No. 09-837

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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REPLY BRIEF FOR PETITIONERS

The government's rigid, categorical position makes this a straightforward case: Because the full-time employee regulation excludes *all* medical residents from the definition of "student" in FICA's Student Exemption, if *any* medical resident is unambiguously a "student," then the regulation is invalid.

The residents enrolled in petitioners' medical residency programs unambiguously are students. Those residents are enrolled in formal, accredited educational programs that require them to complete a rigorous, structured course of study as a prerequisite to their becoming board-certified physicians. Pet. Br. 4-10, 23-33. While enrolled in petitioners' programs, residents follow a comprehensive, didactic core curriculum, attend hundreds of conferences and lectures, conduct laboratory research, take written examinations, receive grades for their academic performance, and engage in intensive, hands-on patient-care training under the close supervision of petitioners' faculty members. *Id.* at 7-9, 23-24.

The student status of petitioners' residents is not diminished by the clinical setting in which they obtain their most critical knowledge and skills. Pet. Br. 23-24. That clinical instruction is vital to a resident's education. A resident cannot learn to "intubat[e] newborn infants in crisis," "stitch[ ] wounds," "execut[e] lumbar punctures," or "us[e] defibrillators" (U.S. Br. 5) by sitting in a classroom. The same is true of many other skills and procedures residents must master in order to complete their residency programs and obtain board certification. As with third- and fourth-year medical students, a resident's "performance in [clinical work] is no less . . . 'aca-

demic' . . . because it involves" developing "skills and techniques in actual conditions of practice, rather than [providing] . . . written answers [to] an essay question." *Bd. of Curators v. Horowitz*, 435 U.S. 78, 95 (1978) (Powell, J., concurring).

The Treasury Department's attempt to exclude petitioners' medical residents from FICA's Student Exemption rests on an arbitrary and irrational distinction between classroom learning and clinical instruction. Because that distinction finds no support in the unambiguous language of the Student Exemption, the full-time employee regulation is invalid.

ARGUMENT

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

The government contends that the full-time employee regulation validly confines the Student Exemption to individuals who are predominantly students. *See*, *e.g.*, U.S. Br. 21, 35-36, 37-38. That argument grossly understates the force and effect of the full-time employee regulation. While that regulation appropriately excludes *some* nonstudents from the scope of the Student Exemption, its categorical, overbroad exclusion of *all* individuals who work more than forty hours per week also reaches individuals who unambiguously are students—including petitioners' medical residents. The government's argument to the contrary ignores the record in this case, as well as the findings of other courts that have examined the nature of graduate medical education programs and concluded that medical residents are plainly students. *See*, *e.g.*, *United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1018 (D. Minn. 2003) ("*Mayo I*").

Petitioners' residents fall squarely within the unambiguous language of the Student Exemption. They are enrolled in "a formal and structured educational program" (Pet. App. 38a n.8) that must meet the rigorous curricula and institutional requirements established by the Accreditation Council for Graduate Medical Education ("ACGME"). *United States v. Mt. Sinai Med. Ctr. of Fla., Inc.*, 2008 WL 2940669, at *7 (S.D. Fla. July 28, 2008). "ACGME accreditation carries with it a host of requirements that are intended to ensure that residents are continually engaged in activities that further their education." AAMC Br. 13; *see also* Univ. of Ala. Br. 19-22.

For example, the ACGME requires residents to attend conferences and lectures, conduct laboratory research, and engage in other scholarly activities. *Mt. Sinai*, 2008 WL 2940669, at *8. Petitioners must provide their residents with a "comprehensive . . . didactic core curriculum and written syllabus." *Mayo I*, 282 F. Supp. 2d at 1004. For each course they take, petitioners' residents are "assigned textbooks and journal articles relevant to the subject matter." *Id.* The residents must regularly attend core curriculum conferences, morbidity and mortality conferences, journal clubs, and lectures. *See* Pet. App. 41a n.10, 63a; *see also Mayo I*, 282 F. Supp. 2d at 1004, 1016 (residents may attend as many as "900 lectures and conferences" during their residency programs). Residents take written examinations and are graded on their academic performance. *See* Pet. App. 63a-64a; *Mayo I*, 282 F. Supp. 2d at 1004; J.A. 213a-14a.

To ensure that they are "fully trained to independently practice medicine" (*Mt. Sinai*, 2008 WL 2940669, at *3), residents not only must study in a traditional classroom but also must learn "how to

safely perform medical procedures on patients." Pet. App. 62a. Residents' "principal classroom" is therefore "the clinical setting," where they "learn by caring for patients in a medical specialty under the supervision of a [ ]faculty member." *Id.* at 62a-63a. That structured teaching environment includes "didactic sessions" in which a faculty member moves residents from patient to patient to "draw out and explain the salient educational points of each patient's condition." *Mayo I*, 282 F. Supp. 2d at 1003. By spending an average of forty or more hours per week caring for patients, petitioners' residents learn "by doing a medical task under the direct and personal guidance" of a faculty member. *Id.* at 1003, 1018. This method of education is "necessary" because "[a] future physician cannot adequately develop skills if not permitted to perform actual procedures on real patients." *Minnesota v. Chater*, 1997 WL 33352908, at *7 (D. Minn. May 21, 1997).

The ACGME accreditation requirements make clear that the clinical focus of residents' training is undertaken solely for objectively educational purposes. For example, the ACGME requires institutions that sponsor residency programs to "priorit[ize] . . . education over service" and prohibits them from using residents for work that lacks educational value. *Mt. Sinai*, 2008 WL 2940669, at *10. In fact, the inefficiencies of providing patient care in a teaching setting make sponsoring a medical residency program a costly endeavor. *See id.* at *9. "Congress," in particular, "was concerned that teaching hospitals would incur greater costs in treating patients than would non-teaching hospitals," and, "[t]o remedy this inequity, . . . established an indirect medical education (IME) adjustment to increase Medicare payments to acute care teaching hospitals." *Rhode Is-*

land Hosp. v. Leavitt, 548 F.3d 29, 32 (1st Cir. 2008); *see also* Univ. of Tex. Br. 35-38.[1]

Nothing about the clinical setting in which residents develop their skills and knowledge undermines the educational purpose of their patient-care services. "Because participants [in graduate medical education programs] learn both by treating patients and by observing other physicians do so, [those] programs take place in a patient care unit (most often in a teaching hospital), rather than in a classroom." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 507 (1994). Indeed, the Treasury Department itself has recognized that student status does not require instruction in a classroom setting. Its regulations construing the Student Exemption explicitly provide that "[t]raditional classroom activities are *not* the sole means of satisfying th[e] requirement" that a student be "enrolled and regularly attending classes." Treas. Reg. § 31.3121(b)(10)-2(d)(1) (emphasis added). "For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes" within the meaning of the Student Exemption. *Id.*; *see also* IRS Gen. Couns. Mem.

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[1] *Amicus* Committee of Interns and Residents cites studies indicating that residents provide "critical patient care services" and that teaching hospitals "would incur substantial costs if the resident physicians had to be replaced with other employees." CIR Br. 4. Petitioners do not dispute that, in order to acquire medical skills, residents provide patient-care services or that, in the absence of residents, teaching hospitals would have to hire other employees to provide those services. Employees need not provide valueless services, however, to qualify for the Student Exemption. Like medical residents, they instead must provide those services "for the purpose of pursuing a course of study." Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i).

37252, 1977 WL 46189 (Sept. 14, 1977) (the Student Exemption should not be "so narrowly construed as to limit the exception to one who actually attends a classroom lecture"). Because residents could not obtain all the skills and knowledge they need to become fully trained physicians in the classroom, the clinical setting in which they receive instruction is essential to their medical education.

II. THE GOVERNMENT'S ARGUMENTS IN DEFENSE OF THE FULL-TIME EMPLOYEE REGULATION ARE UNAVAILING.

None of the government's arguments in defense of the full-time employee regulation's categorical exclusion of medical residents from the Student Exemption withstands scrutiny.

A. The government makes several strained attempts to locate support for the full-time employee regulation in the plain language of the Student Exemption. There is nothing in that unambiguous language, however, that supports the regulation's arbitrary and irrational treatment of full-time employees.

According to the government, "the [statutory] phrase 'service performed by a student' supports the Treasury's longstanding view that the exemption is limited to individuals who are predominantly students and only incidentally employees." U.S. Br. 21; *see also id.* at 35-36 (arguing, on the same ground, that the full-time employee regulation is reasonable and consistent with the statutory text). But the government's statutory argument attacks a strawman. As the government recognizes elsewhere in its brief (at 35), petitioners are not challenging the requirement that the "educational aspect of the relationship between the employer and the employee, as com-

pared to the service aspect of the relationship, . . . be predominant in order for the employee's services" to qualify for the Student Exemption. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i). That unchallenged predominance requirement means that, contrary to the government's dire predictions, "[u]niversity professors, admissions officers, and bookkeepers" could not "exempt themselves from FICA by enrolling in evening classes." U.S. Br. 36. A professor enrolled in night school is not "predominant[ly]" a student.

What petitioners *are* challenging is the Department's effort to categorically exclude all full-time employees from the scope of the Student Exemption, which rests on the implicit assumption that the educational aspect of a full-time employee's relationship with his school can *never* predominate over the service aspect. That assumption is insupportable. The number of hours a person is employed reveals nothing about whether that person is "predominantly" a student. Rather, the relevant inquiry is *what* the employee does and *why*—not *how long* the employee does it. On the government's view, a person can be predominantly a student when he spends 35 hours per week learning in a clinical setting, but is no longer predominantly a student when he devotes 45 hours per week to clinical learning. If anything, the additional 10 hours of clinical education would make one more "predominantly" a student.

In this regard, the government presents the same false dichotomy as *amicus* Committee of Interns and Residents. *See*, *e.g.*, CIR Br. 2 (arguing that "multiple regulatory regimes . . . overwhelmingly treat resident physicians as employees rather than students"). The question is not whether medical residents are employees *or* students. The language of the Student Exemption itself makes clear

that the statute applies to "service performed in the *employ* of a school, college, or university." 26 U.S.C. § 3121(b)(10) (emphasis added). The question is whether the nature of the services that medical residents provide to the educational institutions that employ them makes them "students" within the meaning of the Student Exemption. While the answer to that question is plainly "yes," it does not mean that medical residents are not employees under other federal and state regulatory regimes (or within the meaning of the Student Exemption itself).

The government's other textual argument is equally unpersuasive. The government argues that the statutory phrase "service performed by a student" "supports the full-time employee rule's underlying premise that an individual cannot qualify as a 'student' based on the fact that his employment has educational or training value." U.S. Br. 22. But there is nothing in the statutory language that states that student status must be determined without regard to the nature of an employee's service. What the statute does say is that FICA taxation is inapplicable to "service performed in the employ of a school, college, or university, . . . if such service is performed by a student." 26 U.S.C. § 3121(b)(10). The term "student" unambiguously encompasses individuals who are engaged in "study." *Oxford Universal Dictionary* 2049 (3d ed. 1955). Thus, "service . . . performed" in a teaching hospital by a medical resident qualifies for the Student Exemption because residents perform procedures for an educational purpose and pursuant to a prescribed academic curriculum that guides their ongoing study of medicine. In contrast, "service . . . performed" by an attending physician does not qualify for the Exemption because

board-certified, attending physicians are no longer engaged in the study of medicine.

The government asserts that the term "student" can reasonably be read to encompass only persons engaged in "formal, academic instruction." U.S. Br. 22. But even if that artificially narrow definition of "student" were reasonable, the full-time employee regulation would still be invalid because that definition unambiguously encompasses petitioners' medical residents. Those residents are enrolled in petitioners' formal, structured, ACGME-accredited graduate medical education programs and must complete those rigorous, multi-year academic courses—which include a combination of classroom instruction, academic research, and clinical training—in order to become eligible for board certification in a medical specialty.

Petitioners' medical residents are therefore far different from law clerks and plumbing and electrician apprentices (U.S. Br. 28, 33) because, at least as a general matter, none of those individuals are enrolled and attending classes in formal, accredited, structured educational programs. Indeed, the government concedes as much later in its brief, where it acknowledges that "most architects, engineers, and surveyors who are serving internships required for licensure would not qualify for the student exemption because their internships are generally served in the employ of firms or individuals rather than schools, colleges, or universities." *Id.* at 36. According to the government, however, "it is not evident why Congress would have treated those individuals differently for FICA tax purposes than medical residents." *Id.* But Congress could have reasonably concluded that, in determining eligibility for the Student Exemption, it is appropriate to draw a line between

individuals who are enrolled in school and regularly attending classes, and those individuals who are engaged in learning outside a formal, structured academic setting. Extending the Student Exemption beyond the setting of formal academic institutions would have vastly expanded its scope and significantly complicated the Treasury Department's administration of the Exemption.

B. The government's invocation of "statutory context" similarly provides no support for the full-time employee regulation. U.S. Br. 23-24.

The government abstractly warns against broad constructions of tax exemptions. U.S. Br. 24. But interpreting the Student Exemption as unambiguously written does not constitute a broad—let alone an improper—construction of the Exemption. As explained above, the statutory requirement that the student be "enrolled and regularly attending classes at . . . [a] school, college, or university" (26 U.S.C. § 3121(b)(10))—together with the unchallenged regulatory requirement that the "educational aspect of the relationship between the employer and the employee . . . be predominant" (Treas. Reg. § 31.3121(b)(10)-2(d)(3)(i))—imposes a significant constraint on the Exemption's reach that generally excludes interns, apprentices, and full-time university employees enrolled in evening classes.

The government also invokes the general principle that tax exemptions must be "clear" and may not "'rest upon implication.'" U.S. Br. 24. Those background rules of construction add nothing here because the Student Exemption *is* clear: It applies to all "service performed 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 such school, college, or university." 26 U.S.C. § 3121(b)(10). Even under the government's narrow definition of "student," petitioners' medical residents qualify for the Exemption because they are engaged in "formal, academic instruction" at petitioners' ACGME-accredited educational institutions. U.S. Br. 22.

C. The government's invocation of legislative history (U.S. Br. 24-27) is unwarranted because legislative history has no role where the "statutory text . . . is clear." *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994). In any event, the Student Exemption's legislative history does not support the full-time employee regulation's arbitrary and irrational construction of the plain statutory language.

The snippets of legislative history invoked by the government (at 24-25) give an incomplete picture of the two distinct Student Exemption provisions enacted in 1939. One of those provisions provided an exemption for students employed by tax-exempt schools regardless of their earnings (Pub. L. No. 76-379, § 1426(b)(10)(A)(iii), 53 Stat. 1360, 1384-85 (1939)); the other provided an exemption for students employed by non-tax-exempt schools if the student earned less than $45 per quarter. *Id.* § 1426(b)(10)(E), 53 Stat. at 1385. Thus, it is not the case that, as the government asserts, both of the originally enacted exemptions were confined to "'inconsequential tax payments'" or to "'part-time or intermittent'" employment where the "'total amount of earnings is only nominal.'" U.S. Br. 24-25 (quoting H.R. Rep. No. 728, 76th Cong., 1st Sess. 17 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 19 (1939)). Neither of the statutory exemptions said anything about hours of employment, and, as Congress recognized in the very committee reports cited by the government,

the nominal-earnings requirement applied only to the exemption for employees of non-tax-exempt schools. *See* Pet. Br. 48 (quoting reports). Had Congress wanted to impose an across-the-board nominal-earnings requirement or an hours-based limitation, it would have done so in the text of the statute. Indeed, the Treasury Department itself did not understand Congress to have limited the Student Exemption to "inconsequential tax payments" from "nominal" earnings; it contemporaneously declared by regulation that "the amount of remuneration for services performed by [an] employee" of a tax-exempt school is "*immaterial*" to eligibility for the Exemption. Treas. Reg. § 402.217(d), 5 Fed. Reg. 785 (Feb. 27, 1940) (emphasis added).

Moreover, in 1950, Congress eliminated the nominal-earnings requirement altogether by combining the two Student Exemption provisions into a single provision that does not include *any* limitation based on the amount of compensation. Thus, whatever Congress may have intended regarding the scope of the originally enacted Exemptions, it made clear in 1950 that eligibility for the current Exemption is *not* limited to students who earn a nominal amount of compensation. *See* Pet. Br. 38-39.[2]

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[2] In support of its invocation of legislative history, the government cites a revenue ruling in which the Treasury Department relied on the 1939 legislative history to interpret the Student Nurse Exemption as "appl[ying] only when a nurse's 'employment is substantially less than full-time.'" U.S. Br. 27 (quoting Rev. Rul. 85-74, 1985-1 C.B. 331, 332). That argument is flawed in numerous respects. First, as explained above, the excerpts of legislative history cited by the government—even if relevant to the scope of the Student *Nurse* Exemption—lend no support for the Treasury Department's reading of the general Student Exemption. Second, the only authority the government

D. The government next argues that interpreting the Student Exemption to encompass petitioners' medical residents would undermine "FICA's goal" of "collect[ing] contributions from employees throughout their working lives." U.S. Br. 27. But medical residents have not begun their "working lives" because they "are not deemed fully trained to independently practice medicine." *Mt. Sinai*, 2008 WL 2940669, at *3. "[T]o practice medicine in a given field, . . . an individual holding an M.D. degree typically must (1) complete an accredited residency training program . . . and (2) become certified by a specialty board." *Mayo I*, 282 F. Supp. 2d at 1007.

Petitioners' interpretation of the Student Exemption furthers FICA's purposes by requiring medical-school graduates to begin contributing to FICA only when they have truly commenced their working lives as independently practicing physicians. Moreover,

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cites to support the "reasonableness" of the Department's revenue ruling is the Sixth Circuit's decision in *Johnson City Medical Center v. United States*, 999 F.2d 973, 977 (6th Cir. 1993). U.S. Br. 27. But the application of the Student Nurse Exemption to full-time employees was not at issue in *Johnson City* because the student nurses in that case "worked no more than 40 hours per *two week* pay period." *Johnson City*, 999 F.2d at 974 (emphasis added). In any event, *Johnson City* afforded *Chevron* deference to the IRS's revenue ruling, and the Sixth Circuit has since recognized that, in light of this Court's later decisions, it erred in doing so. *See Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 180-81 (6th Cir. 2003). Finally, even setting aside whether *Chevron* deference may *ever* be afforded to a revenue ruling, it could be proper only when the statute at issue is ambiguous. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Whatever may be said of the Student Nurse Exemption, the Student Exemption at issue here is unambiguous.

the government's concerns about "promot[ing] the fiscal soundness of . . . Social Security and Medicare" (at 27) are misplaced because medical residents who are covered by the Student Exemption do not accrue Social Security and Medicare benefits. *See* 20 C.F.R. § 404.1028(c). Thus, giving force to the full and unambiguous scope of the Student Exemption will not impose any additional financial burdens on these federal benefit programs.

E. The government is equally wrong when it contends that the full-time employee regulation is consistent with the Treasury Department's longstanding interpretation of the Student Exemption. U.S. Br. 30-34. Before the 2005 adoption of that regulation, the Department had never suggested that all full-time employees are categorically ineligible for the Exemption.

In 1951, the Treasury Department adopted regulations stating that the Exemption is limited to those individuals whose services are performed "incident to and for the purpose of pursuing a course of study" (16 Fed. Reg. 12,453, 12,474 (Dec. 12, 1951))—a requirement that remains in the regulations to this day. Treas. Reg. § 31.3121(b)(10)-2(d)(3). The government acknowledges that, "[h]istorically," the Treasury Department "determined whether an individual's student activities predominated by conducting a case-specific examination of all relevant facts and circumstances." U.S. Br. 31. *That* is the Treasury's longstanding interpretation of the Student Exemption, and that case-by-case inquiry cannot be reconciled with the categorical approach embodied in the full-time employee regulation.

Under that case-by-case framework, the government initially reached inconsistent conclusions as to

whether medical residents qualify for the Student Exemption. *Compare* SSR 78-3, [1978-1979 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,641, at 2,100, 1978 WL 14050 (medical residents are ineligible for the Exemption), *with* IRS CCA 200212029 (Jan. 24, 2002) ("whether medical residents are students depends upon the facts and circumstances in each case"). But after four courts of appeals concluded that the Student Exemption unambiguously encompasses medical residents who otherwise satisfy the Exemption's statutory criteria (*see* Pet. Br. 32), the Department formally "accept[ed] the position . . . that medical residents are excepted from FICA taxes . . . for tax periods" preceding the enactment of the full-time employee regulation. IRS, Press Release, IRS to Honor Medical Resident FICA Refund Claims (Mar. 2, 2010). The categorical exclusion of *all* medical residents—and other full-time employees—from the scope of the Student Exemption is therefore a sharp departure from the Department's prior interpretations of the Exemption.[3]

F. The government also maintains that FICA's historical development indicates that residents are not covered by the Student Exemption. *See* U.S. Br.

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[3] Nor can the government derive support for the Department's rigid, hours-based approach by citing pre-2005 revenue rulings and advisory memoranda in which the Treasury "indicated that the number of hours worked is an important factor in determining whether an employee's services are 'incident to' his activities as a student and that full-time work is generally inconsistent with student status." U.S. Br. 31. The number of hours worked can be a relevant factor in determining, on a case-by-case basis, whether an employee is a student. But, contrary to the government's position, where the services performed during the hours worked are educational in nature, long hours make the employee *more* of a student, not less of one.

39-42. The government's argument focuses on the Intern Exemption, which was enacted in 1939 and repealed in 1965. That exemption excluded from the definition of "employment" "service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law." Pub. L. No. 76-379, § 1426(b)(13), 53 Stat. 1360, 1385 (1939). According to the government, "[i]f residents were unambiguously 'students,' interns likewise would have been 'students,' and Congress would have had little need to enact a separate exemption" for interns. U.S. Br. 40.

The government's argument ignores the differences between the Student and Intern Exemptions. The Student Exemption, as originally enacted and as in force today, applies only to individuals who are enrolled and regularly attending classes at a school, college, or university. *See* § 1426(b)(10)(A)(iii), (E), 53 Stat. at 1384-85. The Intern Exemption, in contrast, did not include an attendance-and-enrollment requirement; it instead applied to interns "in the employ of a hospital." *Id.* § 1426(b)(13). Thus, Congress would have had "little need" for the Intern Exemption only if every "hospital" were a "school, college, or university"—which the government rightly does not suggest to be the case.

Nor does the repeal of the Intern Exemption in 1965 "support the conclusion that medical residents are not encompassed by the student exemption." U.S. Br. 41. The government reasons that "[r]epealing the intern exemption would not have accomplished" Congress's goal of providing "needed disability and survivorship benefits" to doctors and their families "if most (or even many) interns, as well as residents, would have been excluded from cover-

age by the student exemption." *Id.* But the government offers no support for its suggestion that "most" or "many" interns were employed by a "school, college, or university" and thus eligible for the Student Exemption.

In any event, Congress did not act with the sweep that the government suggests. The 1965 amendments to FICA were not intended to subject all interns to FICA taxation. As stated in the House Report accompanying the repeal of the Intern Exemption, the elimination of that exemption imposed FICA taxes on interns "unless their services are excluded under provisions other than [the Intern Exemption]." H.R. Rep. No. 213, 89th Cong., 1st Sess. 215 (1965), *reprinted in* 1965-2 C.B. 733, 747. The government attempts to blunt the force of the House Report by observing that the only provision the committee reports mentioned by name was an exemption for services performed for tax-exempt organizations. U.S. Br. 41 n.7. But, notably, the House Report speaks of "exclu[sions]" under other "*provisions*" of law and thus plainly contemplated that an intern might have qualified for an exemption other than the one explicitly identified in the Report.[4]

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[4] Moreover, the history of the Intern and Student Exemptions demonstrates that Congress consistently sought to exempt from FICA taxation doctors who had not completed their medical educations, while assessing FICA taxes upon those who had begun their working lives. Although the term "intern" was initially limited to individuals "seeking . . . hospital training," by the 1960s, the scope of the term had expanded to encompass at least some doctors "entitled to practice medicine." *St. Luke's Hosp. Ass'n v. United States*, 333 F.2d 157, 161 (6th Cir. 1964). The repeal of the Intern Exemption therefore furthered Congress's objectives by extending FICA taxation to those interns

G. Finally, the government contends that this Court's decision in *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), has been superseded by *Chevron* and thus the factors it identifies for determining the validity of a tax regulation are "largely irrelevant" here. *See* U.S. Br. 50-55. But this Court has repeatedly considered the *National Muffler* factors in post-*Chevron* cases involving the reasonableness of tax regulations. *See*, *e.g.*, *Boeing Co. v. United States*, 537 U.S. 437, 448 (2003); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 560-61 (1991). In any event, as the government concedes, several of the *National Muffler* factors bear directly upon the *Chevron* analysis. U.S. Br. 53. Whether the full-time employee regulation is analyzed under *National Muffler* or under *Chevron*, the ultimate question remains whether the regulation is a reasonable interpretation of the Student Exemption. As discussed above, the full-time employee regulation is patently unreasonable because its arbitrary restriction on the scope of the Exemption is inconsistent with the text, history, and purpose of the statute.

The government's specific objections to petitioners' application of the *National Muffler* factors lack merit. For example, the government objects to petitioners' statement that the full-time employee regulation was promulgated only recently, and contends that antiquity is not a condition of a regulation's validity. U.S. Br. 52. But the full-time employee regulation is "undermined" not simply by "the recency of

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who had begun their working lives as doctors, and permitting those interns who were still completing their medical educations and who were employed by a "school, college, or university" to qualify for the Student Exemption.

its adoption" (*id.*), but by the fact that it conflicts with the interpretation of those "presumed to have been aware of congressional intent." *Nat'l Muffler*, 440 U.S. at 477. Indeed, the Treasury Department regulations promulgated in 1940—a year after the Student Exemption's enactment—included no restrictions based on the number of hours worked. Treas. Reg. § 31.3121(b)(10)-2(c) (2004).

Similarly, while an agency is permitted to change positions in interpreting a statute (U.S. Br. 53), it cannot further its policy preferences by adopting an arbitrary position that lacks grounding in the statutory text. That is precisely what happened here. Confronted with a growing tide of judicial decisions holding that medical residents are eligible for the Student Exemption (*see*, *e.g.*, *Mayo I*, 282 F. Supp. 2d at 1018)—and an "avalanche" of pending litigation by institutions seeking refunds under the Exemption (Pet. App. 3a)—the Treasury Department could have asked Congress to amend the Exemption to exclude medical residents. Instead, the Department abandoned its longstanding case-by-case approach for determining eligibility for the Student Exemption and, by agency fiat, replaced it with a categorical standard that excludes full-time employees regardless of the educational nature of their employment. That inflexible and irrational approach has never been endorsed by Congress, has no support in the language of the Student Exemption, and should be rejected by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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