APR 19 2010

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Pursuant to 26 U.S.C. 3121(b)(10), "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" is exempt from tax under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* The question presented is as follows:

Whether the Department of the Treasury validly amended its regulations, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii), to provide that full-time employees are not "students" for purposes of the FICA tax exemption contained in 26 U.S.C. 3121(b)(10).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 568 F.3d 675. The opinion of the district court in *Mayo Foundation for Medical Education & Research* v. *United States* (Pet. App. 20a-46a) is reported at 503 F. Supp. 2d 1164. The opinion of the district court in *Regents of the University of Minnesota* v. *United States* (Pet. App. 47a-65a) is unreported but is available at 2008 WL 906799.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2009. A petition for rehearing was denied on September 17, 2009 (Pet. App. 66a-67a). On December 7, 2009, Justice Alito extended the time within which to

file a petition for a writ of certiorari to and including January 15, 2010, and the petition was filed on January 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of a recent amendment to regulations of the Department of the Treasury governing the "student" exception to coverage under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* FICA requires employers and employees to pay taxes on "wages" from "employment" in order to fund the Social Security and Medicare programs. 26 U.S.C. 3101, 3102, 3111. FICA excepts from covered "employment" 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).

Effective for services performed on or after April 1, 2005, the Treasury Department amended its regulations implementing that "student" exception. T.D. 9167, 2005-1 C.B. 261. As relevant here, the amendment modified the regulations' generally fact-based approach for determining "student" status by adding a proviso that employees who normally work 40 or more hours per week are not "students" eligible for the exemption. 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). In the first decision by any court of appeals addressing the issue, the court below upheld the validity of this full-time employee rule. Pet. App. 1a-19a.

1. Petitioners, the Mayo Foundation for Medical Education and Research and the Mayo Clinic (collectively Mayo) and the University of Minnesota (the Uni-

versity) sponsor graduate medical education programs for medical residents and fellows (collectively residents). Residents are physicians who have graduated from medical school but are pursuing further training in a medical specialty or subspecialty by providing medical and patient-care services. Completion of a residency or fellowship program is a prerequisite to sitting for a board examination for certification in a specialty or subspecialty. Pet. App. 2a, 22a & n.2, 48a; 07-3242 Gov't C.A. App. 67.

Residents are assigned to rotations involving the performance of various medical duties in affiliated hospitals and clinics. Under the supervision of staff physicians, who also hold faculty appointments at petitioners' medical schools, residents work between 50 and 80 hours per week treating patients. In addition to their patient-care duties, residents attend lectures, perform research, and participate in "teaching rounds." Residents are compensated by "stipends" that increase with experience. During the second quarter of 2005, those stipends ranged between $41,057 and $55,935 annually for Mayo's residents and between $43,647 and $55,679 (including the resident's share of FICA tax) for the University's residents. Pet. App. 19a, 22a, 48a-49a, 63a; 07-3242 Gov't C.A. App. 71, 72; 08-2193 Gov't C.A. App. 119, 322.

2. The current controversy has its origins in *Minnesota* v. *Apfel*, 151 F.3d 742 (8th Cir. 1998), which involved a dispute between the State of Minnesota and the Social Security Administration (SSA) about whether the University's medical residents were covered by the Social Security Act, 42 U.S.C. 301 *et seq.* The court of appeals in that case held that the residents were not covered, based in part on the conclusion that they qualified for the Social Security Act's "student" exception in 42

U.S.C. 418(c)(5). *Apfel*, 151 F.3d at 747-748. The court rejected the SSA's position that medical residents were categorically ineligible for "student" status. The court reasoned that "[t]he bright-line rule" advocated by the SSA was "inconsistent with the approach set forth" in the SSA's regulation implementing the exception, 20 C.F.R. 404.1028(c), "which contemplate[d] a case-by-case examination" of the "individual's relationship with a school." *Apfel*, 151 F.3d at 748.

After the decision in *Apfel*, Mayo brought suit seeking a refund of FICA taxes it had paid on behalf of its residents, arguing that the residents qualified for the "student" exception to FICA in 26 U.S.C. 3121(b)(10). See *United States* v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997 (D. Minn. 2003) (*Mayo I*). At that time, the Treasury Regulations implementing that exception provided that an employee's status as a "student" should be determined "on the basis of the relationship of such employee with the organization for which the services are performed," and that an employee was a "student" if he performed the services "as an incident to and for the purpose of pursuing a course of study at such school, college, or university." 26 C.F.R. 31.3121(b)(10)-2(c) (2003). The district court in *Mayo I* rejected the government's contention that residents were categorically ineligible for the "student" exception. The court held that, under the Eighth Circuit's decision in *Apfel*, the Treasury Regulations implementing the FICA exception, like the SSA's Social Security Act regulation, should be construed to require a case-by-case examination of "student" status. 282 F. Supp. 2d at 1005-1007. Based on that case-specific examination, the court concluded that Mayo's residents qualified for FICA's "student" exception. *Id.* at 1015-1018.

The Treasury Department subsequently amended its regulations governing FICA's "student" exception to clarify how the exception applies to situations involving on-the-job training, where work and study "are to some extent intermingled." 69 Fed. Reg. 8605 (2004). *Inter alia*, the amended regulations "clarif[y] who is a student enrolled and regularly attending classes for purposes of [S]ection 3121(b)(10)." *Id.* at 8606; see T.D. 9167, *supra.*

The amended regulations, which are effective for services performed on or after April 1, 2005, 26 C.F.R. 31.3121(b)(10)-2(f), retain the general approach of the prior regulations, under which student status depends on "the relationship" between the employee and the employer and is limited to employees who perform services "incident to and for the purpose of pursuing a course of study," 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i). The amended regulations clarify, however, that this standard is satisfied only if "[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect," is "predominant," and that "[t]he evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect." *Ibid.*

The amended regulations further provide that, although an employee's relationship with an employer is generally evaluated based upon all the relevant facts and circumstances, that case-by-case analysis does not apply to "a full-time employee," *i.e.* an employee whose normal work schedule is 40 hours or more per week. 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). Instead, the regulations establish a categorical rule that "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study." *Ibid.* The regula-

tions include several examples to illustrate their application, including the example of a medical resident who is normally scheduled to work at least 40 hours per week. The discussion accompanying that example explains that such a resident is a full-time employee and is therefore ineligible for the "student" exception, even though some of the services that he performs have an educational, instructional, or training aspect. 26 C.F.R. 31.3121(b)(10)-2(e), Example 4.

3. After the amended regulations took effect, petitioners brought suits in the District Court for the District of Minnesota, challenging the validity of the regulations and seeking a refund of FICA taxes they had paid for their residents during the second quarter of 2005. The district court struck down the full-time employee rule in Mayo's case (Pet. App. 38a-43a) and then followed that ruling in the University's case (*id.* at 54a).

In its opinion in Mayo's case, the district court disagreed with the government's contention "that the definition of 'student' is ambiguous" and "that a rule categorically denying student status to a full-time employee is a permissible and reasonable interpretation." Pet. App. 38a. The court concluded instead that "[t]he word 'student' is well defined and commonly understood outside the context of the Student Exclusion," noting that the dictionary definition is "an individual who engages in 'study' and is 'enrolled in a class or course in a school, college, or university.'" *Id.* at 39a (quoting *Webster's Third New International Dictionary of the English Language* 2268 (1981)). The court did not take issue with the regulations' longstanding provision that the services must be performed "incident to and for the purpose of pursuing a course of study." *Ibid.* (quoting 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i)). Nor did the court dis-

pute the validity of the amended regulations' clarification that the educational aspect of the relationship between the student and the employer must predominate over the service aspect. *Ibid.*

Instead, the district court observed that "[a] natural reading of the full text in which the term 'student' appears demonstrates that an employee is a 'student' so long as the educational aspect of his service predominates over the service aspect of the relationship with his employer." Pet. App. 39a. The court concluded that "[t]he full-time employee exception arbitrarily narrows this definition by providing that a 'full-time' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service aspect." *Id.* at 40a. Because the court had already decided in *Mayo I* that Mayo's residents qualify as students under the prior regulation, the court ruled that Mayo was entitled to a refund of the FICA taxes at issue. *Id.* at 46a.

In the University's case, the district court noted that it had already ruled, in Mayo's case, that the full-time employee rule is invalid. Pet. App. 54a. The court went on to conclude that the University's residents are "students" "enrolled" (*id.* at 60a-62a) and "regularly attending classes" (*id.* at 62a-64a) who treated patients "incident to and for the purpose of pursuing a course of study" (*id.* at 64a-65a). Accordingly, the court ruled that the University was entitled to a refund of the FICA taxes at issue. *Id.* at 65a.

4. The court of appeals reversed the district court's judgments. Pet. App. 1a-19a. The court of appeals observed that a Treasury Regulation is valid and entitled to deference if the statutory provision that it interprets is "ambiguous with respect to the specific issue" and the regulation "is based on a permissible construction of the

statute." *Id.* at 8a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)). The court 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 9a (quoting *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 (11th Cir. 2007), and citing *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009), *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009), and *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 567 (7th Cir. 2008)). The court observed, however, that, "[v]iewed narrowly," those decisions "held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents are *categorically* ineligible for the student exception." *Id.* at 9a n.2. The court of appeals emphasized that the courts deciding the prior cases "did not address the validity of the amended regulations," and it stated that petitioners' current challenge to those regulations "raises an entirely different issue." *Ibid.*

To the extent that the other circuits had suggested that any Treasury Regulation clarifying the meaning of the term "student" in Section 3121(b)(10) is necessarily invalid because that term has an established common meaning, the court of appeals rejected that approach. Pet. App. 9a-11a. The court observed that this Court has frequently upheld Treasury Regulations interpreting terms that have a plain or common meaning in other contexts on the ground that their meaning as used in tax statutes is not clear. *Id.* at 11a. The court of appeals noted that Section 3121(b)(10) further requires that the

student be "enrolled and regularly attending classes." *Ibid.* In the court's view, that phrase is susceptible to an interpretation that "limits the student exception to services that are subordinate to the student's educational activities." *Ibid.* Stressing that "words must be construed in context," the court held that "the statute is silent or ambiguous on the question" whether residents working full-time are "student[s]." *Id.* at 12a.

The court of appeals next held that the amended regulations' definition of the term "student" as excluding individuals who work full-time "is a permissible interpretation of the statute." Pet. App. 12a. Examining the history of the FICA exemptions, including the legislative record surrounding their enactment and amendment, the court concluded that the "exceptions were directed to part-time workers," and that "the full-time employee limitation in the amended regulation is [therefore] consistent with the origin and purpose of the student exception." *Id.* at 15a. The court also noted that the Commissioner of Internal Revenue has consistently taken the position that the "student" exception does not encompass full-time employees. *Id.* at 17a. The court further observed that, although the courts in *Apfel* and *Mayo I* had applied the prior "regulation in a contrary manner, * * * the Commissioner responded with amended regulations more specifically articulating the underlying policy." *Ibid.* Relying on this Court's repeated holdings that "agencies may validly amend regulations to respond to adverse judicial decisions, * * * so long as the amended regulation is a permissible interpretation of the statute" (*id.* at 17a-18a), the court of appeals concluded that the amended Treasury Regulations are valid. *Id.* at 19a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Indeed, the court below is the first and only court of appeals to address the validity of the full-time employee rule contained in the amended Treasury Regulations. This Court's review is not warranted.

1. As the court of appeals correctly held (Pet. App. 8a-19a), the amended regulations' full-time employee rule is a permissible interpretation of the "student" exception to FICA tax in 26 U.S.C. 3121(b)(10). The statute does not unambiguously resolve the question whether a full-time worker may qualify as a "student * * * enrolled and regularly attending classes," *ibid.*, and the Treasury Department reasonably resolved that ambiguity by determining that a full-time worker does not qualify, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). The amended regulation is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See Pet. App. 8a (quoting *Chevron*, 467 U.S. at 842-843); *id.* at 8a-19a (applying *Chevron* to the issue in this case).

First, the statute does not clearly resolve whether a full-time employee may qualify as a "student." See Pet. App. 8a-12a. Although the term can have a broader meaning, the word "student" is most commonly used to refer to a pupil receiving formal instruction in an academic setting, not a full-time employee who learns by doing. See, *e.g.*, *Random House Webster's Unabridged Dictionary* 1888 (2d ed. 2001) ("a person formally engaged in learning, esp. one enrolled in a school or college; pupil"). That understanding is reinforced by the surrounding statutory language, which requires that the individual be "enrolled" at a "school, college, or univer-

sity." 26 U.S.C. 3121(b)(10). And by requiring that the individual be "*regularly* attending classes," *ibid.* (emphasis added), that surrounding language also suggests the appropriateness of a temporal limit on the number of hours that the individual may work. The possibility that the term "student" does not include full-time workers is also supported by the overarching purpose of FICA, because exempting full-time workers from FICA taxes would undermine the statutory goal of collecting contributions during an employee's entire working career in order to fund benefits in retirement.

Second, the Treasury Department's determination that the "student" exception does not apply to full-time employees is reasonable. See Pet. App. 12a-19a. As just discussed, that limitation is consistent with the surrounding statutory language and furthers FICA's underlying goals. Moreover, as the court of appeals observed, the full-time employee limitation "is consistent with the origin and purpose of the student exception." *Id.* at 15a. The legislative record surrounding the enactment and amendment of the FICA exemptions demonstrates that Congress intended to exempt only "part-time" or "intermittent" work, for "nominal" wages, where the attendant loss of benefits is inconsequential and not worth the trouble of administration. See H.R. Rep. No. 728, 76th Cong., 1st Sess. 18 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 19 (1939); see also H.R. Rep. No. 1300, 81st Cong., 1st Sess. 12 (1949); S. Rep. No. 1669, 81st Cong., 2d Sess. 15 (1950). And, as the court of appeals also observed, "the historical record reflects a consistent substantive policy" (Pet. App. 17a) of not extending the exception to full-time employees. See also *Johnson City Med. Ctr.* v. *United States*, 999 F.2d 973 (6th Cir. 1993) (upholding a Revenue Ruling

interpreting the parallel student nurse exception as precluding full-time employment).

2. Contrary to petitioners' contention (Pet. 12-16), the Eighth Circuit's decision in this case—the first and only appellate decision to address the validity of the amended regulations' full-time employee rule—does not conflict with the decision of any other court of appeals.

As the court below explained, the decisions on which petitioners rely for their claim of conflict "did not address the validity of the amended regulations." Pet. App. 9a n.2. See, *e.g.*, *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 25 n.2 (2d Cir. 2009) (*Sloan-Kettering*) (noting that, because the amended regulation was not applicable to the tax periods at issue, the court "d[id] not apply or consider it"); *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 568 (7th Cir. 2008) (noting that "the new regulation is not applicable here"). Instead, those "decisions held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents [were] *categorically* ineligible for the student exception." Pet. App. 9a n.2. The courts that issued those decisions expressly relied on the fact that the prior regulations mandated a fact-specific, case-by-case approach for determining student status. See *Sloan-Kettering*, 563 F.3d at 27-28; *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009); *University of Chi. Hosps.*, 545 F.3d at 568; *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 n.2 (11th Cir. 2007) (*Mount Sinai*).

Petitioners nonetheless contend that the decisions of the other circuits conflict with the decision below because some of the earlier decisions stated that the text of 26 U.S.C. 3121(b)(10) is "not ambiguous." Pet. 12

(quoting *Mount Sinai*, 486 F.3d at 1251). But even if some statements in the earlier cases were inconsistent with the analysis of the court below, such inconsistency would not warrant this Court's intervention because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). In any event, there is no conflict between the statements in the earlier cases and the decision of the court of appeals here. In describing the statute as "not ambiguous," the courts in the prior cases meant only that the statute unambiguously "does not limit the *types* of services that qualify for the exemption" and therefore does not categorically exempt medical residents *qua* medical residents. *Mount Sinai*, 486 F.3d at 1251-1252 (emphasis added); see *University of Chi. Hosps.*, 545 F.3d at 567 (agreeing with *Mount Sinai*); *Sloan-Kettering*, 563 F.3d at 27 (agreeing with *Mount Sinai* and *University of Chi. Hosps.*); *Detroit Med. Ctr.*, 557 F.3d at 417 (relying on *Mount Sinai*). The earlier decisions expressed no opinion on the question addressed by the court below—whether the term "student" includes *full-time employees*. The courts that issued those decisions had no occasion to address that question because the Treasury Regulations in effect at the time did not treat full-time employees as categorically excluded from the student exception.[1]

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[1] Petitioners are also incorrect in contending that "[t]he government itself has acknowledged the existence of [a] conflict" between the decision below and the earlier cases. Pet. 15. The quotation on which petitioners base that contention is from the government's opening brief in the University's appeal in this case. Because that brief preceded the decision below, the government's statement cannot possibly be conceding a conflict. The quotation from the government's brief simply acknowledges that earlier cases had rejected the government's argument

Petitioners are also wrong in contending (Pet. 16) that the decision below will cause taxpayers in different parts of the country to be subject to different FICA tax obligations. All services performed on or after April 1, 2005, are governed by the new regulations, which provide that full-time employees are ineligible for the "student" exception. That full-time employee rule applies to taxpayers in every judicial circuit. Because no other court has addressed the validity of the amended Treasury regulations, there is no basis for concluding that similarly-situated medical residents who perform full-time employment in other circuits will be exempt from FICA taxes.[2]

3. Petitioners' contention (Pet. 17-18) that the decision below conflicts with *Chevron* is likewise without merit. As discussed above (see pp. 10-12, *supra*), the court of appeals correctly applied the *Chevron* analysis to the issue presented in this case. In any event, petitioners' assertion that the court below "misapplie[d]" (Pet. 17) that settled framework in this particular case does not warrant the Court's review.

Petitioners' contention that the court of appeals adopted an "extreme level of deference to tax regula-

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that medical residents as an occupational class are per se ineligible for the student exception. See 08-2193 Gov't C.A. Br. 42 n.7.

[2] Taxpayers throughout the country are also now subject to a uniform rule for services performed before April 1, 2005. On March 2, 2010, the Internal Revenue Service announced that it had made an administrative determination to accept the position (reflected in the decisions of the Second, Sixth, Seventh, and Eleventh Circuits on which petitioners rely) that medical residents are exempt from FICA taxes for tax periods covered by the prior regulations. See I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf.

tions" is mistaken. Pet. 18. The court simply observed that the complexities of the Internal Revenue Code frequently give rise to a need for regulatory interpretation, even of terms that have a common meaning in other contexts. Pet. App. 10a-12a. That observation is borne out by numerous decisions of this Court upholding regulatory definitions of statutory terms that had ostensibly common meanings. See *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 559-561 (1991) ("disposition of property"); *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476 (1979) ("business league"); *United States* v. *Correll*, 389 U.S. 299, 304 (1967) ("meals and lodging . . . away from home"); *Magruder* v. *Washington, Balt. & Annapolis Realty Corp.*, 316 U.S. 69, 73 (1942) ("carrying on or doing business"); *Helvering* v. *Reynolds*, 313 U.S. 428, 433 (1941) ("acquisition").

Contrary to petitioners' implication (Pet. 18), the court of appeals did not suggest that Treasury regulations may never be invalidated as contrary to plain statutory language. Indeed, the court acknowledged that they may, citing decisions of this Court that had invalidated regulations on that basis. Pet. App. 11a (citing *Knight* v. *Commissioner*, 552 U.S. 181 (2008), and *Maass* v. *Higgins*, 312 U.S. 443 (1941)). The court of appeals simply (and correctly) concluded that the regulations at issue here are not contrary to FICA but are instead a permissible interpretation of ambiguous statutory language.

4. As petitioners note (Pet. 20), the application of the student exemption is an issue of significant administrative and fiscal importance to the Treasury, involving as much as $700 million annually in FICA taxes for medical residents alone. The court below decided that issue

correctly, upholding the full-time employee rule, which provides an easily administrable bright-line test. That rule resolves the uncertainty and controversy over the application of FICA taxes that was generated by the decision in *Apfel*. The rule is consistent with the statutory language, and it gives effect to Congress's intent to exempt from FICA coverage only employment that generates nominal wages and exemption of which will not result in a significant loss of Social Security and Medicare benefits. Because the court of appeals' decision upholding the full-time employee rule does not conflict with any decision of this Court or any other court of appeals, this Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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QUESTION PRESENTED

Pursuant to 26 U.S.C. 3121(b)(10), "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" is exempt from tax under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* The question presented is as follows:

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Effective for services performed on or after April 1, 2005, the Treasury Department amended its regulations implementing that "student" exception. T.D. 9167, 2005-1 C.B. 261. As relevant here, the amendment modified the regulations' generally fact-based approach for determining "student" status by adding a proviso that employees who normally work 40 or more hours per week are not "students" eligible for the exemption. 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). In the first decision by any court of appeals addressing the issue, the court below upheld the validity of this full-time employee rule. Pet. App. 1a-19a.

1. Petitioners, the Mayo Foundation for Medical Education and Research and the Mayo Clinic (collectively Mayo) and the University of Minnesota (the Uni-

versity) sponsor graduate medical education programs for medical residents and fellows (collectively residents). Residents are physicians who have graduated from medical school but are pursuing further training in a medical specialty or subspecialty by providing medical and patient-care services. Completion of a residency or fellowship program is a prerequisite to sitting for a board examination for certification in a specialty or subspecialty. Pet. App. 2a, 22a & n.2, 48a; 07-3242 Gov't C.A. App. 67.

Residents are assigned to rotations involving the performance of various medical duties in affiliated hospitals and clinics. Under the supervision of staff physicians, who also hold faculty appointments at petitioners' medical schools, residents work between 50 and 80 hours per week treating patients. In addition to their patient-care duties, residents attend lectures, perform research, and participate in "teaching rounds." Residents are compensated by "stipends" that increase with experience. During the second quarter of 2005, those stipends ranged between $41,057 and $55,935 annually for Mayo's residents and between $43,647 and $55,679 (including the resident's share of FICA tax) for the University's residents. Pet. App. 19a, 22a, 48a-49a, 63a; 07-3242 Gov't C.A. App. 71, 72; 08-2193 Gov't C.A. App. 119, 322.

2. The current controversy has its origins in *Minnesota* v. *Apfel*, 151 F.3d 742 (8th Cir. 1998), which involved a dispute between the State of Minnesota and the Social Security Administration (SSA) about whether the University's medical residents were covered by the Social Security Act, 42 U.S.C. 301 *et seq.* The court of appeals in that case held that the residents were not covered, based in part on the conclusion that they qualified for the Social Security Act's "student" exception in 42

U.S.C. 418(c)(5). *Apfel*, 151 F.3d at 747-748. The court rejected the SSA's position that medical residents were categorically ineligible for "student" status. The court reasoned that "[t]he bright-line rule" advocated by the SSA was "inconsistent with the approach set forth" in the SSA's regulation implementing the exception, 20 C.F.R. 404.1028(c), "which contemplate[d] a case-by-case examination" of the "individual's relationship with a school." *Apfel*, 151 F.3d at 748.

After the decision in *Apfel*, Mayo brought suit seeking a refund of FICA taxes it had paid on behalf of its residents, arguing that the residents qualified for the "student" exception to FICA in 26 U.S.C. 3121(b)(10). See *United States* v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997 (D. Minn. 2003) (*Mayo I*). At that time, the Treasury Regulations implementing that exception provided that an employee's status as a "student" should be determined "on the basis of the relationship of such employee with the organization for which the services are performed," and that an employee was a "student" if he performed the services "as an incident to and for the purpose of pursuing a course of study at such school, college, or university." 26 C.F.R. 31.3121(b)(10)-2(c) (2003). The district court in *Mayo I* rejected the government's contention that residents were categorically ineligible for the "student" exception. The court held that, under the Eighth Circuit's decision in *Apfel*, the Treasury Regulations implementing the FICA exception, like the SSA's Social Security Act regulation, should be construed to require a case-by-case examination of "student" status. 282 F. Supp. 2d at 1005-1007. Based on that case-specific examination, the court concluded that Mayo's residents qualified for FICA's "student" exception. *Id.* at 1015-1018.

The Treasury Department subsequently amended its regulations governing FICA's "student" exception to clarify how the exception applies to situations involving on-the-job training, where work and study "are to some extent intermingled." 69 Fed. Reg. 8605 (2004). *Inter alia*, the amended regulations "clarif[y] who is a student enrolled and regularly attending classes for purposes of [S]ection 3121(b)(10)." *Id.* at 8606; see T.D. 9167, *supra.*

The amended regulations, which are effective for services performed on or after April 1, 2005, 26 C.F.R. 31.3121(b)(10)-2(f), retain the general approach of the prior regulations, under which student status depends on "the relationship" between the employee and the employer and is limited to employees who perform services "incident to and for the purpose of pursuing a course of study," 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i). The amended regulations clarify, however, that this standard is satisfied only if "[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect," is "predominant," and that "[t]he evaluation of the service aspect of the relationship is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect." *Ibid.*

The amended regulations further provide that, although an employee's relationship with an employer is generally evaluated based upon all the relevant facts and circumstances, that case-by-case analysis does not apply to "a full-time employee," *i.e.* an employee whose normal work schedule is 40 hours or more per week. 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). Instead, the regulations establish a categorical rule that "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study." *Ibid.* The regula-

tions include several examples to illustrate their application, including the example of a medical resident who is normally scheduled to work at least 40 hours per week. The discussion accompanying that example explains that such a resident is a full-time employee and is therefore ineligible for the "student" exception, even though some of the services that he performs have an educational, instructional, or training aspect. 26 C.F.R. 31.3121(b)(10)-2(e), Example 4.

3. After the amended regulations took effect, petitioners brought suits in the District Court for the District of Minnesota, challenging the validity of the regulations and seeking a refund of FICA taxes they had paid for their residents during the second quarter of 2005. The district court struck down the full-time employee rule in Mayo's case (Pet. App. 38a-43a) and then followed that ruling in the University's case (*id.* at 54a).

In its opinion in Mayo's case, the district court disagreed with the government's contention "that the definition of 'student' is ambiguous" and "that a rule categorically denying student status to a full-time employee is a permissible and reasonable interpretation." Pet. App. 38a. The court concluded instead that "[t]he word 'student' is well defined and commonly understood outside the context of the Student Exclusion," noting that the dictionary definition is "an individual who engages in 'study' and is 'enrolled in a class or course in a school, college, or university.'" *Id.* at 39a (quoting *Webster's Third New International Dictionary of the English Language* 2268 (1981)). The court did not take issue with the regulations' longstanding provision that the services must be performed "incident to and for the purpose of pursuing a course of study." *Ibid.* (quoting 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i)). Nor did the court dis-

pute the validity of the amended regulations' clarification that the educational aspect of the relationship between the student and the employer must predominate over the service aspect. *Ibid.*

Instead, the district court observed that "[a] natural reading of the full text in which the term 'student' appears demonstrates that an employee is a 'student' so long as the educational aspect of his service predominates over the service aspect of the relationship with his employer." Pet. App. 39a. The court concluded that "[t]he full-time employee exception arbitrarily narrows this definition by providing that a 'full-time' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service aspect." *Id.* at 40a. Because the court had already decided in *Mayo I* that Mayo's residents qualify as students under the prior regulation, the court ruled that Mayo was entitled to a refund of the FICA taxes at issue. *Id.* at 46a.

In the University's case, the district court noted that it had already ruled, in Mayo's case, that the full-time employee rule is invalid. Pet. App. 54a. The court went on to conclude that the University's residents are "students" "enrolled" (*id.* at 60a-62a) and "regularly attending classes" (*id.* at 62a-64a) who treated patients "incident to and for the purpose of pursuing a course of study" (*id.* at 64a-65a). Accordingly, the court ruled that the University was entitled to a refund of the FICA taxes at issue. *Id.* at 65a.

4. The court of appeals reversed the district court's judgments. Pet. App. 1a-19a. The court of appeals observed that a Treasury Regulation is valid and entitled to deference if the statutory provision that it interprets is "ambiguous with respect to the specific issue" and the regulation "is based on a permissible construction of the

statute." *Id.* at 8a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)). The court 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 9a (quoting *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 (11th Cir. 2007), and citing *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009), *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009), and *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 567 (7th Cir. 2008)). The court observed, however, that, "[v]iewed narrowly," those decisions "held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents are *categorically* ineligible for the student exception." *Id.* at 9a n.2. The court of appeals emphasized that the courts deciding the prior cases "did not address the validity of the amended regulations," and it stated that petitioners' current challenge to those regulations "raises an entirely different issue." *Ibid.*

To the extent that the other circuits had suggested that any Treasury Regulation clarifying the meaning of the term "student" in Section 3121(b)(10) is necessarily invalid because that term has an established common meaning, the court of appeals rejected that approach. Pet. App. 9a-11a. The court observed that this Court has frequently upheld Treasury Regulations interpreting terms that have a plain or common meaning in other contexts on the ground that their meaning as used in tax statutes is not clear. *Id.* at 11a. The court of appeals noted that Section 3121(b)(10) further requires that the

student be "enrolled and regularly attending classes." *Ibid.* In the court's view, that phrase is susceptible to an interpretation that "limits the student exception to services that are subordinate to the student's educational activities." *Ibid.* Stressing that "words must be construed in context," the court held that "the statute is silent or ambiguous on the question" whether residents working full-time are "student[s]." *Id.* at 12a.

The court of appeals next held that the amended regulations' definition of the term "student" as excluding individuals who work full-time "is a permissible interpretation of the statute." Pet. App. 12a. Examining the history of the FICA exemptions, including the legislative record surrounding their enactment and amendment, the court concluded that the "exceptions were directed to part-time workers," and that "the full-time employee limitation in the amended regulation is [therefore] consistent with the origin and purpose of the student exception." *Id.* at 15a. The court also noted that the Commissioner of Internal Revenue has consistently taken the position that the "student" exception does not encompass full-time employees. *Id.* at 17a. The court further observed that, although the courts in *Apfel* and *Mayo I* had applied the prior "regulation in a contrary manner, * * * the Commissioner responded with amended regulations more specifically articulating the underlying policy." *Ibid.* Relying on this Court's repeated holdings that "agencies may validly amend regulations to respond to adverse judicial decisions, * * * so long as the amended regulation is a permissible interpretation of the statute" (*id.* at 17a-18a), the court of appeals concluded that the amended Treasury Regulations are valid. *Id.* at 19a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Indeed, the court below is the first and only court of appeals to address the validity of the full-time employee rule contained in the amended Treasury Regulations. This Court's review is not warranted.

1. As the court of appeals correctly held (Pet. App. 8a-19a), the amended regulations' full-time employee rule is a permissible interpretation of the "student" exception to FICA tax in 26 U.S.C. 3121(b)(10). The statute does not unambiguously resolve the question whether a full-time worker may qualify as a "student * * * enrolled and regularly attending classes," *ibid.*, and the Treasury Department reasonably resolved that ambiguity by determining that a full-time worker does not qualify, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). The amended regulation is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See Pet. App. 8a (quoting *Chevron*, 467 U.S. at 842-843); *id.* at 8a-19a (applying *Chevron* to the issue in this case).

First, the statute does not clearly resolve whether a full-time employee may qualify as a "student." See Pet. App. 8a-12a. Although the term can have a broader meaning, the word "student" is most commonly used to refer to a pupil receiving formal instruction in an academic setting, not a full-time employee who learns by doing. See, *e.g.*, *Random House Webster's Unabridged Dictionary* 1888 (2d ed. 2001) ("a person formally engaged in learning, esp. one enrolled in a school or college; pupil"). That understanding is reinforced by the surrounding statutory language, which requires that the individual be "enrolled" at a "school, college, or univer-

sity." 26 U.S.C. 3121(b)(10). And by requiring that the individual be "*regularly* attending classes," *ibid.* (emphasis added), that surrounding language also suggests the appropriateness of a temporal limit on the number of hours that the individual may work. The possibility that the term "student" does not include full-time workers is also supported by the overarching purpose of FICA, because exempting full-time workers from FICA taxes would undermine the statutory goal of collecting contributions during an employee's entire working career in order to fund benefits in retirement.

Second, the Treasury Department's determination that the "student" exception does not apply to full-time employees is reasonable. See Pet. App. 12a-19a. As just discussed, that limitation is consistent with the surrounding statutory language and furthers FICA's underlying goals. Moreover, as the court of appeals observed, the full-time employee limitation "is consistent with the origin and purpose of the student exception." *Id.* at 15a. The legislative record surrounding the enactment and amendment of the FICA exemptions demonstrates that Congress intended to exempt only "part-time" or "intermittent" work, for "nominal" wages, where the attendant loss of benefits is inconsequential and not worth the trouble of administration. See H.R. Rep. No. 728, 76th Cong., 1st Sess. 18 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 19 (1939); see also H.R. Rep. No. 1300, 81st Cong., 1st Sess. 12 (1949); S. Rep. No. 1669, 81st Cong., 2d Sess. 15 (1950). And, as the court of appeals also observed, "the historical record reflects a consistent substantive policy" (Pet. App. 17a) of not extending the exception to full-time employees. See also *Johnson City Med. Ctr.* v. *United States*, 999 F.2d 973 (6th Cir. 1993) (upholding a Revenue Ruling

interpreting the parallel student nurse exception as precluding full-time employment).

2. Contrary to petitioners' contention (Pet. 12-16), the Eighth Circuit's decision in this case—the first and only appellate decision to address the validity of the amended regulations' full-time employee rule—does not conflict with the decision of any other court of appeals.

As the court below explained, the decisions on which petitioners rely for their claim of conflict "did not address the validity of the amended regulations." Pet. App. 9a n.2. See, *e.g.*, *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 25 n.2 (2d Cir. 2009) (*Sloan-Kettering*) (noting that, because the amended regulation was not applicable to the tax periods at issue, the court "d[id] not apply or consider it"); *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 568 (7th Cir. 2008) (noting that "the new regulation is not applicable here"). Instead, those "decisions held only that the statute *as construed in the prior regulations* precluded the government's contention that payments to medical residents [were] *categorically* ineligible for the student exception." Pet. App. 9a n.2. The courts that issued those decisions expressly relied on the fact that the prior regulations mandated a fact-specific, case-by-case approach for determining student status. See *Sloan-Kettering*, 563 F.3d at 27-28; *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009); *University of Chi. Hosps.*, 545 F.3d at 568; *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 n.2 (11th Cir. 2007) (*Mount Sinai*).

Petitioners nonetheless contend that the decisions of the other circuits conflict with the decision below because some of the earlier decisions stated that the text of 26 U.S.C. 3121(b)(10) is "not ambiguous." Pet. 12

(quoting *Mount Sinai*, 486 F.3d at 1251). But even if some statements in the earlier cases were inconsistent with the analysis of the court below, such inconsistency would not warrant this Court's intervention because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). In any event, there is no conflict between the statements in the earlier cases and the decision of the court of appeals here. In describing the statute as "not ambiguous," the courts in the prior cases meant only that the statute unambiguously "does not limit the *types* of services that qualify for the exemption" and therefore does not categorically exempt medical residents *qua* medical residents. *Mount Sinai*, 486 F.3d at 1251-1252 (emphasis added); see *University of Chi. Hosps.*, 545 F.3d at 567 (agreeing with *Mount Sinai*); *Sloan-Kettering*, 563 F.3d at 27 (agreeing with *Mount Sinai* and *University of Chi. Hosps.*); *Detroit Med. Ctr.*, 557 F.3d at 417 (relying on *Mount Sinai*). The earlier decisions expressed no opinion on the question addressed by the court below—whether the term "student" includes *full-time employees*. The courts that issued those decisions had no occasion to address that question because the Treasury Regulations in effect at the time did not treat full-time employees as categorically excluded from the student exception.[1]

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[1] Petitioners are also incorrect in contending that "[t]he government itself has acknowledged the existence of [a] conflict" between the decision below and the earlier cases. Pet. 15. The quotation on which petitioners base that contention is from the government's opening brief in the University's appeal in this case. Because that brief preceded the decision below, the government's statement cannot possibly be conceding a conflict. The quotation from the government's brief simply acknowledges that earlier cases had rejected the government's argument

Petitioners are also wrong in contending (Pet. 16) that the decision below will cause taxpayers in different parts of the country to be subject to different FICA tax obligations. All services performed on or after April 1, 2005, are governed by the new regulations, which provide that full-time employees are ineligible for the "student" exception. That full-time employee rule applies to taxpayers in every judicial circuit. Because no other court has addressed the validity of the amended Treasury regulations, there is no basis for concluding that similarly-situated medical residents who perform full-time employment in other circuits will be exempt from FICA taxes.[2]

3. Petitioners' contention (Pet. 17-18) that the decision below conflicts with *Chevron* is likewise without merit. As discussed above (see pp. 10-12, *supra*), the court of appeals correctly applied the *Chevron* analysis to the issue presented in this case. In any event, petitioners' assertion that the court below "misapplie[d]" (Pet. 17) that settled framework in this particular case does not warrant the Court's review.

Petitioners' contention that the court of appeals adopted an "extreme level of deference to tax regula-

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that medical residents as an occupational class are per se ineligible for the student exception. See 08-2193 Gov't C.A. Br. 42 n.7.

[2] Taxpayers throughout the country are also now subject to a uniform rule for services performed before April 1, 2005. On March 2, 2010, the Internal Revenue Service announced that it had made an administrative determination to accept the position (reflected in the decisions of the Second, Sixth, Seventh, and Eleventh Circuits on which petitioners rely) that medical residents are exempt from FICA taxes for tax periods covered by the prior regulations. See I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf.

tions" is mistaken. Pet. 18. The court simply observed that the complexities of the Internal Revenue Code frequently give rise to a need for regulatory interpretation, even of terms that have a common meaning in other contexts. Pet. App. 10a-12a. That observation is borne out by numerous decisions of this Court upholding regulatory definitions of statutory terms that had ostensibly common meanings. See *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 559-561 (1991) ("disposition of property"); *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476 (1979) ("business league"); *United States* v. *Correll*, 389 U.S. 299, 304 (1967) ("meals and lodging . . . away from home"); *Magruder* v. *Washington, Balt. & Annapolis Realty Corp.*, 316 U.S. 69, 73 (1942) ("carrying on or doing business"); *Helvering* v. *Reynolds*, 313 U.S. 428, 433 (1941) ("acquisition").

Contrary to petitioners' implication (Pet. 18), the court of appeals did not suggest that Treasury regulations may never be invalidated as contrary to plain statutory language. Indeed, the court acknowledged that they may, citing decisions of this Court that had invalidated regulations on that basis. Pet. App. 11a (citing *Knight* v. *Commissioner*, 552 U.S. 181 (2008), and *Maass* v. *Higgins*, 312 U.S. 443 (1941)). The court of appeals simply (and correctly) concluded that the regulations at issue here are not contrary to FICA but are instead a permissible interpretation of ambiguous statutory language.

4. As petitioners note (Pet. 20), the application of the student exemption is an issue of significant administrative and fiscal importance to the Treasury, involving as much as $700 million annually in FICA taxes for medical residents alone. The court below decided that issue

correctly, upholding the full-time employee rule, which provides an easily administrable bright-line test. That rule resolves the uncertainty and controversy over the application of FICA taxes that was generated by the decision in *Apfel*. The rule is consistent with the statutory language, and it gives effect to Congress's intent to exempt from FICA coverage only employment that generates nominal wages and exemption of which will not result in a significant loss of Social Security and Medicare benefits. Because the court of appeals' decision upholding the full-time employee rule does not conflict with any decision of this Court or any other court of appeals, this Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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