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 Petition For A 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 concedes many of the principal points that petitioners raise in favor of certiorari.

The government acknowledges, for example, that medical residents' tax status under the Federal Insurance Contributions Act ("FICA") is "an issue of significant administrative and fiscal importance to the Treasury, involving as much as $700 million annually." Opp. 15. Moreover, the government now "accept[s] the position . . . that medical residents are exempt from FICA taxes for tax periods" preceding the 2005 promulgation of the Treasury Department's full-time employee regulation, which purports to narrow the statutory Student Exemption to exclude all full-time employees. *Id.* at 14 n.2. The government further admits that, in the decision below, the Eighth Circuit "recognized that 'four of [its] sister circuits ha[d] recently declared, in cases arising under the former regulations,' that 'the student exception statute is *unambiguous*' and 'does not limit the types of services that qualify for the exemption.'" *Id.* at 8 (quoting Pet. App. 9a) (emphasis added).

The government nevertheless urges this Court to deny review because it sees "no conflict between the statements in the earlier cases"—one of which reiterated *five times* that the Student Exemption unambiguously encompasses medical residents who are enrolled in and regularly attending classes (*see United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27-28 (2d Cir. 2009))—"and the decision of the court of appeals here." Opp. 13. According to the government, the decision below is distinguishable because it was decided after the promulgation of the full-time employee regulation.

That position is untenable. The argument that the government advanced below—that the statutory Student Exemption can be construed by the Treasury Department to exclude full-time employees—is the *same* argument that the government advanced in the Second, Sixth, Seventh, and Eleventh Circuits, where it contended that "residents simply cannot qualify as students under the student exception" because "residents' hours [are] not part-time." Br. of the United States at 46-47, United States v. Mount Sinai Med. Ctr. of Fla., Inc., 486 F.3d 1248 (11th Cir. 2007) (No. 06-11693). Those circuits *all* rejected the government's reading of the statutory language, and held that the Student Exemption "unambiguously" includes medical residents who otherwise satisfy the Exemption's statutory criteria. *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 565 (7th Cir. 2008). The Eighth Circuit, in contrast, agreed with the government's reading of the statute—but, in so doing, acknowledged that it was departing from the interpretation of the Student Exemption adopted by the Second, Sixth, Seventh, and Eleventh Circuits. *See* Pet. App. 9a ("[i]f [the other circuits'] interpretation of the statute is correct, we must affirm").

The newly promulgated full-time employee regulation thus does nothing to diminish the irreconcilable conflict on the important question of statutory interpretation presented in this case. Only an authoritative resolution of that question by this Court can prevent "more litigation costs by educational institutions that can ill-afford them . . . and continued uncertainty across the country" on an issue that has profound financial implications not only for the Treasury Department, but also for the Nation's 8,000 residency programs and 100,000 medical residents. Br. of Am. Med. Colleges at 12.

ARGUMENT

The question before the Court is whether FICA's Student Exemption encompasses medical residents who, as part of their graduate medical education, provide full-time patient care while enrolled in a residency program sponsored by a school, college, or university. The Second, Sixth, Seventh, and Eleventh Circuits have held that the Student Exemption is *unambiguous* in this regard and thus cannot be narrowed by the Treasury Department to categorically exclude medical residents. *See Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27; *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417-18 (6th Cir. 2009); *Univ. of Chi. Hosps.*, 545 F.3d at 567; *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1251-53 (11th Cir. 2007). According to these courts, any reading of the Student Exemption that categorically excludes medical residents is "textually untenable" (*Univ. of Chi. Hosps.*, 545 F.3d at 567) and conflicts with the "plain" (*Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1252), "entirely clear" (*id.*), and "unambiguous" (*Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27) language of the Student Exemption.

In the decision below, the Eighth Circuit acknowledged that "four of [its] sister circuits have recently declared . . . that the student exception statute is unambiguous" and encompasses medical residents who treat patients full-time while enrolled in and regularly attending classes. Pet. App. 9a. The court nevertheless concluded that those decisions "cannot be correct." *Id.* at 10a. According to the Eighth Circuit, the Student Exemption is "ambiguous on the question whether a medical resident working for the school full-time is a 'student'" and the Treasury Department can therefore construe the statutory lan-

guage to exclude *all* medical residents and other full-time employees. *Id.* at 12a.

Despite the Eighth Circuit's explicit acknowledgment that it was departing from the decisions of four other circuits, the government resists this Court's review. In so doing, it relies heavily on the Eighth Circuit's far-from-pellucid footnote suggesting that, "*[v]iewed narrowly*," the prior circuit court decisions are distinguishable because they did not expressly "address the validity of the amended regulations." Pet. App. 9a n.2 (emphasis added). According to the government (and, perhaps, the Eighth Circuit's footnote), the "earlier decisions expressed no opinion on the question addressed by the court below—whether the term 'student' includes full-time employees." Opp. 13 (emphasis omitted). But, in fact, that is *precisely* the question addressed by the Second, Sixth, Seventh, and Eleventh Circuits. Indeed, the government argued at length in each of those courts that medical residents do not qualify as "students" under the statutory Student Exemption because they are engaged in full-time paid employment.

In the Sixth Circuit, for example, the government argued that "[m]edical residents work long hours treating patients, and they are paid more than nominal compensation in return. Having begun their working lives, residents should be covered by FICA." Br. of the United States at 17, *Detroit Med. Ctr.* (No. 07-1602). The government added, "[a]llowing residents to invoke the student exception would conflict with the clear intent of Congress to reserve the student exception for students working few hours and earning nominal compensation." *Id.* at 55 (internal quotation marks omitted). Similarly, it contended in the Seventh Circuit that, "[s]ince no

medical resident or intern today works less than 40 hours per week and frequently is required to work up to 80 hours per week, it is obvious that the educational component is incidental to the residents' services." Reply Br. of the United States at 23, *Univ. of Chi. Hosps.* (No. 07-1838) (emphasis omitted). And, on multiple occasions, the government argued that "the residents' hours were not part-time or intermittent, and their pay certainly was not 'nominal.' As a result, the residents simply cannot qualify as students under the student exception." Br. of the United States at 46-47, *Mount Sinai Med. Ctr. of Fla., Inc.* (No. 06-11693); *see also* Br. of the United States at 40, *Albany Med. Ctr. v. United States*, 563 F.3d 19 (2d Cir. 2009) (No. 07-0949) (same); Br. of the United States at 44, *Univ. of Chi. Hosps.* (No. 07-1838) (same).

Moreover, even in the cases regarding pre-2005 tax periods, the government repeatedly relied on the full-time employee regulation in defense of its position—arguing that, while "not controlling" in litigation concerning pre-2005 taxes, the regulation "is instructive regarding the nature and type of services that the IRS, the agency charged with interpreting §3121, deems 'incident to' a course of study under the student exception." Br. of the United States at 66 n.11, *Univ. of Chi. Hosps.* (No. 07-1838); *see also* Br. of the United States at 65 n.13, *Albany Med. Ctr.* (No. 07-0949) (same); Br. of the United States at 64 n.12, *Detroit Med. Ctr.* (No. 07-1602).

Every circuit to consider the government's statutory argument in a pre-2005 tax case rejected it. Each of those circuits held that "the statutory language of [FICA's Student Exemption] is not ambiguous" and that "the services performed by medical residents are not categorically ineligible for the stu-

dent exemption from FICA taxation." *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1249-50, 1251; *see also, e.g., Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 28 (the Student Exemption "is unambiguous"). As a result, the government itself has now conceded that, at least for the pre-2005 tax period, its artificially narrow reading of the statutory Student Exemption is no longer defensible. Opp. 14 n.2.

In the Eighth Circuit, the government again argued—as it had done in four circuits previously—that residents are categorically ineligible for the Student Exemption because of their full-time status. *See, e.g.*, Br. of the United States at 47, Regents of Univ. of Minn. v. United States (8th Cir. filed Sept. 2, 2008) (No. 08-2193). In contrast to the Second, Sixth, Seventh, and Eleventh Circuits, however, the Eighth Circuit agreed with the government's position that the Student Exemption is "ambiguous" and can reasonably be read to exclude all medical residents and other full-time employees. Pet. App. 12a.

Accordingly, the decisions in the Second, Sixth, Seventh, and Eleventh Circuits present the *same* issue as the decision below: Can the Treasury Department validly construe the statutory Student Exemption to categorically exclude all medical residents? Whether that narrowing construction of the statutory language is advanced in litigation or embodied in a regulation, the interpretation is only permissible if the plain statutory language is susceptible to such a reading. According to four circuits, the language of the "student exception unambiguously does *not* categorically exclude medical residents as 'students'" and thus is not amenable to the government's narrowing construction. *Univ. of Chi. Hosps.*, 545 F.3d at 565. According to the Eighth Circuit, however, those decisions "cannot be correct"

because the statute is "ambiguous on the question" of its applicability to full-time employees and thus can be interpreted by the Treasury Department to exclude all such employees. Pet. App. 10a, 12a.[1]

The government nevertheless attempts to obscure this circuit split by contending that the Second, Sixth, Seventh, and Eleventh Circuits "expressly relied on the fact that the prior regulations mandated a fact-specific, case-by-case approach for determining student status." Opp. 12. In fact, none of those decisions relied on the Treasury Department's regulations when concluding that the language of the statutory Student Exemption was unambiguous. Those circuits that considered the prior regulations did so only after concluding that, on its own terms, the statutory language is unambiguous. The Seventh Circuit, for example, held that the "student exception unambiguously does *not* categorically exclude medical residents as 'students,'" and then went on to explain that, *"[e]ven if [it] were to consider the statute ambiguous*, the implementing Treasury Regulation . . . implies a case-specific analysis." *Univ. of Chi. Hosps.*, 545 F.3d at 565 (second emphasis

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[1] Moreover, even if the government were correct (at 13) that the Second, Sixth, Seventh, and Eleventh Circuits only addressed whether medical residents are excluded from the Student Exemption due to the nature of the services they perform—and not because of the hours they spend performing those services—the Eighth Circuit's decision would still conflict with those earlier cases. Each of those four circuits held that the Student Exemption unambiguously encompasses at least *some* medical residents. Thus, according to those circuits, the Treasury Department cannot categorically exclude *all* medical residents from the Student Exemption—whether based on the nature of the services they render or the time spent rendering those services.

added); *see also Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 27-28 ("We agree . . . that the statute is unambiguous . . . . Even if we were to find ambiguity in the statute, the method for resolving the ambiguity is found in the implementing regulations."); *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1252 n.2 (relegating analysis of the prior regulations to a footnote).

The government also seeks to minimize the significance of the lower courts' disagreement by suggesting that the conclusions of the Second, Sixth, Seventh, and Eleventh Circuits regarding the absence of ambiguity in the statutory Student Exemption are merely stray "statements" that cannot be the source of a true circuit conflict. But the conclusion that the Student Exemption unambiguously encompasses medical residents who otherwise satisfy the statutory criteria was an essential component of those courts' statutory analysis. Indeed, the Second, Seventh, and Eleventh Circuits all expressly relied on the absence of ambiguity in the Student Exemption to reject the government's attempted reliance on legislative history to alter the meaning of the statute's plain language. *See Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 1252 ("The government's attempt to look past the plain language of the statute in reliance on the legislative history violates a basic principle of statutory interpretation. . . . We will not review the legislative history of this statute to create an ambiguity where there is none."); *see also Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 28; *Univ. of Chi. Hosps.*, 545 F.3d at 570.[2]

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[2] The legislative history on which the government relies here (at 11) does not support its reading of the Student Exemption. The descriptions of the Student Exemption in the committee

The government is therefore wrong to suggest that taxpayers in the Second, Sixth, Seventh, and Eleventh Circuits will not be treated differently from taxpayers in the Eighth Circuit. Opp. 14. Four circuits have already explicitly held that the unambiguous statutory language of the Student Exemption prevents the Treasury Department from categorically excluding medical residents and other full-time employees from the statute's scope. The fact that the government has now embodied its flawed statutory interpretation in a regulation will do nothing more than "forc[e] affected institutions and residents to file repetitive cases in those circuits" (Br. of Ass'n of Am. Med. Colleges at 12), which, bound by their own prior precedent construing the language of the Student Exemption, will necessarily reject the government's position yet again.

Indeed, the government's reading of the Student Exemption is manifestly unreasonable, and the

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reports the government cites indicate that Congress intended the Student Exemption to apply beyond part-time work for nominal wages to full-time work by students employed by their schools. For example, the House Report that accompanied the initial enactment of the Student Exemption explained that service would be exempted from taxation if its compensation "does not exceed $45 . . . *or* . . . without regard to amount of compensation, if service is performed by a student enrolled and regularly attending classes at a school, college, or university." H.R. Rep. No. 728, 76th Cong., 1st Sess. 47-48 (1939) (emphasis added). Similarly, the House Report accompanying amendments enacted in 1950 explained that the Student Exemption covers "service performed for nominal amounts in the employ of tax-exempt nonprofit organizations . . . *and* service performed by students in the employ of colleges and universities." H.R. Rep. No. 1300, 81st Cong., 1st Sess. 12 (1949) (emphasis added).

Eighth Circuit's decision endorsing that reading thus cannot be reconciled with the interpretative principles articulated by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although the government strategically invokes the term "pupil" as a synonym for "student" to conjure up images of young schoolchildren (Opp. 10), the term "student" is, in fact, far broader. It includes *any* "'person formally engaged in learning, esp[ecially] one enrolled in a school or college.'" *Id.* (quoting *Random House Webster's Unabridged Dictionary* 1888 (2d ed. 2001)). The definition therefore encompasses individuals "engaged in learning" in a hands-on, interactive setting.

Medical residents unambiguously satisfy the ordinary and accepted definition of "student." Just as law students sit for a bar exam after completing accredited educational programs that often include clinical courses, medical residents become eligible for a specialty board examination after graduating from nationally accredited programs that include a clinical learning component. Pet. App. 22a; U.S. C.A. App. 300 (No. 08-2193). In addition to engaging in didactic sessions with instructors guiding their hands-on learning, residents register for electives, attend lectures, receive reading assignments, take tests, and join journal clubs—much like many other graduate students. Pet. App. 22a, 41a n.10, 63a. As one federal district court concluded after holding a full trial on the Student Exemption issue, such "graduate medical education is absolutely vital to teach inexperience[d] doctors who graduate from medical school how to be sophisticated and accomplished practitioners in a complex world of medical specialization." *United States v. Mount Sinai Med.*

Ctr. of Fla., Inc., 2008 WL 2940669, at *2 (S.D. Fla. July 28, 2008).

The government disagrees with this reading of the term "student"—but, when confronted with adverse precedent rejecting its peculiarly selective definition of the term, the government declined to approach Congress to seek a statutory amendment. It instead promulgated a regulation purporting to overrule those decisions, and now seeks, once again, to defend its flawed reading of the Student Exemption in the lower courts.

Twenty years of litigation on this issue are enough. This Court should grant review to forestall the needless, repetitive, and wasteful litigation that will inevitably be generated by the government's unwillingness to accept prior decisions rejecting its untenable interpretation of the Student Exemption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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