSA has not made corresponding changes to its own regulations. Its failure to do so, despite the IRS's recognition of the importance of interpreting the Social Security Act and FICA tax provisions consistently, see *Student FICA Exception*, 69 Fed. Reg. 8604, 8605 (Feb. 24, 2004), suggests SSA understands it lacks authority to do so. Cf. *Meaning of "Temporary" Work under 8 U.S.C. § 1101(a)(15)(H)(ii)(B)*, 32 Op. O.L.C. 1, 5 n.4 (2008), available at http://www.justice.gov/olc/2008/dhs-temp-worker.pdf (noting Department of Labor and Department of Homeland Security amending related regulations simultaneously to conform to one another).

Construing the Social Security Act (or the I.R.C.) to permit administrative action to alter a State's choice of coverage groups would conflict with the congressional deference afforded a State's coverage decisions.

III. The Amended Regulation Is An Unreasonable Interpretation Of I.R.C. § 3121(b)(10)

The Amended Regulation departs from over a half-century of consistent interpretation of the Student Exemption that was, before 2005, applied to *both* the I.R.C. and the Social Security Act, and which the courts have consistently held reflects the "unambiguous" meaning of the statutory language. See *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27. The IRS's abrupt departure from that reading is not a reasonable interpretation of the statute. See generally *United States* v. *Correll*, 389 U.S. 299, 305-06 (1967).

When Congress initially excluded students from FICA taxation in 1939, it included two separate exemptions. The original exemption for student employment at a school, college, or university capped the amount an individual could earn while qualifying for the exemption: "Service performed in any calendar quarter in the employ of a school, college, or university * * * [if] the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition)." Social Security Act Amendments of 1939, Pub. L. No. 76-379, ch. 666, § 201, 53 Stat. 1360, 1375 (Social Security Act); *id.* § 606, 53 Stat. at 1385 (I.R.C.). The other, involving tax-exempt organizations, had no cap: "Service performed in any calen-

dar quarter in the employ of any organization [is] exempt from income tax * * * [if] such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university * * * ." § 201, 53 Stat. at 1374; § 606, 53 Stat. at 1384-85. In setting forth the test for eligibility, the initial regulations referenced "the amount of remuneration * * * in the calendar quarter," consistent with the statutory requirement, but the focus of the regulation was "the character of the organization in whose employ the services are performed * * * and the status of the employee as a student enrolled and regularly attending classes at the school." 20 C.F.R. § 403.821 (1940). The regulation emphasized that "the type of services performed by the employee * * * [is] immaterial." *Ibid.*; accord 26 C.F.R. § 403.221(b) (1944).

When Congress amended the I.R.C. and Social Security Act in 1950, it eliminated the income cap for the student exemption, leaving a single exemption for "[s]ervice performed in the employ of a school, college, or university if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university." Social Security Act Amendments of 1950, *supra*, § 104(a), 64 Stat. at 497 (Social Security Act); *id.* § 204(a), 64 Stat. at 531 (I.R.C.). The regulations were amended to conform to the new legislation. The regulations provided:

> For purposes of this section, the type of services performed by the employee, the place where the services are performed, and *the amount of remuneration* for services performed by the em-

> ployee are immaterial; the statutory tests are the character of the organization in the employ of which the services are performed, and the status of the employee as a student enrolled and regularly attending classes * * *.
>
> 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.

26 C.F.R. § 31.3306(c)(10)(E)-1(b), (c) (1956) (emphasis added; substructure omitted); accord 20 C.F.R. § 404.1019(b), (c) (1951). The Treasury Regulations remained substantially unchanged until promulgation of the Amended Regulation. See 26 C.F.R. § 31.3121(b)(10)-2(b), (c) (2004). Nearly 60 years later, the Social Security regulations remain substantially identical to those promulgated immediately after enactment of the statutory language. See 20 C.F.R. § 404.1028.

The Amended Regulation's categorical disqualification of student employees who work full time is fundamentally inconsistent with Congress's unambiguous intent. There is a natural and obvious link between remuneration and hours worked. That Congress saw fit to eliminate *any* income cap demonstrates that Congress rejected the idea that the

Student Exemption was to be applicable only to a student's minor, incidental services.[16] See *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) ("when Congress deletes limiting language, 'it may be presumed that the limitation was not intended'" (quoting *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983)). If Congress had wanted to tie the Student Exemption to income or hours, the earlier versions of the exemption show that Congress knew how to do so.[17] Con-

---

[16] There are isolated statements in the legislative history of the 1950 amendments suggesting that certain members of Congress intended that only service "performed for nominal amounts" would come within the exception. See Pet. App. 14a. But as this Court explained last Term, the legislature's purpose and the "manner in which the law 'could have been written,' has no bearing; what matters is the law the Legislature *did* enact." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) (citation omitted). And what Congress enacted in 1950 was a law that deleted the limit on remuneration. See generally *Univ. of Chi. Hosps.* v. *United States*, No. 05-C-5120, 2006 WL 2631974, at *3 (N.D. Ill. Sept. 8, 2006) (rejecting reliance on statements in 1950 legislative history), aff'd, 545 F.3d 564 (7th Cir. 2008).

[17] See, *e.g.*, *Hardt* v. *Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010) ("Because Congress failed to include in [29 U.S.C.] § 1132(g)(1) an express 'prevailing party' limit on the availability of attorney's fees [as it did in § 1132(g)(2)], the Court of Appeals' decision adding that term of art to a fee-shifting statute from which it is conspicuously absent more closely resembles 'invent[ing] a statute rather than interpret[ing] one.'" (alteration in original) (quoting *Pasquantino* v. *United States*, 544 U.S. 349, 359 (2005))); *Whitfield* v. *United States*, 543 U.S. 209, 216-17 (2005) ("Where Congress has chosen *not* to [include certain language], we will not override that choice based on vague and ambiguous signals from legislative history.") (citation omitted).

gress's meaning was quite apparent to both agencies implementing the legislative change; they stated that "the amount of remuneration" was "*immaterial,*" emphasized that the *only* relevant factors were "the character of the organization" as a school, college, or university and "the status of the employee as a student," and explained the exemption was available to any student who worked "as an incident to and for the purpose of pursuing a course of study." 20 C.F.R. § 404.1019(b), (c) (1951); 26 C.F.R. § 31.3306(c)(10)(E)-1(b), (c) (1956). Cf. *Nat'l Muffler Dealers Ass'n, Inc.* v. *United States*, 440 U.S. 472, 477 (1979) ("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."); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515 (1994) ("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").

Neither Congress nor the agencies disturbed these regulations for a half-century, despite numerous amendments to I.R.C. § 3121(b) and the Social Security Act. And not once has Congress made a change that suggests any doubt about the validity of those longstanding administrative interpretations. Cf. *Cottage Savings Ass'n* v. *Comm'r*, 499 U.S. 554, 561 (1991) ("Treasury regulations * * * long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and

have the effect of law.") (quoting *Correll*, 389 U.S. at 305-06).

Indeed, if anything, Congress has taken affirmative steps showing its approval of the Social Security regulations' definition of student—and in particular, their application to medical residents. As noted above, only months after the Eight Circuit held in *Apfel* that the University of Minnesota's medical residents were "students" under the SSA regulations and the State's Section 418 agreement, Congress enacted legislation permitting States to amend their Section 418 agreements to exclude "service performed in the employ of a school, college, or university if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university." See § 2023(a), 112 Stat. at 2681-904. This enactment suggests that Congress agreed with the understanding of the student exemption reflected in both *Apfel* and the SSA regulations. See, *e.g.*, *Dabit*, 547 U.S. at 85-86.

IV. Medicare Reimbursement Programs Reflect Congress's Acknowledgement that Residents Are Students

Other areas of law confirm that medical residents are principally engaging in educational activities and thus properly classified as students. For example, "Medicare, the federal health care program for elderly and certain disabled people, subsidizes training for medical school graduates [i.e., residents] in hospitals and other teaching institutions by helping to support the increased costs associated with post-graduate medical training." U.S. Gov't Accountabil-

ity Office, *supra* note 14, at 1. "Training resident physicians involves significant costs beyond those customarily associated with patent care," because, in addition to the fact that "the involvement of trainees in care reduces the overall efficiency of hospital operations," residency programs "must pay for faculty, faculty offices, classroom space, comprehensive medical libraries, and advanced, highly sophisticated technological equipment to support their residency programs." Am. Hosp. Ass'n, *Teaching Hospitals: Their Impact on Patients and the Future Health Care Workforce* 3 (Sept. 2009), available at www.aha.org/aha/trendwatch/2009/twsept2009teaching.pdf.

To help offset those costs, "[t]he federal government invests significantly in medical education" by making graduate medical education payments "to help ensure that the anticipated supply of new physicians meets the nation's health care needs." U.S. Gov't Accountability Office, *supra* note 14, at 1. These payments include direct and indirect Medicare graduate medical education ("GME") payments. "Direct payments are provided to teaching institutions for costs directly related to medical training, such as teachers' salaries and administrative costs." *Id.* at 1 n.1; accord Texas Higher Educ. Coordinating Bd., *Funding Graduate Medical Education in Texas* 1 (Aug. 23, 2004), available at http://www.thecb.state.tx.us/reports/pdf/0778.pdf. Indirect payments are provided in recognition of the increased costs because of "'the additional tests and procedures ordered by residents as well as the extra demands placed on other staff as they participate in the edu-

cational process.'" *St. Mary's Hosp.* v. *Leavitt*, 416 F.3d 906, 909 (8th Cir. 2005) (quoting H.R. Rep. No. 98-25, at 140 (1983), reprinted in 1983 U.S.C.C.A.N. 219, 359).

The fact that the Medicare system makes "graduate medical education" payments confirms Congress's judgment that residency programs perform a necessary *educational* function and are designed to produce an adequate supply of doctors, and do not simply represent on-the-job training for staff physicians. That conclusion is underscored by the rules governing Medicare reimbursements, which clearly indicate that supervising faculty are present in an *educational* capacity, repeatedly referring to them as "teaching physician[s]," "teaching surgeon[s]," and "teaching anesthesiologist[s]." Centers for Medicare & Medicaid Servs., Dep't of Health & Human Servs., No. 100-04, *Medicare Claims Processing Manual*, ch. 12 (Mar. 12, 2010), available at http://www.cms.gov/manuals/downloads/clm104c12.pdf. Those rules make clear that residents are not primarily present as caregivers in their own right, but because they are students being educated. The rules state that, with very limited exceptions, see *id.* § 100.1.1.C, Medicare reimbursement is *only* permissible when care is "[p]ersonally furnished by a physician who is not a resident," or "[f]urnished by a resident where a teaching physician was physically present during the critical or key portions of the service," *id.* § 100.1, even for "[m]inor [p]rocedures." *Id.* § 100.1.2.A.3. The teaching physician's involvement must be carefully documented. *Id.* § 100.1.1. The structure of the payments makes clear they are tailored to offset the

costs of educating residents, rather than for residents' provision of patient-care services. The existence of these funding mechanisms is further evidence that residency programs are principally designed to educate physicians, and the residents involved are properly regarded as students.[18]

[18] One IRS memorandum asserts in passing that the Medicare GME reimbursement program supports taxation of residents' salaries because "implicit in Medicare's reimbursement of GME costs is Congress' belief that GME enhances the quality of patient care in a teaching hospital." See Memorandum from Mary Oppenheimer, Assistant Chief Counsel, to Steven T. Miller, Director, Exempt Organizations, IRS 9 (Aug. 23, 2001), available at http://www.ama-assn.org/ama/upload/mm/16/irsficamemo.pdf. It concludes that residency programs are disqualified because they "improve the quality of health in the United States by ensuring and improving the quality of graduate medical education experience for physicians in training." *Id.* at 10 (internal quotation marks omitted). But that analysis focuses inappropriately on the beneficial *effects* of residency programs rather than their educational purpose, as required by the regulations. See *supra*, at 32.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BARRY D. BURGDORF
Vice Chancellor and General Counsel
KYLE R. ZUMBERGE
Attorney
THE UNIVERSITY OF TEXAS SYSTEM
201 W. 7th Street, 6th Floor
Austin, TX 78701
(512) 499-4462

DONALD F. WOOD
J. GRAHAM KENNEY
DOUGLAS D. GEYSER
VINSON & ELKINS LLP
2801 Via Fortuna
Suite 100
Austin, TX 78746
(512) 542-8400

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
The Willard Office Building
1455 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20004
(202) 639-6518
jelwood@velaw.com

HARRY M. REASONER
VINSON & ELKINS LLP
First City Tower
1001 Fannin Street
Suite 2500
Houston, TX 77002
(713) 758-2222

Counsel for Amicus Curiae

AUGUST 2010