No. 09-837 FEB 16 2010

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 OF AMERICA,

Respondent.

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

BRIEF OF GEORGETOWN UNIVERSITY, LOYOLA UNIVERSITY MEDICAL CENTER, SAINT LOUIS UNIVERSITY, UNIVERSITY OF ARKANSAS, UNIVERSITY OF NORTH DAKOTA, UNIVERSITY OF ROCHESTER, THE UNIVERSITY OF TENNESSEE, AND VANDERBILT UNIVERSITY AS *AMICI CURIAE* SUPPORTING PETITIONERS

JULIE ANN EVANS
GENERAL COUNSEL
OFFICE OF GENERAL COUNSEL
UNIVERSITY OF NORTH DAKOTA
O'Kelly Hall Room 104
221 Centennial Stop 8196
Grand Forks, ND 58202
(701) 777-6345
julieevans@mail.und.nodak.edu

BERTRAND M. HARDING, JR.
Counsel of Record
LAW OFFICES OF
BERTRAND M. HARDING, JR.
111 Oronoco Street
Alexandria, VA 22314
(703) 683-8036
bharding@erols.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Georgetown University, Loyola University Medical Center, Saint Louis University, University of Arkansas, University of North Dakota, University of Rochester, The University of Tennessee, and Vanderbilt University (hereinafter referred to collectively as the "Universities") are institutions of higher education and one hospital that conduct graduate medical residency programs in substantially the same manner as the programs conducted by the Petitioners in this case. In this connection, the medical residents who participate in the Universities' medical residency programs receive annual stipends that are subject to social security taxation unless the 26 U.S.C. § 3121(b)(10) Student Exception to the Federal Insurance Contribution Act ("FICA") applies. In addition, the Universities, or in some cases the hospitals that participate in the Universities' medical residency programs, are likewise subject to social security taxation unless the Student Exception applies.

The financial impact of the issue raised by this case on the Universities, their participating hospitals, and their medical residents is substantial.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief, and the parties have consented to the filing of this brief. A*mici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

The Universities, which individually operate dozens of different medical residency programs, have, collectively, approximately 4,500 medical residents who receive a total of over $200 million in annual stipend payments. The social security/Medicare tax imposed by 26 U.S.C. §§3111(a) and (b) on the stipends paid to these medical residents is obviously a significant cost element for the Universities, their participating hospitals, and the medical residents.

Thus, the Universities have a vital interest in the issue before the Court in this matter.

Pursuant to this Court's Rule 37.2(a), counsel of record in this case received timely notice of the Universities' intent to file this brief, and all parties consented to the filing of this brief with the Court.

SUMMARY OF ARGUMENT

This case involves an interpretation of the 26 U.S.C. § 3121(b)(10) Student Exception, which exempts from the definition of "employment" for social security taxation purposes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." The Treasury Department, however, in Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) has categorically excluded all full-time employees, including medical residents, as being able to qualify as "students" for purposes of the Student Exception regardless of the nature and extent of the educational activities in which the individuals may be engaged. The Eighth Circuit in the case below upheld the validity of this regulation,

and the Petitioners have asked the Court to hear this case and review the Eighth Circuit's decision and the validity of this regulation.

Petitioners set forth in their brief compelling legal reasons for granting *certiorari* in this case. The Universities will not restate these arguments, but will instead explain why the medical residents who participate in the Universities' residency programs are clearly students and how the Treasury regulation is therefore contrary to the unambiguous statutory language of 26 U.S.C. § 3121(b)(10).

In addition, the Universities will present for the Court's consideration two arguments why Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) should be declared invalid – first, because the Treasury Department should not be permitted by regulatory fiat to overturn judicial decisions in four circuit courts of appeal, and secondly, because the regulation, being inconsistent with a longstanding existing Social Security Administration regulation, may result in medical residents being subject to social security tax but ineligible for corresponding social security benefits.

ARGUMENT

I. Because Medical Residents Are "Students," Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is Contrary to the Unambiguous Language of 26 U.S.C. § 3121(b)(10)

The Eighth Circuit decision in the case below validates a Treasury regulation that categorically excludes medical residents from the definition of "students" for purposes of the Student Exception. But as institutions that operate medical residency programs, the Universities are in a unique position to advise the Court that from the Universities' standpoint the medical residents enrolled in their residency programs are clearly "students" within every meaning of that term.

The Student Exception clearly and unambiguously exempts from social security taxation "students" who meet certain other criteria. By categorically excluding medical residents enrolled in the Universities' medical residency programs from qualifying as "students" even if the other statutory criteria are met, the Treasury regulation violates and is contrary to the clear and unambiguous language of the Student Exception in the same manner as if the Treasury Department had attempted to exclude full-time college sophomores. The Universities submit that the Court should agree to hear this case to enforce the unambiguous statutory language of the Student Exception and to give the medical residents enrolled in the

Universities' residency programs the opportunity to demonstrate why they are indeed students.

In this connection, it is difficult to overstate how strongly the Universities view the medical residents participating in their residency programs as "students." Medical residents fit squarely within the commonly understood definition of a student cited by Petitioners at p. 17-18 of their brief: "a person engaged in study . . . esp[ecially] one who attends a school" (*Webster's New International Dictionary* 2502 (2d ed. 1954)), or a person who engages in "study" by applying the mind "to the acquisition of learning, whether by means of books, observation, or experiment." (*Oxford Universal Dictionary* 2049-50 (3d ed. 1955)).

Like any student at any educational institution, medical residents attend medical lectures, read assigned texts, sit for written examinations to test the extent and depth of their learning, engage in research on medical-related topics, and participate in journal clubs.

In addition, residents provide patient care; however, all patient care-related activities are conducted as part of a structured teaching and learning environment. Patient care is provided only under the supervision of attending physicians, and residents participate in didactic sessions during rounds. Medical residents are being taught by the medical school faculty to operate as independent physicians, and all patient care activities in which residents are engaged are training and learning activities expressly intended to achieve that goal.

Medical schools make every effort to ensure that their residents engage only in those patient care activities that further the educational training mission and that residents do not frequently if at all engage in routine activities, such as drawing blood and taking blood pressure readings.

Whenever a resident is providing patient care services, the resident is learning in the time-honored manner of a student apprentice learning any craft. The manner in which a resident provides patient care services differs markedly from the manner in which patients are treated by attending physicians, and these differences reflect the "learning by doing" nature of the medical resident's education and training. For example, a resident may take a patient history, thereafter reviewing it with the supervising physician, and the supervising physician will return with the resident to complete the examination. This is quite different from the process of an examination undertaken by someone who already is a qualified attending physician.

The Accreditation Council on Graduate Medical Education ("ACGME"), the organization that accredits medical residency programs, requires each residency program to have an educational curriculum that contains (1) overall educational goals for the program; (2) competency-based goals and objectives for each residency assignment at each level of training; and (3) delineation of resident responsibility for patient care, including a plan for progressive responsibility for patient management and supervision of residents over the continuum of

the program.[2] In addition, all medical residency programs must comply with certain ACGME "competencies," which include ensuring that residents demonstrate (1) medical and clinical knowledge and the ability to apply this knowledge to patient care; (2) the development of skills to investigate and evaluate care of patients; (3) interpersonal and communication skills to be able to exchange information with patients, their families, and other health care professionals; and (4) a commitment to carrying out professional responsibilities and ethical principles.[3]

Thus, the Universities, as institutions that conduct medical residency programs, submit for the Court's consideration their considered opinion that all of the activities conducted by medical residents participating in their residency programs – whether they be traditional educational activities or patient care-related activities conducted in an apprenticeship capacity under the supervision of attending physicians – are learning activities engaged in by "students" as that term is and has always been commonly understood. By categorically excluding medical residents from "student" classification, Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is therefore contrary to the unambiguous language of 26 U.S.C. § 3121(b)(10) that exempts "students" from social security taxation.

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[2] ACGME Common Program Requirements, effective July 1, 2007, § IV.

[3] *Id.*

II. The Treasury Department Should Not Be Permitted By Regulation to Change an Unambiguous Statutory Provision and Effectively Reverse the Previous Decisions of Four Circuit Courts of Appeal

The government has for many years taken the administrative position that medical residents are ineligible for the benefits of 26 U.S.C. § 3121(b)(10) on the ground that they are not "students." It initially based its position on the facts and circumstances of the medical residents' relationship to the institution at which the residents worked and trained, arguing that these facts demonstrated that the residents were primarily "employees" and not "students."[4]

The government then changed tactics and argued that there is no need to examine the facts and circumstances of the medical residents' relationship to the institution because, based on the legislative history of 26 U.S.C. § 3121(b)(10), medical residents are ineligible for the Student Exception as a matter of law. The courts have consistently rejected this argument and concluded that the student/employee determination must be made by an

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[4] This is the position asserted by the government in *Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998). *See also*, Chief Counsel Advice 200029030 (July 21, 2000) and Field Service Advice 200041002 (Jan. 24, 2000) (holding that medical residents are not students under a student v. employee facts and circumstances test).

examination of all of the relevant facts and circumstances.[5]

Thus, faced with the prospect of having to engage in a detailed factual litigation of perhaps thousands of FICA tax refund cases and with the real possibility of not prevailing in this litigation, the government changed tactics a third time and amended the Treasury regulations to create a bright-line test that excludes medical residents from qualification under of 26 U.S.C. § 3121(b)(10) – a result it failed to lawfully achieve through the civil court system. And to make absolutely sure that it achieved the purpose of overruling the circuit courts that had fully considered this issue, it included in these new regulations an example specifically concluding that medical residents do not qualify.[6]

The government should not be permitted to contort the tax laws in this manner, particularly in a case, such as this, where the courts have previously and clearly held, in the context of determining whether the statute can be interpreted though the use of legislative history, that the statute is unambiguous on the question of whether medical residents can qualify for its benefits. As this Court said: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court

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[5] *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007); *United States v. Mem'l Sloan-Kettering Ctr.*, 563 F.3d 19 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States* 545 F.3d 564 (7th Cir. 2008).

[6] Treas. Reg. § 31.3121(b)(10)-2(e), Example (4).

decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[7] Here, we submit, four circuit courts have held that 26 U.S.C. § 3121(b)(10) unambiguously includes medical residents within its scope (provided that they can meet the other statutory requirements) and therefore these judicial decisions "trump" the Treasury Department's full-time employee regulation that creates an irrebutable presumption to the contrary.

The Eighth Circuit very briefly addressed this issue but summarily dismissed it, saying that the Supreme Court "has repeatedly held that agencies may validly amend regulations to respond to adverse judicial decisions, or for other reasons, so long as the amended regulation is a permissible interpretation of the statute." The Universities submit for the reasons previously stated that Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is not a valid interpretation of 26 U.S.C. § 3121(b)(10), and moreover contend that the cases cited by the Eighth Circuit panel as support for the "adverse judicial decisions" proposition do not do so.

The two Supreme Court decisions cited by the panel – *Dickman v. Commissioner*, 465 U.S. 330 (1984) and *Morrissey v. Commissioner*, 296 U.S. 344 (1935) – do not support this position. *Dickman* did not involve the amendment of a Treasury regulation issued in response to an adverse court decision; rather, it involved a change in the Commissioner's

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[7] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

"administrative practice." The regulation in question in that case was "virtually identical to those in effect during the prior five decades."[8] And, in *Morrissey* the Court upheld the Commissioner's amended regulation that conformed the definition of an "association" for income tax purposes to the definition of the same term for excise tax purposes articulated in a Supreme Court case. In other words, the regulatory amendment at issue in *Morrissey* was made to conform the regulation to a favorable judicial decision, not in response to an unfavorable decision.

Norwest Corp. v. Commissioner, 69 F.3d 1404 (8th Cir. 1995) and *McNamee v. Dep't of the Treasury*, 488 F.3d 100 (2d Cir. 2007) are equally unpersuasive. *Norwest* involved a regulation that, an amicus argued, reflected an "abrupt shift in the Commissioner's position." And the issue in *McNamee* was a proposed regulation that, if and when promulgated, would have changed the Commissioner's approach reflected in an existing regulation. In neither case, however, was the new regulation in question issued in response to adverse judicial decisions.

Thus, pursuant to the standard set forth by this Court in *Nat'l Cable & Telecomms. Ass'n*, Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) should be declared invalid because the regulation effectively reverses decisions reached by four different circuit courts of appeal. The Treasury Department should not be

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[8] *Dickman*, footnote 11.

permitted to administer the tax laws in such a manner.

III. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is Invalid Because It May Result in Medical Residents Being Subject to Social Security Tax but Ineligible for Corresponding Social Security Benefits

As further evidence of the invalidity of Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii), the regulation is inconsistent with a previously issued and virtually identical regulation promulgated by the Social Security Administration ("SSA"), and allowing the Treasury regulation to stand together with the SSA regulation may mean that medical residents will be subject to social security taxation but will not be eligible for social security benefits related to the taxes paid. This is because the Treasury regulation interprets the term "student" for tax purposes in a manner different from the manner in which applicable SSA regulations interpret the exact same term.

Longstanding SSA regulations, adopted under a provision of the Social Security Act ("Act") identical to the Student Exception, apply to social security benefits.[9] The SSA regulations provide with respect to "student" status: "Whether 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

[9] See 42 U.S.C. § 410(a)(10); 20 C.F.R. § 404.1028.

work is not considered employment." 20 C.F.R. § 404.1028(c). From 1940 to 2004, the SSA regulations and the IRS regulations under the Student Exception were substantially identical.[10]

The adoption in 2004 of the amendments to the Treasury regulations interpreting the Student Exception, however, has caused the Treasury and the SSA regulations to define "student" differently. As a result, it is now possible for an employee to qualify as a "student" under the SSA regulations but not under the Treasury regulations because of the inclusion of the Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) "full-time employee" rule. "Full-time" student-employees to whom this regulation applies, but who, like medical residents, meet the SSA regulatory test of having as their "main purpose . . . pursuing a course of study rather than earning a livelihood," will be subject to social security taxation. But these persons may not receive social security benefit credits corresponding to the taxes paid

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[10] When adopted in 1940, the SSA regulations were identical to the Treasury regulations adopted in that year. See 5 F.R. 1849, 1877 (1940) (codified at 42 C.F.R. § 402.817). Their language remained substantially identical through 1979. Compare 20 C.F.R. § 404.1019 (1979) (Social Security Act regulation) with Treas. Reg. § 3121(b)(10)-2 (1979) (Internal Revenue Code regulation). In 1980, the SSA regulations were "rewritten and reorganized" to make them "clearer and easier for the public to use." 45 F.R. 20074 (Mar. 27, 1980). The changes were thus formal rather than substantive, and no further change has been made in the SSA regulations. The Internal Revenue Code regulation was not changed after 1979 (until its amendment in 2004).

because they qualify as "students" under the SSA regulations and are therefore ineligible to receive social security benefits.

The Treasury Department has acknowledged that the social security tax provisions of the Internal Revenue Code and the social security benefit provisions of the Act must be symmetrical to yield consistent social security results. In its Explanation of the amendments of the Student Exception regulation proposed in 2004, it stated:

> Wage and employment questions affect both social security benefits entitlement and FICA taxes which fund the social security trust fund. Except in unusual circumstances, the Social Security Act, and the Internal Revenue FICA provisions, are to be read in pari materia. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). Thus, whether certain service is employment affects not just FICA taxation, but also social security benefits eligibility and level of benefits. Moreover, the integrity of the social security system requires symmetry between service that is considered employment for social security benefits.

REG-156421-03, 69 F.R. 8604, 8605 (Feb. 25, 2004), 2004-1 C.B. 571, 572.[11] Cf. *Rowan Companies v. United States*, 452 U.S. 247, 253 (1981) (Treasury regulations that defined "wages" differently for social security and unemployment tax purposes than for income tax withholding purposes were invalid because they "fail to implement the congressional mandate in a consistent and reasonable manner").[12]

Forced to choose between inconsistent regulations interpreting identical statutory terms in a case where symmetry is required for the effective administration of a single program, the Court should prefer the SSA regulations over the amended Treasury regulations. The Treasury regulations and the SSA regulations were substantially identical until the Treasury's pre-April 1, 2005 regulations were superseded by the amended regulations in

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[11] See also Joint Committee on Taxation, Staff Report on Options to Improve Tax Compliance and Reform Tax Expenditures, Jan. 27, 2005, at 83 (Social Security Act provides exceptions to "wages" and "employment" that "parallel" FICA tax exceptions; compensation or services not subject to FICA tax therefore are also not taken into account in determining social security benefits).

[12] The Supreme Court has recently stated that it relied in *Rowan* upon a manifest "congressional concern for the interest of simplicity and ease of administration." *Environmental Defense v. Duke Energy Corp.*, 167 L. Ed. 2d 295, 308 (2007), quoting *Rowan, supra*, 452 U.S. at 255. The justification for uniformity in the present case is similarly compelling because, as the Treasury Department acknowledged in its Explanation of the proposed regulatory amendments (quoted *supra*), the "integrity" of the social security system requires "symmetry" in the definitions of employment for benefits and taxation purposes.

2004. Thus, the amended regulations are entitled to minimal deference vis-à-vis the SSA regulations for the same reasons that the district court in this case determined that the amended regulations were entitled to minimal deference in relation to the pre-April 1, 2005 Treasury regulations. See Pet. App. 37a – 38a.

Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) is therefore invalid because, by expressly excluding medical residents from being classified as "students," the regulation will subject the residents to social security tax and may therefore conflict with longstanding SSA regulations that would deny residents social security benefits related to the taxes paid because, under those regulations, the residents would qualify as "students."

CONCLUSION

For the reasons set forth above, the Universities respectfully request the Court to grant certiorari in this case and declare Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) invalid.

Respectfully submitted,

Bertrand M. Harding, Jr.
Law Offices of Bertrand M. Harding, Jr.
111 Oronoco Street
Alexandria, VA 22314
(703) 683-8036
bharding@erols.com

Julie Ann Evans
ND Attorney ID #04692
General Counsel
Office of General Counsel
University of North Dakota
O'Kelly Hall Room 104
221 Centennial Stop 8196
Grand Forks, North Dakota 58202
701-777-6345
julieevans@mail.und.nodak.edu