No. 09-837

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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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, 26 U.S.C. 3101 *et seq.* The question presented is as follows:

Whether a Treasury regulation providing that full-time employees are not "students" for purposes of that exemption, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii), is valid.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 14
Argument:
The Treasury Regulations reasonably interpret FICA's student exemption as not encompassing full-time employees 19
A. The full-time employee rule reflects a reasonable interpretation of the student exemption 20
1. The statutory text supports the full-time employee rule 20
2. The statutory context supports the full-time employee rule 23
3. The legislative history supports the full-time employee rule 24
4. The full-time employee rule advances FICA's purposes 27
5. The full-time employee rule is consistent with the Treasury's longstanding interpretation of the student exemption 30
B. Contrary to petitioners' contentions, the full-time employee rule is reasonable and consistent with the statutory text 34
C. The student exemption does not unambiguously encompass petitioners' medical residents 38
1. FICA's historical development indicates that residents are not covered by the student exemption 39
2. Petitioners' additional arguments are unpersuasive 42

Table of Contents—Continued: Page

D. Petitioners' reliance on *National Muffler* is misplaced 50
Conclusion 56
Appendix – Relevant statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

American Hosp. Ass'n v. *NLRB*, 499 U.S. 606 (1991) ... 34
Atlantic Mut. Ins. Co. v. *Commissioner*, 523 U.S. 382 (1998) 51
Bingler v. *Johnson*, 394 U.S. 741 (1969) 24
Board of Curators v. *Horowitz*, 435 U.S. 78 (1978) 48
Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999) 49
Brown Univ., 342 N.L.R.B. 483 (2004) 49
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 12, 14, 20, 50, 52, 53
Cottage Savings Assn. v. *Commissioner*, 499 U.S. 554 (1991) 51
Field v. *Commissioner*, 680 F.2d 510 (7th Cir. 1982) 46
Helvering v. *Davis*, 301 U.S. 619 (1937) 27
Johnson City Med. Ctr. v. *United States*, 999 F.2d 973 (6th Cir. 1993) 27
Lopez v. *Davis*, 531 U.S. 230 (2001) 34
Minnesota v. *Apfel*, 151 F.3d 742 (8th Cir. 1998) ... 7, 8, 30
National Cable & Telecomm. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 52, 53
National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 (1979) 18, 50, 51, 52

Cases—Continued: Page

Physicians Nat'l Housestaff Ass'n, 7 F.L.R.A. 434 (1981) 49
Regents of the Univ. of Cal. v. *Public Employment Relations Bd.*, 715 P. 2d 590 (Cal. 1986) 49
Regents of the Univ. of Mich. v. *Ewing*, 474 U.S. 214 (1985) 48
Rowan Cos. v. *United States*, 452 U.S. 247 (1981) 30
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 52, 53
Social Sec. Bd. v. *Nierotko*, 327 U.S. 358 (1946) 24
St. Luke's Hosp. Ass'n v. *United States*, 333 F.2d 157 (6th Cir. 1964), cert. denied, 379 U.S. 963 (1965) 40
Swallows Holding, Ltd. v. *Commissioner*, 515 F.3d 162 (3d Cir. 2008) 51
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 44
United States v. *Boyle*, 469 U.S. 241(1985) 34, 51
United States v. *Centennial Sav. Bank FSB*, 499 U.S. 573 (1991) 24
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 30, 51
United States v. *Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009) 50
United States v. *Lee*, 455 U.S. 252 (1982) 24, 27, 34
United States v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997 (D. Minn. 2003) 3, 6, 8
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 50
United States v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19 (2d Cir. 2009) 41, 50

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United States v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007) 40, 50
United States v. *Silk*, 331 U.S. 704 (1947) 24
United States v. *Wells Fargo Bank*, 485 U.S. 351 (1988) 24
United States Trust Co. v. *Helvering*, 307 U.S. 57 (1939) 24
University Hosp. v. *State Employee Relations Bd.*, 587 N.E.2d 835 (Ohio 1992) 49
University of Chi. Hosps. v. *United States*, 545 F.3d 564 (7th Cir. 2008) 50

Statutes and regulations:

Federal Insurance Contributions Act, 26 U.S.C. 3101 *et seq.* 2
26 U.S.C. 3101 ..... 2, 20, 28, 1a
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26 U.S.C. 3121(a) 20
26 U.S.C. 3121(b) 2, 20
26 U.S.C. 3121(b)(6)(B) 42, 48, 49
26 U.S.C. 3121(7)(C)(ii) 42, 48, 49
26 U.S.C. 3121(b)(8)(B) (1964) 42
26 U.S.C. 3121(b)(10) ..... *passim*
26 U.S.C. 3121(b)(13) 26
Internal Revenue Code (26 U.S.C.):
26 U.S.C. 6110(k)(3) 54
26 U.S.C. 7805(a) 51

Statutes and regulations—Continued: Page

Internal Revenue Code of 1954, ch. 736, § 3121(b)(11)(B), 68A Stat. 422 31
National Labor Relations Act, 29 U.S.C. 152(3) 49
Old-Age, Survivors, and Disability Amendments of 1965, Pub. L. No. 89-97, Tit. III, 79 Stat. 361:
§ 311(b)(1), 79 Stat. 381 42
§ 311(b)(4), 79 Stat. 381 42
§ 311(b)(5), 79 Stat. 381 39
§ 317(b)(3), 79 Stat. 389 42
Social Security Act, 42 U.S.C. 301 *et seq.* 6
42 U.S.C. 410(a)(6)(B) 49
42 U.S.C. 410(a)(6)(D)(ii) 49
42 U.S.C. 410(a)(10) 7
42 U.S.C. 418 7
Social Security Act Amendments of 1939, ch. 66, § 606, 53 Stat. 1385 24
26 U.S.C. 1426(b)(10)(A) (1940) 6, 26
26 U.S.C. 1426(b)(10)(E) (1940) 6, 26
26 U.S.C. 1426(b)(13) (1940) 39
Social Security Act Amendments of 1950, ch. 809, § 204(b)(11)(B), 64 Stat. 531 (26 U.S.C. 1426(b)(11)(B)(1952)) 26
Social Security Amendments of 1954, ch. 1206, § 205(b), 68 Stat. 1091 31
Social Security Amendments of 1972, Pub. L. No. 92-603, § 129(a)(1), 86 Stat. 1359 31
5 U.S.C. 5102 48
5 U.S.C. 5351(2)(A) 48

Statutes and regulations—Continued: Page

15 U.S.C. 37b(b)(1)(D) 48
38 U.S.C. 7405(a)(1)(D) 49
38 U.S.C. 7406(b) 49
20 C.F.R. 404.1028 7
26 C.F.R.:
Section 31.3121(b)(10)-2(c) (2004) 6
Section 31.3121(b)(10)-2(c) 10, 37
Section 31.3121(b)(10)-2(d) 6, 30, 43
Section 31.3121(b)(10)-2(d)(1) 43
Section 31.3121(b)(10)-2(d)(3)(i) 3, 9, 10, 32, 33
Section 31.3121(b)(10)-2(d)(3)(iii) 3, 10, 33
Section 31.3121(b)(10)-2(e), Example 4 10
Section 31.3121(b)(10)-2(f) 9
Section 404.1019 (Cum. Supp. 1952) 7
Section 408.219 (Cum. Supp. 1952) 6

Miscellaneous:

111 Cong. Rec. 16,106-16,107 (1965) 41
5 Fed. Reg. 787 (1940) 40
16 Fed. Reg. (1951):
p. 12,474 . . . . . 6, 30
p. 13,070 7
25 Fed. Reg. 13,051 (1960) 40
45 Fed. Reg. (1980):
20,074 7
20,082-20,083 7

Miscellaneous—Continued: Page

69 Fed. Reg. (2005):
p. 8604 ..... 32, 51
pp. 8604-8605 53
p. 8605 ..... 9, 25, 27, 32
p. 8606 9
pp. 8606-8607 ..... 25, 30
pp. 8606-8608 53
p. 8607 ..... 9, 27, 36
p. 8608 42
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H.R. Rep. No. 728, 76th Cong. 1st Sess. (1939) 6, 24, 25, 40
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I.R.S. Chief Couns. Advice 200029030 (July 21, 2000) 32, 39, 54
I.R.S. Chief Couns. Advice 200212029 (Mar. 22, 2002) 32, 45, 55
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I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf 55
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Miscellaneous—Continued: Page

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Teryl K. Nuckols et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, New Eng. J. of Med., May 21, 2009 ..... 46, 47

Rev. Proc. 98-16, 1998-1 C.B. 403 55

Rev. Rul. 66-285, 1966-2 C.B. 455 ..... 6, 31

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S. Rep. No. 1669, 81st Cong., 2d Sess. (1950) 26

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Soc. Sec. Acq. Rul. 98-5(8), 63 Fed. Reg. 58,446 (1998) ... 30

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T.D. 6190, 1956-2 C.B. 605 ..... 30, 40

T.D. 6983, 1969-1 C.B. 228 40

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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. The petition was filed on January 14, 2010, and was granted on June 1, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

This case concerns the validity of Treasury Department regulations governing the "student" exemption from coverage under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* To fund the Social Security and Medicare programs, FICA requires employers and employees to pay taxes on "wages" from "employment," broadly defined as "any service, of whatever nature, performed * * * by an employee." 26 U.S.C. 3101, 3102, 3111, 3121(b). FICA contains certain limited exceptions to that broad definition of "employment," including an exception for 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).

Treasury regulations have long interpreted that exemption as limited to individuals who are predominantly students and only secondarily or incidentally employees. Beginning in the late 1990s, however, litigation over the eligibility of medical residents for the exemption revealed confusion over how that limitation applies to full-time employees whose employment involves on-the-job training or otherwise has an educational component. In response, the Treasury Department amended its regula-

tions to provide that full-time employees do not qualify for the student exemption, even if their employment has an educational component. T.D. 9167, 2005-1 C.B. 261 (promulgating 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i) and (iii)). The court of appeals upheld the validity of that "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 Regents of the University of Minnesota (the University), sponsor programs for medical residents and fellows (collectively residents). Residents are physicians who have graduated from medical school and received M.D. degrees but are pursuing further training in a specialty or subspecialty. Pet. App. 2a, 22a n.2. A residency program generally lasts three to seven years. *United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1002 (D. Minn. 2003) *(Mayo I)*. After completing the program, a resident does not receive a degree, but rather obtains a certificate of completion and becomes eligible to take an examination for certification in a specialty or subspecialty. *Id*. at 1004-1005.

Residents are assigned to rotations during which they perform medical duties in various practice areas at Mayo's medical facilities and at hospitals and clinics affiliated with the University. Pet. App. 62a-63a; *Mayo I*, 282 F. Supp. 2d at 1003-1004. On their rotations, residents work between 50 and 80 hours per week treating patients. J.A. 76a, 114a-116a, 153a. Residents generally report to work early in the morning and leave in the evening, as dictated by patient needs. A workweek of between 75 and 80 hours is not uncommon. J.A. 30a, 72a, 97a-98a, 125a.

Under guidelines established in 2003 by the Accreditation Council for Graduate Medical Education (ACGME), residents may work no more than 80 hours per week and no more than 30 consecutive hours at any time. J.A. 106a-107a, 113a. After ACGME instituted the 80-hour limit, hospitals were forced to hire additional staff to provide patient care that residents could no longer provide. J.A. 113a-114a.

Residents are supervised by staff physicians, who hold faculty appointments at petitioners' medical schools. J.A. 45a, 61a. Residents are also supervised by more senior residents. J.A. 39a-40a, 53a, 123a, 178a-186a. Unlike medical students, residents present themselves to patients as doctors. J.A. 48a-49a, 68a, 110a-111a, 203a-204a. Residents initially treat patients under fairly close supervision by attending physicians and more senior residents. As they gain experience, however, residents assume extensive responsibilities and perform complicated procedures with minimal oversight. J.A. 99a-101a, 111a-112a, 134a-138a, 174a-186a. In some disciplines, attending physicians may spend only two to three hours per day at the hospital. J.A. 69a. At night, residents must take action, including potentially lifesaving steps, without significant opportunity to consult attending physicians. J.A. 36a, 67a-68a, 131a-132a.

Residents are responsible for a designated number of patients over the course of a shift. Residents' duties include obtaining medical histories, performing physical examinations, diagnosing medical problems, and serving on emergency call. J.A. 34a-37a, 38a-43a, 89a, 174a-186a, 194a-198a. Residents recommend plans of care, order laboratory tests, prescribe medications, and write progress notes on their patients without first consulting attending physicians. J.A. 34a-35a, 68a-69a, 87a-94a,

122a-123a, 132a, 194a-197a. Even relatively inexperienced residents perform physical examinations and procedures such as inserting intravenous devices, injecting local anesthesia, stitching wounds, performing CPR, using defibrillators, and executing lumbar punctures with no attending physician present, as long as one is on call. J.A. 40a-43a, 134a-135a. Residents continue to perform procedures after mastering them; indeed, a resident's refusal to perform a procedure that he has already learned "would result in major disciplinary action." J.A. 54a.

Residents are "essential to patient care." J.A. 58a. They serve on "code" teams and perform emergency procedures, such as intubating newborn infants in crisis. J.A. 42a-43a, 66a-68a, 94a-95a, 129a-130a, 137a-139a. A resident's diagnosis of a condition overlooked by an attending physician can save a life. J.A. 139a-142a.

In addition to their patient-care duties, residents attend weekly lectures, called grand rounds, and conferences for a few hours per week. Pet. App. 41a n.10, 63a. These formal educational activities, however, take up only 10%-15% of a resident's time. J.A. 50a, 72a, 82a, 114a-115a. Although residents are sometimes required to attend conferences, attendance can be excused because of patient-care responsibilities, which take precedence. Pet. App. 41a n.10; J.A. 107a, 119a, 128a.

Residents are compensated by "stipends" that increase with experience. During the second quarter of 2005, stipends ranged between $41,057 and $55,935 annually for Mayo's residents and between $43,647 and $55,679 for the University's residents. J.A. 22a, 172a. Petitioners also provide residents health insurance, malpractice insurance, and paid vacation time. The University provides its residents life and long-term disability

insurance, and Mayo gives its residents the opportunity to purchase that coverage. J.A. 199a-200a; *Mayo I*, 282 F. Supp. 2d at 1005 n.22.

2. FICA has included a "student" exemption since the enactment of the Social Security Act Amendments of 1939 (1939 Act), ch. 666, § 606, 53 Stat. 1384-1385 (26 U.S.C. 1426(b)(10)(A) and (E) (1940)). The legislative history accompanying the 1939 Act expressed the intent that the exemption would apply only where "the employment is part-time or intermittent and the total amount of earnings is only nominal." H.R. Rep. No. 728, 76th Cong., 1st Sess. 18 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 19 (1939). The Treasury has consistently interpreted the exemption as limited to individuals who are primarily students and only secondarily or incidentally employees. In 1951, the Treasury adopted a regulation stating that the exemption is limited to individuals whose employment services are "incident to and for the purpose of pursuing a course of study." 16 Fed. Reg. 12,474 (promulgating 26 C.F.R. 408.219 (Cum. Supp. 1952)). The requirement that services be "incident to" a qualifying individual's predominant activities as a student has remained in the regulations ever since. See, *e.g.*, 26 C.F.R. 31.3121(b)(10)-2(d); 26 C.F.R. 31.3121(b)(10)-2(c) (2004). In applying the predominance requirement, the Treasury has repeatedly indicated that the number of hours worked is an important factor and that full-time work is generally inconsistent with eligibility for the student exemption. See, *e.g.*, Rev. Rul. 78-17, 1978-1 C.B. 306; Rev. Rul. 66-285, 1966-2 C.B. 455; I.R.S. Gen. Couns. Mem. 37,252 (Sept. 14, 1977); I.R.S. Tech. Adv. Mem. 9332005 (Aug. 13, 1993).

The provisions of the Social Security Act, 42 U.S.C. 301 *et seq.*, describing what employment is covered for

benefits eligibility contain a student exception substantially identical to the tax exemption under FICA. 42 U.S.C. 410(a)(10). Like the Treasury's regulations, the regulations promulgated by the Social Security Administration (SSA) to implement that exception have, since 1951, interpreted it as limited to individuals who are predominantly students and whose employment is only incidental. See 16 Fed. Reg. at 13,070 (promulgating 20 C.F.R. 404.1019 (Cum. Supp. 1952) (limitation identical to limitation in Treasury regulations); 45 Fed. Reg. 20,074, 20,082-20,083 (1980) (revising language of limitation, now codified at 20 C.F.R. 404.1028, for stylistic purposes). In 1978, the SSA issued an interpretive ruling expressing its longstanding view that medical residents do not fall within the Social Security Act's student exception. Soc. Sec. Rul. 78-3, [1978-1979 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,641, at 2100, 1978 WL 14050 (SSR 78-3).

Apart from the isolated inquiry that prompted that 1978 SSA ruling, no one appears to have contended that residents are "students" eligible for the FICA and Social Security exceptions until the litigation that culminated in *Minnesota* v. *Apfel*, 151 F.3d 742 (8th Cir. 1998). *Apfel* involved the coverage under the Social Security Act of the University's residents during 1985 and 1986. Because the University is a state institution, those residents were not subject to FICA tax and were covered under the Social Security Act only if the State had elected to cover them by entering into an agreement under 42 U.S.C. 418. In *Apfel*, Minnesota and the SSA disputed whether the University's residents were "employees" covered under the terms of Minnesota's Section 418 agreement. The court of appeals held that the residents were not "employees" under the agreement.

151 F.3d at 745-747. Alternatively, the court concluded that the residents were excluded from the agreement because they qualified for the student exception to the Social Security Act. *Id.* at 747-748. In reaching that conclusion, the court rejected "[t]he bright-line rule" advanced by the SSA in SSR 78-3 as "inconsistent" with the SSA's regulation, which the court viewed as calling for a "case-by-case" determination of student status. *Id.* at 748.

The decision in *Apfel* triggered an "avalanche" of litigation. Pet. App. 3a. Sponsors of residency programs filed more than 7000 claims seeking refunds of FICA taxes they had paid on residents' wages, asserting that the residents were covered by FICA's student exemption. *Id.* at 4a. One refund action was brought by petitioner Mayo. *Mayo I*, *supra*. In ruling for petitioner, the district court rejected the Treasury's contention that residents are categorically ineligible for the FICA student exemption. The court held that, under the Eighth Circuit's decision in *Apfel*, the Treasury regulations implementing the FICA exemption, like the SSA's regulations implementing the Social Security Act exception, should be construed to require a case-by-case examination of student status. *Mayo I*, 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 exemption. *Id.* at 1015-1018.

3. The litigation generated by the *Apfel* decision prompted the Treasury to reassess its regulations governing the student exemption. In 2004, the Treasury issued a notice of proposed rulemaking, which explained that the litigation had revealed the need for "additional clarification" regarding "whether certain employees performing services in the nature of on the job training

have the status of a student who is enrolled and regularly attending classes for purposes of section 3121(b)(10)." 69 Fed. Reg. 8605. The Treasury noted that, under the "incident to" provision of its existing regulations, "to qualify for the exception, the individual's predominant relationship with the [school, college, or university] must be as a student, and only secondarily or incidentally as an employee." *Id.* at 8607. The Treasury proposed regulations that would clarify that a full-time employee (*i.e.*, an individual whose normal work schedule is 40 or more hours per week) does not meet the predominant relationship requirement because full-time employees "have filled the conventional measure of available time with work, and not study," and "are earning wages at a level that exceeds Congress's intended scope for the student FICA exception." *Ibid.*; see *id.* at 8606 (citing the 1939 Act legislative history). The Treasury observed that "[r]esolution of this issue has significant social security benefits and FICA tax implications," noting the SSA's concern that exempting residents could deprive them of needed disability and survivorship benefits. *Id.* at 8605.

After receiving comments and holding a public hearing, the Treasury amended its regulations. 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 status as a "student * * * enrolled and regularly attending classes," 26 U.S.C. 3121(b)(10), is limited to those 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 state explicitly 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." *Ibid.* The regulations also clarify 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 the determination whether an employee satisfies the predominance requirement is generally based upon all the relevant facts and circumstances, 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i), 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 regulations include 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 accompanying discussion explains that, as a full-time employee, the resident is ineligible for the student exemption, even though some of the services he performs have an educational or training aspect. 26 C.F.R. 31.3121(b)(10)-2(e), Example 4.[1]

4. After the amended regulations took effect, petitioners brought suits in the District Court for the Dis-

[1] The amended regulations also clarify that an employer is not a "school, college, or university" unless its "primary function" is the presentation of formal instruction. 26 C.F.R. 31.3121(b)(10)-2(c). Although Mayo challenged that provision in the district court, the court of appeals found it unnecessary to address the provision's validity. Pet. App. 19a. Accordingly, that issue is not before this Court.

trict of Minnesota, challenging the validity of the regulations and seeking refunds 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 suit (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 concluded that the full-time employee rule is not "a permissible and reasonable interpretation" of Section 3121(b)(10) because the rule is inconsistent with the unambiguous meaning of the word "student." Pet. App. 38a. The court stated 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 reasoned 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." *Ibid.*

The district court determined 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." Pet. App. 40a. The court found that the Treasury's regulatory approach was impermissible because it "ignores the educational aspect of student services" and "denies 'student' status to medical residents even though the services they provide are primarily for educational purposes and

essential to becoming fully qualified physicians." *Ibid.* Because the court had already determined in *Mayo I* that Mayo's residents qualified as students under the prior regulations, it ruled that Mayo was entitled to a refund of $1,676,118 in FICA taxes. *Id.* at 41a, 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. It then held, on a summary judgment record, that the University's residents qualified for the student exemption under the prior regulations. *Id.* at 55a-65a. Accordingly, the court awarded the University a refund of $1,094,803. *Id.* at 65a.

5. The court of appeals reversed the district court's judgments. Pet. App. 1a-19a. The court 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 noted that "four of [its] sister circuits have recently declared, in cases arising under the former regulations, that the student exception is unambiguous and 'does not limit the types of services that qualify for the exemption.'" *Id.* at 9a (citation omitted). 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 stressed that the decisions "did not address the validity of the amended regulations," explaining that petitioners' 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 10a-11a. The court of appeals noted that Section 3121(b)(10) further requires that the student be "enrolled and regularly attending classes." *Id.* at 11a. In the court's view, Section 3121(b)(10) 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 a medical resident working for the school full-time is a 'student who is enrolled and regularly attending classes' for purposes of [Section] 3121(b)(10)." *Id.* at 12a.

The court of appeals next held that the amended regulation "is a permissible interpretation of the statute." Pet. App. 12a. Examining the history of the FICA exemptions, the court concluded that they "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 Treasury regulations have included the "incident to" requirement for more than 50 years, that petitioners had not challenged its validity, and that the Treasury has consistently interpreted that requirement as not encompass-

ing full-time employees. *Id.* at 15a, 17a, 18a. 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." *Id.* at 17a. 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 "full-time employee" rule is valid (*id.* at 19a).

SUMMARY OF ARGUMENT

The Treasury Department's regulations reasonably construe the student exemption from FICA tax in 26 U.S.C. 3121(b)(10) as not encompassing full-time employees, even if their remunerative work has a training or educational component. The court of appeals correctly upheld that full-time employee rule under *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837 (1984).

A. Under Section 3121(b)(10), service performed in the employ of a "school, college, or university" is excluded from FICA's definition of "employment" 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). Section 3121(b)(10)'s reference to "service performed by a student" indicates that an individual's status as a student does not depend on the activity he is performing at a given moment, but is instead determined as a general matter, based on the individual's predominant activities during a larger period of time. And the requirement that the student "regularly" attend classes implies a limit on the amount

of time that a qualifying individual may spend on other, non-student activities, including work.

The text of Section 3121(b)(10) also suggests that an individual may not qualify as a "student" based on the educational or training value of his employment. Although the term "student" can sometimes broadly refer to anyone engaged in any manner of study or learning, it is more commonly used to refer to someone engaged in formal, academic instruction. The surrounding text—which requires that the student be "enrolled and regularly attending classes at [a] school, college, or university"—suggests that Section 3121(b)(10) uses "student" in that narrower sense, which does not naturally encompass a full-time employee serving an apprenticeship or receiving on-the-job-training. That interpretation of "student" is also more consistent with ordinary usage. One would not customarily use the term "student" to describe a judge's law clerk or an architect who interns at a firm as a prerequisite to independent licensure, even though those employees certainly learn from their work.

Construing the student exemption narrowly so as not to encompass full-time employees is also consistent with this Court's repeated recognition that coverage under FICA and the Social Security Act should be construed expansively and exemptions from taxation should be construed narrowly. The legislative history also supports the rule. The relevant committee reports make clear that Congress viewed the student exemption as an administrative convenience that would not meaningfully affect tax receipts or Social Security benefits, and the reports state that the exemption applies only to individuals engaged in part-time or intermittent work. Excluding full-time employees from the student exemption also

advances FICA's purposes by ensuring that full-time employees pay FICA taxes on their compensation and earn credit toward benefits throughout their working lives. It thereby promotes the fiscal soundness of the Social Security and Medicare programs, while reducing the risk that affected workers and their families will be left without needed benefits in the event of death or disability.

Based on many of these same considerations, the Treasury has long interpreted the student exemption as limited to individuals who are predominantly students and only incidentally employees. Although the Treasury historically relied on a case-specific examination of all the facts and circumstances to determine whether the predominance limitation was satisfied, it consistently stressed that the number of hours worked was an important consideration and that full-time work is generally inconsistent with student status. Litigation spawned by the *Apfel* decision, however, revealed confusion about how the predominance requirement applies to full-time employees whose work has a training or educational component. That litigation also revealed the administrative difficulties in using a case-by-case approach to determine student status in all circumstances. The Treasury responded by amending its regulations to adopt the full-time employee rule. That rule reasonably addresses a recurring factual situation in a manner consistent with the statute's language, context, purpose, and history, and with the Treasury's longstanding interpretation of the student exemption. The court of appeals therefore correctly deferred to the rule under *Chevron*.

B. Petitioners contend that the full-time employee rule is inconsistent with the "plain meaning" of the word "student," which petitioners construe as encompassing

all persons engaged in any manner of study or learning. But although the word "student" *can* be used in the expansive manner that petitioners advocate, the word is more often used in a narrower sense that excludes full-time employees who are learning on the job. Petitioners' broad construction, moreover, would lead to results that Congress could not have intended. Any employee of a school, college, or university—from the president to a member of the admissions staff—could exempt himself from FICA tax by enrolling in evening classes. And individuals who ought to be treated equivalently for FICA coverage would be treated inconsistently. Architects, engineers, and surveyors serving internships at professional firms as a prerequisite for licensure would not qualify for the student exemption because they do not work for schools, colleges, or universities. Even some medical residents would not qualify for the exemption if their hospitals were not considered schools, colleges, or universities. But residents employed by schools, colleges, and universities would qualify.

C. Petitioners' contention that their medical residents unambiguously qualify for the student exemption is also inconsistent with FICA's historical development, which strongly suggests that the exemption does not encompass medical residents. When Congress enacted the student exemption, it also enacted an exemption for medical interns, and it made a considered decision not to include residents in that exemption. Both the enactment of the intern exemption and the decision to exclude residents from its coverage would have been pointless if the student exemption already excluded residents (and thus interns) from FICA coverage. Moreover, in 1965, Congress repealed the intern exemption, along with several other exemptions that applied to doctors, in an effort to

ensure that Social Security coverage would extend to doctors at all stages of their careers after medical school. That legislation would not have achieved Congress's goals if residents were excluded from coverage under the student exemption.

In addition to ignoring these statutory developments, petitioners' arguments that their residents are unambiguously "students" are flawed on their own terms. Most notably, petitioners ignore the fact that residents spend the vast majority of their time—50 to 80 hours a week—treating patients in exchange for a substantial salary and employee benefits. Petitioners also ignore the facts that residents frequently perform complex and sometimes life-saving medical procedures with minimal supervision and that for many hours of each day they are the only physicians directly treating patients.

D. Petitioners are wrong in contending that the full-time employee rule is invalid because it fails to satisfy a multi-factor test set out in *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979). *National Muffler* has been superseded by *Chevron*, and most of the *National Muffler* factors on which petitioners rely are not relevant under *Chevron*. Moreover, although petitioners characterize the full-time employee rule as novel, the rule is simply a refinement of the Treasury's longstanding view that the student exemption encompasses only those who are predominantly students, and the rule is consistent with the historical understanding of both taxpayers and the government that residents do not qualify for the student exemption.

ARGUMENT

THE TREASURY REGULATIONS REASONABLY INTERPRET FICA'S STUDENT EXEMPTION AS NOT ENCOMPASSING FULL-TIME EMPLOYEES

Since FICA's student exemption was enacted, the Treasury has interpreted it as limited to individuals who are predominantly students and only incidentally employees. In response to uncertainty about how that predominance requirement applies to full-time employees (such as medical residents) whose employment has a training or educational aspect, the Treasury amended its regulations to make clear that the exemption does not cover such workers.

The Treasury's conclusion that petitioners' residents fall outside the student exemption rests on three subsidiary determinations. First, consistent with the Treasury's longstanding view, the amended regulations state that, when an individual both pursues a course of study and performs remunerative work for his school, college, or university, the applicability of the student exemption turns on whether the course-of-study or the service component of the relationship between the individual and the school predominates. Second, the amended regulations clarify that, in conducting the predominance inquiry, the Treasury does not attach weight to the fact that particular remunerative work may itself have an educational or training element. Third, the amended regulations establish a bright-line rule that full-time employees categorically fall outside the student exemption.

As the court of appeals recognized, the Treasury's regulatory approach is valid and entitled to deference if the pertinent statutory provision is "ambiguous with

respect to the specific issue" and the regulation "is based on a permissible construction of the statute." Pet. App. 8a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)). Although 26 U.S.C. 3121(b)(10) does not directly address the proper treatment of full-time employees who learn through on-the-job training, the statute's text, context, history, and purpose all support the reasonableness of the Treasury's interpretation. Accordingly, the court of appeals correctly deferred to the full-time employee rule under *Chevron*.

A. The Full-Time Employee Rule Reflects A Reasonable Interpretation Of The Student Exemption

1. The statutory text supports the full-time employee rule

FICA requires all employers and employees to pay taxes on "wages" from "employment," 26 U.S.C. 3101, 3111, and it defines those terms in sweeping language. "Wages" include "all remuneration for employment," subject only to certain specified exceptions. 26 U.S.C. 3121(a). And "employment" includes "any service, of whatever nature, performed * * * by an employee for the person employing him," again subject only to limited exceptions. 26 U.S.C. 3121(b). Because employment includes "any service, of whatever nature," it plainly encompasses service that has an aspect of training or learning. Such service is therefore subject to FICA unless a specific exemption applies.

As relevant here, FICA's definition of "employment" excludes 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). Section 3121(b)(10) does not directly ad-

dress the question whether the exemption encompasses full-time employees whose work provides them with training or other educational benefits. Analyzed closely, however, the statutory text supports the conclusion that the exemption does not encompass full-time employees, even if their employment has an educational or training aspect.

First, the phrase "service performed by a student" supports the Treasury's longstanding view that the exemption is limited to individuals who are predominantly students and only incidentally employees. If an individual's status as a "student" varied from moment to moment depending on the activity in which he was engaged at a given time—*e.g.*, if an undergraduate ceased to be a "student" during the hours that he spent working in the campus cafeteria or shelving books in the school library—Section 3121(b)(10)'s reference to "service performed by a student" would be an oxymoron. Section 3121(b)(10)'s evident assumption that "service" can be "performed by a student" makes sense only if the determination of "student" status is based on an individual's overall mix of activities during a relatively extended period of time. Once that premise is accepted, it is reasonable to conclude that a person qualifies as a "student" only if his activities in that capacity predominate.

That conclusion is reinforced by the statute's requirement that a student be "regularly" attending classes. That requirement implies that a qualifying individual will spend only a limited amount of time on other, non-student activities, including work. A predominance requirement is also supported by common usage of the word "student." One would not ordinarily refer to a CPA working full-time in a university's budgeting office as a "student," even if the accountant is also taking

classes at the university after work hours. Nor would one ordinarily refer to a full-time attorney in a university's general counsel's office as a "student," even if he attends classes at the university's law school in order to fulfill his continuing legal education requirements.

Second, the text supports the full-time employee rule's underlying premise that an individual cannot qualify as a "student" based on the fact that his employment has educational or training value. That premise is reflected in the phrase "service performed by a student," which indicates that the "service" performed "by" a qualifying individual is separate from the attributes that render him a "student." The premise is also inherent in the term "student" as it is used in Section 3121(b)(10). The term "student" can sometimes be used very broadly to refer to anyone engaged in any manner of study or learning. *E.g.*, *The Random House Dictionary of the English Language* 1888 (2d ed. 1987) ("any person who studies, investigates, or examines thoughtfully") (*Random House Dictionary*). But the term also has the narrower meaning of someone engaged in formal, academic instruction. See *ibid.* ("a person formally engaged in learning, esp. one enrolled in a school or college"); *The Oxford Universal Dictionary on Historical Principles* 2049 (3d ed. 1955) (*OUD*) ("[a] person who is undergoing a course of study and instruction at a university or other place of higher education or technical training"). The surrounding text suggests that Section 3121(b)(10) uses "student" in that more limited sense because it requires that the student be "enrolled and regularly attending classes at [a] school, college, or university." 26 U.S.C. 3121(b)(10). And the more limited meaning of "student"

does not naturally encompass a full-time employee who is receiving on-the-job training.[2]

Interpreting the word "student" to exclude full-time workers whose jobs have a training or educational aspect is also more consistent with ordinary usage. One would not generally use the term "student" to describe a judge's law clerk, even though the clerk undoubtedly learns from his work experience. Nor would one customarily use the term to describe an architect interning at a firm before he can be independently licensed. And most people (including most patients) would not use the word "student" to describe resident physicians—who have M.D. degrees and are eligible to become licensed physicians after one year of residency, and who serve on the front lines of patient care in numerous hospitals and emergency rooms. They would call the residents what they are—doctors.

2. The statutory context supports the full-time employee rule

FICA taxes are used to fund the important old-age, survivors, disability, and health insurance programs established by the Social Security Act. The coverage provisions of FICA and the Social Security Act parallel each other, and the Social Security Act includes a student exception that mirrors FICA's tax exemption. Because of the breadth of the terms "wages" and "employ-

[2] The broader structure of the exemption supports this conclusion. A student is not ordinarily paid for pursuing a course of study, and that activity, which establishes an individual's status as a student, therefore is not a concern of FICA. FICA instead covers services performed for wages. The distinction indicates that time spent in performing such services is not also an aspect of the individual's underlying status as a student, even if his employment has some training or educational features.

ment" that define coverage under both statutes, the specificity of the exemptions from coverage, and the importance of broad coverage to the Social Security Act's goals, this Court has long held that the statutory provisions should be construed in favor of coverage unless an exemption is clear. See *United States* v. *Silk*, 331 U.S. 704, 711-712 (1947); *Social Sec. Bd.* v. *Nierotko*, 327 U.S. 358, 365 (1946); see also *United States* v. *Lee*, 455 U.S. 252, 261 (1982).

More generally, the Court has consistently held that tax exemptions may not "rest upon implication," *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939), but "must be unambiguously proved," *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988). Accordingly, tax exemptions are "construed narrowly." *United States* v. *Centennial Sav. Bank FSB*, 499 U.S. 573, 583 (1991); see, *e.g.*, *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969). The longstanding principles that coverage under FICA and the Social Security Act should be construed expansively and that tax exemptions should be construed narrowly both support the construction of the student exemption embodied in the full-time employee rule.

3. The legislative history supports the full-time employee rule

The student exemption was originally enacted by the Social Security Act Amendments of 1939, ch. 66, § 606, 53 Stat. 1385 (1939 Act). The committee reports accompanying that legislation explain that the exemption was one of several designed "to eliminate the nuisance of inconsequential tax payments" without meaningfully affecting Social Security benefits. H.R. Rep. No. 728, 76th Cong. 1st Sess. 17 (1939) (*1939 House Report*);

S. Rep. No. 734, 76th Cong. 1st Sess. 19 (1939) *(1939 Senate Report*). The reports state that the exemptions were intended to apply only where "the employment is part-time or intermittent and the total amount of earnings is only nominal." *Ibid.*; *1939 House Report* 18.

As the Treasury recognized in the rulemaking that produced the full-time employee rule, the legislative history's description of the purpose and anticipated effect of the student exemption supports the conclusion that full-time employees do not qualify for the exemption even if their work provides them training or other educational benefit. 69 Fed. Reg. at 8606-8607. Petitioners' medical residents—who work between 50 and 80 hours a week and earn between $41,000 and $56,000 a year—well illustrate the point. Their employment is neither "part-time" nor "intermittent"; their earnings are not "nominal"; and the tax implications and benefit consequences of exempting such full-time workers would not be "inconsequential." The Treasury estimates that exempting medical residents alone would result in the loss of approximately $700 million a year in FICA tax revenues. And the SSA has stated that, given the long duration of many residencies, an exemption could "have a very significant effect" on the eligibility of residents and their families for disability and survivor benefits. *Id.* at 8605.

Contrary to petitioners' contention (Br. 37-39), the 1950 amendments to the student exemption do not undermine the full-time employee rule. As originally enacted in 1939, the student exemption was divided into two provisions, one that exempted services performed by students for tax-exempt organizations and another that exempted services performed by students at non-tax-exempt schools, if the quarterly remuneration did

not exceed $45. See 1939 Act § 606, 53 Stat. 1385 (26 U.S.C. 1426(b)(10)(A) and (E) (1940)). In 1950, when Congress consolidated the two provisions into one, it eliminated that fixed dollar cap on quarterly earnings. Social Security Act Amendments of 1950, ch. 809, § 204(b)(11)(B), 64 Stat. 531 (26 U.S.C. 1426(b)(11)(B) (1952)). The elimination of the $45 cap does not logically imply, however, that Congress intended to expand the scope of the exemption beyond "part-time or intermittent" work to full-time employees. Rather, Congress more likely eliminated the dollar cap because it concluded that the remaining language of the exemption already embodied a limitation to part-time work and that a fixed dollar cap was not a precise or sensible way to implement that limitation over the long term.[3]

The Treasury has also relied on the 1939 legislative history in interpreting a related FICA exemption, which was enacted at the same time as the student exemption and has never contained a fixed dollar cap. That other exemption excludes "service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law." 26 U.S.C. 3121(b)(13). The Treasury has long taken the view that

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[3] The committee reports accompanying the 1950 amendments describe the amended statute as "continu[ing]" the prior exemption. H.R. Rep. No. 1300, 81st Cong., 1st Sess. 12 (1949); S. Rep. No. 1669, 81st Cong., 2d Sess. 15 (1950). And the reports reiterate that the exemption is intended to "simplify administration without depriving a significant number of people of needed protection." *Ibid.*; H.R. Rep. No. 1300, at 12. Those statements refute petitioners' contention (Br. 38) that the 1950 amendments were intended to expand the student exemption to encompass full-time workers.

this student nurse exemption applies only when a nurse's "employment is substantially less than full-time." Rev. Rul. 85-74, 1985-1 C.B. 331, 332. That Revenue Ruling has been upheld as a reasonable interpretation of the student nurse exemption. *Johnson City Med. Ctr.* v. *United States*, 999 F.2d 973, 977 (6th Cir. 1993). The full-time employee rule is likewise a reasonable interpretation of the similarly-worded general student exemption.

4. The full-time employee rule advances FICA's purposes

a. FICA's goal is to collect contributions from employees throughout their working lives in order to fund benefits when workers retire or if they die or become disabled before retirement. See *Lee*, 455 U.S. 258-259 & n.7. Broad and continuous coverage of employees under FICA is essential to the fiscal vitality of the Social Security and Medicare programs, *id.* at 258-259, 261, and it enables the covered employees to qualify for important benefits, *Helvering* v. *Davis*, 301 U.S. 619, 641-644 (1937). The full-time employee rule advances FICA's purposes by ensuring that employees working full-time pay FICA taxes on their compensation and earn credit toward benefits throughout their working lives. The rule thereby promotes the fiscal soundness of the Social Security and Medicare programs while reducing the risk that affected workers who die or become disabled will not yet have qualified for benefits. See 69 Fed. Reg. at 8605, 8607.

Interpreting the student exemption to encompass full-time employees would undermine FICA's purposes. If the exemption covered persons who are not predominantly students, any employee of a school, college, or

university—from the president to a member of the admissions staff—could exempt himself from FICA tax throughout his career simply by enrolling in classes in his spare time. Interpreting the exemption to encompass apprenticeships and similar jobs that provide employees with professional training would likewise be inconsistent with FICA's purposes. Medical residencies are not the only apprenticeships affiliated with schools, colleges, and universities. Similar residencies are common in other health-related professions, including veterinary medicine. See U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *Bulletin 2800*, *Occupational Outlook Handbook* 403 (2010-2011 Library Ed.) (*OOH*). Plumbers and electricians also often begin their careers by serving apprenticeships that combine paid on-the-job-training with related classroom instruction. *Id.* at 642, 660. Excluding individuals from FICA coverage during extended periods (petitioners' own residency programs generally range from three to seven years, see p. 3, *supra*) when they are earning salaries for full-time work would reduce the funding available for the Social Security system and could deprive the exempted employees of needed benefits.

b. Petitioners' arguments (Br. 39-40) that the full-time employee rule conflicts with FICA's purposes rest on flawed foundations. Petitioners contend (Br. 39) that, because a physician must complete a residency in order to become certified in a desired specialty or subspecialty, the full-time employee rule inappropriately subjects residents to FICA tax before they have "embarked on their careers." The requirement that employers and employees pay FICA tax, however, depends not on whether a worker has begun a "career," but on whether he is earning "wages" from "employment." 26 U.S.C.

3101, 3111. Under petitioners' logic, any professional or skilled tradesperson who must serve an apprenticeship to qualify for licensure or independent practice ought to be exempt from FICA tax. But that has never been the rule. See Rev. Rul. 69-519, 1969-2 C.B. 185 (apprentices subject to FICA tax).

Nor could the student exemption (however broadly read) be interpreted to exempt all such employees from FICA. The exemption applies only to "service performed in the employ of * * * a school, college, or university" (and certain affiliated organizations). 26 U.S.C. 3121(b)(10). Many apprenticeships—including those served by architects, engineers, and surveyors to qualify for licensure—generally entail employment by firms or individuals rather than schools, colleges, or universities. See *OOH* 152, 158, 165. In any event, petitioners' contention that residents have not yet begun their medical careers ignores the fact that completion of a residency is not required for medical licensure. Instead, most States permit residents to become fully licensed after one year of practice. See Federation of State Med. Bds., *State-specific Requirements for Initial Medical Licensure* (July 2010), http://www.fsmb.org/usmle_eliinitial.html. Once licensed, residents can "moonlight" outside the residency as independent practitioners. J.A. 30a, 199a.

Petitioners are also wrong in arguing (Br. 39-40) that taxing residents under FICA is inappropriate because residents may not be eligible to earn Social Security benefit credits. That assertion is based on a reading of SSA regulations that is directly contrary to the SSA's own longstanding position. "The [SSA] has always held that resident physicians are not students" covered by the student exception in the Social Security Act. SSR

78-3, *supra*. When the Eighth Circuit disagreed with that position in *Minnesota* v. *Apfel*, 151 F.3d 742 (1998), the SSA declined to acquiesce in that ruling outside the Eighth Circuit, reiterating that "[u]nder SSA rules, the services performed by medical residents do not qualify for the student exclusion." Soc. Sec. Acq. Rul. 98-5(8), 63 Fed. Reg. 58,446 (1998). As petitioners themselves note (Br. 40), FICA and the Social Security Act are generally construed in pari materia unless there is a good reason for a divergent interpretation. See *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001); *Rowan Cos.* v. *United States*, 452 U.S. 247, 255 (1981). Accordingly, the SSA's longstanding position that medical residents are not encompassed by the Social Security Act's student exception supports the Treasury Department's conclusion that residents, as full-time employees, are not encompassed by FICA's student exemption.

5. The full-time employee rule is consistent with the Treasury's longstanding interpretation of the student exemption

The Treasury has long interpreted the student exemption as limited to individuals who are predominantly students and whose service as employees is secondary or incidental. See 69 Fed. Reg. at 8606-8607. In 1951, the Treasury adopted regulations limiting the exemption to individuals whose employment services are "incident to and for the purpose of pursuing a course of study," 16 Fed. Reg. at 12,474, and that requirement has remained in the regulations ever since. See T.D. 6190, 1956-2 C.B. 605, 653; T.D. 7373, 1975-2 C.B. 394, 397-398; T.D. 9167, 2005-1 C.B. at 264-265; 26 C.F.R. 31.3121(b)(10)-2(d). During that time, Congress has reenacted or amended

the student exemption several times without disapproving the Treasury's interpretation. See Internal Revenue Code of 1954, ch. 736, § 3121(b)(11)(B), 68A Stat. 422; Social Security Amendments of 1954, Pub. L. No. 54-761, ch. 1206, § 205(b), 68 Stat. 1091; Social Security Amendments of 1972, Pub. L. No. 92-603, § 129(a)(1), 86 Stat. 1359. Indeed, petitioners have not independently challenged the predominance requirement, see Pet. App. 18a, and the district court accepted its validity, see *id.* at 11a, 39a-40a, 64a-65a.

Historically, the Treasury generally determined whether an individual's student activities predominated by conducting a case-specific examination of all relevant facts and circumstances. In applying that approach, the Treasury repeatedly indicated that the number of hours worked is an important factor in determining whether an employee's services are "incident to" his activities as a student and that full-time work is generally inconsistent with student status. See Rev. Rul. 78-17, 1978-1 C.B. at 307 (concluding that services performed by students working "on a part-time basis" were "incident to" their courses of study, but that services performed by an individual "employed on a full-time basis" were not); Rev. Rul. 66-285, 1966-2 C.B. at 456 (stressing part-time nature of employment in concluding that services performed by work-study student were exempt); I.R.S. Gen. Couns. Mem. 37,252 (Sept. 14, 1977) (noting that "the primary concerns under the statute and regulations are the hours worked and the course load taken," and treating the fact that "employment is part-time rather than full-time" as an indication that the work is "incident to and for the purpose of pursuing the course of study"); I.R.S. Tech. Adv. Mem. 9332005 (Aug. 13, 1993) (stating that the critical question is "whether we are

dealing with a student who works or a worker who attends school," and that the "number of employment hours" is an important variable).

The litigation over the status of medical residents spawned by *Apfel* revealed two related inadequacies in the Treasury's traditional approach. First, the litigation revealed confusion about how the predominance requirement applies to full-time employees who are performing services "in the nature of on the job training." 69 Fed. Reg. at 8605. Second, when the Treasury was confronted with approximately 7000 refund claims in the wake of the *Apfel* litigation, it recognized that continued case-by-case analysis of all relevant facts and circumstances would entail an extraordinary administrative burden. See I.R.S. Chief Couns. Advice 200029030 (July 21, 2000) (giving detailed guidance to examining personnel on factual inquiries involved in processing claims) (2000 Advice); I.R.S. Chief Couns. Advice 200212029 (Mar. 22, 2002) (describing procedures adopted, including analyzing a representative sample of cases, to aid processing) (2002 Advice).

In response to those concerns, the Treasury conducted a notice-and-comment rulemaking that culminated in amended regulations. See 69 Fed. Reg. at 8604 (notice of proposed rule-making); T.D. 9167, *supra* (final rule). Those regulations reaffirm the Treasury's longstanding view that "[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be 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 regulations further clarify 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 regulations thus make clear that, in determining whether an individual's predominant status is that of a student, the relevant question is whether the individual is primarily engaged in study rather than remunerative work, not whether the principal benefit of the work is its educational or training value rather than the remuneration it provides. That approach accords with the fact that apprentices, law clerks, and similar workers are not commonly described as "students" even though a major benefit of their jobs is experience and training rather than money. The Treasury's approach to the predominance inquiry also alleviates the administrative difficulties that could arise from an attempt to compare, on a case-by-case basis, the pecuniary and educational benefits provided by a particular job.

As a general matter, the current Treasury regulations maintain in effect the prior understanding that "whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances." 26 C.F.R. 31.3121(b)(10)-2(d)(3)(i). In the application of that general approach, however, the regulations establish a bright-line rule that "[t]he services of a full-time employee are not incident to and for the purpose of pursuing a course of study." 26 C.F.R. 31.3121(b)(10)-2(d)(3)(iii). In that situation, the hours spent in employment are so significant under the facts and circumstances that they are dispositive. And the Treasury reasonably decided to adopt a categorical rule in light of the administrative burden that application of the facts-and-circumstances approach could entail, as well as the importance of workable rules for efficient

implementation of a broadly applicable tax like FICA, see *Lee*, 455 U.S. at 258-259.

This Court has repeatedly held that agencies may adopt categorical rules to address recurring issues of general applicability, as long as the rules are reasonable and consistent with the applicable statutes. *Lopez* v. *Davis*, 531 U.S. 230, 242-244 (2001); *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991); see also *United States* v. *Boyle*, 469 U.S. 241, 249 & n.8 (1985). The full-time employee rule satisfies that test. The rule accords with the Treasury's longstanding view that Section 3121(b)(10) is limited to individuals who are predominantly students and that hours worked is an important factor in assessing whether that limitation is met. As explained above, the rule is also supported by the statute's language, context, history, and purpose. Those considerations all indicate that Section 3121(b)(10) is reasonably read as a narrow exemption encompassing students who are performing incidental employment, such as students with part-time jobs that help fund their educations, rather than a broad exemption encompassing full-time employees who are engaged in incidental study, such as medical residents serving apprenticeships to advance their careers. The court of appeals correctly upheld that reasonable interpretation under *Chevron*.

B. Contrary To Petitioners' Contentions, The Full-Time Employee Rule Is Reasonable And Consistent With The Statutory Text

1. Petitioners contend (Br. 20-22) that the court of appeals should not have deferred under *Chevron* because the full-time employee rule "conflict[s] with the plain language of the Student Exemption." Br. 36. Petitioners argue that the word "student" in Section

3121(b)(10) "unambiguously" encompasses any "person who engages in 'study' by applying the mind 'to the acquisition of learning, whether by means of books, observation, or experiment.'" Br. 21-22 (quoting *OUD* 2049-2050). As discussed above, however, the term "student" does not necessarily have that broad meaning, which would encompass numerous employees (including university professors engaged in academic or scientific research) who would not ordinarily be considered "students." Instead, as demonstrated by the very dictionaries on which petitioners rely, the word "student" can have the more limited meaning of someone engaged in formal, academic instruction. See p. 22, *supra* (quoting *OUD* 2049 and *Random House Dictionary* 1888). That narrower meaning is entirely consistent with the Treasury's conclusion that, as used in Section 3121(b)(10), the term "student" does not encompass full-time employees engaged in on-the-job training or serving apprenticeships.

Petitioners also argue (Br. 22) that the statute "unambiguously" precludes limiting eligibility for the student exemption based on how much time an individual spends working because Section 3121(b)(10) contains no explicit language to that effect. As discussed above, however, a close reading of the statutory language supports limiting the exemption to individuals who are predominantly students and whose employment services are only incidental. See pp. 21-22, *supra*. Treasury regulations have long included a predominance requirement for eligibility for the student exemption—a requirement that petitioners have not challenge as a general matter. See Pet. App. 18a. And the Treasury's longstanding position is that hours worked are a significant factor in determining whether the requirement is satisfied. See

pp. 31-32, *supra*. In its recent rulemaking, the Treasury clarified that the predominance inquiry focuses on whether an individual's primary activity is study rather than remunerative work, not whether the principal benefit of the work is its training value rather than the remuneration it provides. See p. 32-33, *supra*. Based on those premises, the Treasury reasonably concluded that employees who work full-time are not predominantly students because they "have filled the conventional measure of available time with work, and not study," and they "are earning wages at a level that exceeds Congress's intended scope for the student FICA exception." 69 Fed. Reg. at 8607.

Acceptance of petitioners' view that anyone engaged in learning qualifies as a "student," no matter how much time that individual spends working, would lead to results that Congress could not have intended. University professors, admissions officers, and bookkeepers could exempt themselves from FICA by enrolling in evening classes. And individuals who ought to be treated equivalently for FICA coverage would be treated inconsistently. For example, most architects, engineers, and surveyors who are serving internships required for licensure would not qualify for the student exemption because their internships are generally served in the employ of firms or individuals rather than schools, colleges, or universities. See p. 29, *supra*. But it is not evident why Congress would have treated those individuals differently for FICA tax purposes than medical residents. Indeed, petitioners' position could lead to inconsistent treatment among residents themselves. Residents employed by schools, colleges, and universities would be exempt from FICA tax, but those em-

ployed by other facilities would not be exempt, even if their work was equally educational.[4]

2. Petitioners are also mistaken in contending (Br. 34-35) that the full-time employee rule is arbitrary. Petitioners first assert that the rule arbitrarily focuses on the "*amount* of time" that an individual spends learning whereas "the relevant issue is *what* the person does and *why*—not *how long* the person does it." Br. 34. As explained above, however, focusing on how much time an individual spends working is not arbitrary; it reflects statutory and policy considerations that justify construing the student exemption as limited to individuals who are predominantly students and only incidentally employees.

Petitioners next claim that the full-time employee rule draws an "insupportable distinction between students who learn through hands-on training and students who learn through classroom instruction and textbooks." Br. 35. But the statute expressly limits the exemption to students who are "regularly attending *classes*." 26 U.S.C. 3121(b)(10) (emphasis added). In any event, the full-time employee rule does not distinguish between students who learn through hands-on training and students who learn through classroom instruction. The rule

[4] In the courts below, Mayo advocated a broad definition of "school, college, or university" that would encompass most hospitals offering residency programs. See Pet. App. 32a-33a. That definition is contrary to the amended regulations, which define the phrase as encompassing only institutions whose "primary function" is the presentation of formal instruction. 26 C.F.R. 31.3121(b)(10)-2(c). The validity of that component of the regulations is not before this Court. See note 1, *supra*. But, if the Treasury's full-time employee rule were overturned, and both the terms "student" and "school, college, and university" were given the broad definitions that Mayo advocates, the student exemption would have an extraordinary sweep that Congress could not have intended.

instead distinguishes between individuals who are predominantly students and those who are paid, full-time employees.

The Treasury's determination that full-time employees are not transformed into students by the receipt of on-the-job training as part of their paid work, or because their work is otherwise educational, is entirely reasonable. That determination is consistent with the statutory language, which suggests that term "student" means someone engaged in formal, academic instruction rather than anyone engaged in learning. See pp. 22-23, *supra*. The Treasury's determination is also consistent with the exemption's limitation to employees of "school[s], college[s], and universit[ies]," 26 U.S.C. 3121(b)(10), which indicates that it is not intended as a broad exclusion for all apprentices and interns. And the Treasury's determination is consistent with FICA's purposes and the legislative history, both of which support limiting the student exemption to individuals working only part-time or intermittently.

C. The Student Exemption Does Not Unambiguously Encompass Petitioners' Medical Residents

Apart from their arguments that the full-time employee rule is arbitrary and inconsistent with the meaning of the word "student," petitioners devote comparatively little of their brief to addressing whether the rule reasonably interprets Section 3121(b)(10). Instead, petitioners primarily argue (Br. 19-33) that their medical residents unambiguously satisfy the definition of "student" that petitioners themselves have selected. Because the definition of "student" that petitioners have chosen is untethered to the language, context, and purposes of Section 3121(b)(10), and inconsistent with the

Treasury's reasonable regulations, petitioners' contention that their residents meet that definition is largely beside the point. In any event, petitioners' argument that their residents unambiguously qualify for the student exemption is unpersuasive for two additional reasons. First, petitioners ignore FICA's historical development, which indicates that Congress did not intend medical residents to qualify for the exemption. Second, petitioners' arguments that residents are unambiguously students are flawed on their own terms.

1. FICA's historical development indicates that residents are not covered by the student exemption

a. In 1939, at the same time that it enacted the student exemption, Congress also enacted several other exemptions from FICA tax. One of those exemptions was for "service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law." 1939 Act § 606, 53 Stat. 1385 (26 U.S.C. 1426(b)(13) (1940)). At that time, an "intern" was an individual participating in a one-year training program required for admission into a residency program. 2000 Advice 2 n.3.[5] The enactment of the intern exemption, and its subsequent repeal, see Old-Age, Survivors, and Disability Insurance Amendments of 1965 (1965 Amendments), Pub. L. No. 89-97, Tit. III, § 311(b)(5), 79 Stat. 381, both suggest that Congress did not intend medical residents to qualify for the student exemption.

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[5] Internship programs were discontinued in 1975, and residency programs have since included physicians in their first year of post-graduate training. First-year residents are now often called interns. 2000 Advice 2 n.3.

The committee reports accompanying the enactment of the intern exemption make clear that Congress made a considered decision to limit it to interns and not also to exempt medical residents. *1939 House Report* 49 (stating that the exemption applies to "service performed as an interne (as distinguished from a resident doctor)"); *1939 Senate Report* 58 (same). From the intern exemption's enactment through its repeal, Treasury regulations reflected that understanding, expressly stating that the exemption did not encompass services provided by residents. See 5 Fed. Reg. 787 (1940); T.D. 6190, 1956-2 C.B. at 655; 25 Fed. Reg. 13,051 (1960); T.D. 6983, 1969-1 C.B. 228, 233. In *St. Luke's Hospital Ass'n* v. *United States*, 333 F.2d 157 (1964), cert. denied, 379 U.S. 963 (1965), the Sixth Circuit upheld the Treasury's interpretation, agreeing that Congress intended to exclude residents from coverage under the intern exemption.

Congress's considered decision to exclude residents from coverage under the intern exemption would have been a pointless gesture if residents were already excluded from FICA tax under the student exemption. Indeed, the intern exemption itself would have been largely unnecessary if medical residents were unambiguously covered by the student exemption. If residents were unambiguously "students," interns likewise would have been "students," and Congress would have had little need to enact a separate exemption to exclude them from FICA coverage.[6]

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[6] In *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1253 (2007), the Eleventh Circuit suggested that the intern exemption may have been designed to encompass interns who did not qualify for the student exemption because they were employed by a hospital that was not a "school, college, or university." Congress would have

b. The 1965 Amendments, which repealed the intern exemption as well as various other exemptions that applied to doctors, also support the conclusion that medical residents are not encompassed by the student exemption. Those amendments were prompted by congressional concern that many doctors and their families were being deprived of needed disability and survivorship benefits because of exemptions from FICA and the Social Security Act. See H.R. Rep. No. 213, 89th Cong., 1st Sess. 95 (1965) (*1965 House Report*); S. Rep. No. 404, 89th Cong., 1st Sess. Pt. I, at 111 (1965) (*1965 Senate Report*); 111 Cong. Rec. 16,106-16,107 (1965). Explaining the reasons for repealing the intern exemption, the committee reports stated that "[t]he coverage of services as an intern would give young doctors an earlier start in building up social security protection and would help many of them to become insured under the program at a time when they need the family survivor and disability protection it provides." *1965 House Report* 95; *1965 Senate Report* 112. Repealing the intern exemption would not have accomplished that purpose if most (or even many) interns, as well as residents, would have been excluded from coverage by the student exemption.[7]

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had no evident reason, however, to exempt *all* interns from FICA tax regardless of the sites at which they worked, while exempting residents from FICA tax only if they worked at schools, colleges, or universities. Moreover, under the broad definition espoused by Mayo, see note 4, *supra*, virtually any hospital sponsoring an internship or residency program would qualify as a "school, college, or university," so the Eleventh Circuit's theory would still leave the intern exemption without any significant function.

[7] In *United States* v. *Memorial Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 30 (2009), the Second Circuit noted the committee reports' acknowledgment that some interns might qualify for a FICA exemption under other statutory provisions. But the only provision mentioned was

Moreover, at the same time that it repealed the intern exemption, Congress repealed or narrowed other FICA exemptions that had previously applied to doctors. In particular, Congress repealed an exemption for self-employed physicians and expressly excluded "medical [and] dental resident[s] in training" from exemptions for certain employees of medical facilities operated by the federal and D.C. governments. 1965 Amendments §§ 311(b)(1) and (4), 317(b)(3), 79 Stat. 381, 389; see *1965 House Report* 215-216, 225; *1965 Senate Report* 237, 243-244. In making those legislative changes, Congress demonstrated an intent that FICA cover doctors at all stages of their careers, starting with their internships and continuing through their residencies into private practice. See 69 Fed. Reg. at 8608.[8]

2. Petitioners' additional arguments are unpersuasive

In addition to ignoring statutory developments indicating that residents are not covered by the student ex-

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the former exemption in 26 U.S.C. 3121(b)(8)(B) (1964) for services performed for tax-exempt organizations. *1965 House Report* 215; *1965 Senate Report* 238. If the committees had believed that most interns would remain exempt from FICA under the student exemption, the reports surely would have mentioned that possibility.

[8] The provisions excluding residents who work at federal and D.C. medical facilities from FICA exemptions applicable to other employees of those facilities remain in effect today. 26 U.S.C. 3121(b)(6)(B) and (7)(C)(ii). There is no evident reason that Congress would require medical residents at federal and D.C. facilities to pay FICA tax while exempting residents employed by schools, colleges, and universities. And, if petitioners' view of the student exemption were combined with Mayo's broad conception of the term "school, college, or university," Congress's decision to make the Section 3121(b)(6)(B) and (7)(C)(ii) exemptions unavailable to federal and D.C. medical residents would be largely pointless, since those residents would qualify for the student exemption in any event.

emption, petitioners' arguments that their residents must be viewed as "students" are flawed on their own terms.

a. Petitioners first suggest (Br. 23-24) that their residents are necessarily "students" because their "rotations"—sequential assignments to different facilities or practice areas—are "classes" within the meaning of Section 3121(b)(10). As an initial matter, both the statute and the Treasury's regulations make clear that class attendance, by itself, does not qualify an individual for the student exemption. 26 U.S.C. 3121(b)(10) (requiring both that a qualifying individual be a "student" and that he be "regularly attending classes"); 26 C.F.R. 31.3121(b)(10)-2(d) (explaining that, "to have the status of a student," an individual must be pursuing "a course of study" and his employment services must be "incident to and for the purpose of pursuing [that] course of study").

In any event, rotations are not classes; they are work—recurring periods during which residents are paid to care for patients. Cf. 26 C.F.R. 31.3121(b)(10)-2(d)(1) (stating that "a class is an instructional activity led by a faculty member or other qualified individual").[9] During rotations, residents spend 50 to 80 hours a week providing patient care. For many hours of the day, residents are the only physicians directly treating patients. In some disciplines, supervising physicians are generally present at the hospital for only two or three hours each

[9] Although its regulations recognize that "classes" may include some activities conducted outside the "[t]raditional classroom," such as faculty-supervised research required for an academic degree, 26 C.F.R. 31.3121(b)(10)-2(d)(1), the Treasury has never suggested that an individual could "attend[] classes" by providing paid services that are not part of a degree program.

day. From the beginning of their residencies, residents may examine and diagnose patients, order laboratory tests and prescribe medications, and perform medical procedures without first consulting attending physicians. Residents' services may include life-saving diagnoses and treatment. While on rotations, residents spend some of their time in activities, such as lectures and conferences, that may more closely resemble "classes." But those activities occupy only a small percentage of residents' time, and residents can skip them if the exigencies of patient care so require. See pp. 4-5, *supra*.[10]

b. Petitioners next assert (Br. 24-25) that residents are "students" because completing a residency is necessary for board certification in a specialty, which is often required for a doctor to obtain hospital privileges. As discussed above, however, completion of a residency is not required for a physician to obtain a license. Instead, most States permit residents to become fully licensed after one year of post-graduate training, and once licensed, residents may practice independently outside their residency. Moreover, although most physicians choose to obtain board certification, it is not required for a physician to treat patients, and 15% of American physicians are not board-certified. See Ass'n of Am. Med. Colleges Amicus Br. 10. In any event, many professions, including architecture and engineering, require practitioners to serve internships or obtain on-the-job training

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[10] Petitioners' reliance (Br. 24) on *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 507 (1994), is misplaced. The Court in that case merely recognized that medical residents "learn" in the course of "treating patients." *Ibid.* The Court neither stated that residents attend "classes" nor expressed a view on whether residents are "students" within the meaning of Section 3121(b)(10).

as a prerequisite to licensure, but those practitioners are not "students" covered by Section 3121(b)(10)'s FICA tax exemption.

c. Petitioners also argue (Br. 25-26) that residents qualify as "students" because their purpose for participating in residency programs is predominantly educational. Section 3121(b)(10), however, contains no indication that "student" status turns on a taxpayer's "subjective reasons for engaging in certain activities," and the Treasury has rejected that approach as impractical. 2002 Advice 7. Petitioners assert (Br. 26) that residents do not choose a residency based on salary or benefits but instead select the program that they believe will be most educational or will best advance their careers. And petitioners observe (*ibid.*) that a resident generally does not expect to obtain permanent employment at the institution sponsoring his residency. But the same observations apply to individuals serving in many other apprenticeship-type jobs, including judicial law clerks, yet those employees are not considered "students."

Residents earn substantial salaries, comparable to the national median household income. Compare p. 5, *supra* (petitioners' residents earn between $41,000 and $56,000) with U.S. Census Bureau, U.S. Dep't of Commerce, *Median Household Income for States: 2007 and 2008 American Community Surveys* 2 (Sept. 2009), http://www.census.gov/prod/2009pubs/acsbr08-2.pdf (2008 median household income was approximately $52,000). And residents receive significant employee benefits, including health insurance and paid vacation time. See pp. 5-6, *supra*. Those forms of compensation are the hallmarks of employment, even assuming that residents typically attach even greater importance to

the training and opportunities for professional growth that their residencies provide.

d. Petitioners also contend that, as sponsors, they operate residency programs "purely for *educational* purposes." Br. 26. Petitioners' subjective reasons for employing residents, however, are as irrelevant to whether residents are "students" as are residents' motivations for accepting employment. Moreover, although petitioners assert that residents "do not provide a net economic benefit," Br. 27, nothing in Section 3121(b)(10) suggests that "student" status turns on whether the employing institution profits from the services provided. In any event, although residents (like many new employees) may be less efficient than more experienced physicians, "[r]esidents earn a stipend because they provide patient care and perform other services that are of value to the hospital." Medicare Payment Advisory Comm'n, *Rethinking Medicare's Payment Policies for Graduate Medical Education and Teaching Hospitals* 8 (Aug. 1999), http://www.aamc.org/advocacy/teachhosp/medpac/rethinkingmedicare.pdf (*MedPAC Report*). Courts have widely recognized that residents' stipends are not scholarships but compensation for services they render. See *Field* v. *Commissioner*, 680 F.2d 510, 513 (7th Cir. 1982) (collecting cases). When ACGME required residency programs to curtail the hours worked by residents, hospitals were required to hire additional staff to provide the patient care that residents could no longer provide. J.A. 113a-114a. And one recent study indicates that further reductions in resident workloads recommended by the Institute of Medicine would cost residency programs approximately $1.6 billion because of the need to shift to other providers the responsibility for patient care that is currently provided by residents. See Teryl K. Nuck-

ols et al., *Cost Implications of Reduced Work Hours and Workloads for Resident Physicians*, New Eng. J. of Med., May 21, 2009, at 2202, 2209 (*NEJM Study*).

Petitioners' contention that residents do not perform work that "lacks educational value" (Br. 27) is also inaccurate. Studies indicate that residents "spend 9 to 24 hours per week on noneducational tasks that lower-level providers can perform." *NEJM Study* 2204. Residents continue to perform procedures after completing the minimum number required for their training by ACGME. J.A. 205a. And a resident's refusal to perform a procedure on the ground that he had already learned how to perform it "would result in major disciplinary action." J.A. 54a. Nor does the fact that Medicare compensates hospitals for higher operational costs associated with residency programs indicate that residents are "students." See Pet. Br. 28–29. Medicare reimburses the costs of residency programs because those programs "enhance the quality of care" and their costs "should be considered as an element in the cost of patient care." *1965 House Report* 32; *1965 Senate Report* 36; see *MedPAC Report* 6 ("[T]he direct and indirect costs" of residency programs "both represent costs of providing patient care.").

e. In a kind of reverse bootstrapping, petitioners argue (Br. 29-30) that residents are students because the curriculum for the third and fourth years of medical school consists principally of clinical work. The fact that medical school includes a clinical component, however, does not transform residents back into the students they once were. Unlike medical students, residents are doctors who have graduated from medical school, and they are paid for providing patient care. Moreover, residents have significantly greater responsibilities than medical

students even on the first day of their residencies. J.A. 110a-111a; 2002 Advice 22.[11]

f. Finally, petitioners' assertion (Br. 31-33) that medical residents are widely classified as "students" by Congress and the courts is an inaccurate generalization.

The statutes cited by petitioners (Br. 31) do not establish that Congress uniformly views residents as "students." Under 5 U.S.C. 5102(c)(16) and 5351(2)(A), "residents-in-training" employed by the federal and D.C. governments are described as "student-employee[s]." But that classification does not indicate that those residents are predominantly students rather than employees, which would be necessary for them to qualify as "students" under Section 3121(b)(10). On the contrary, those residents are specifically made *subject to* FICA tax by 26 U.S.C. 3121(b)(6)(B) and (7)(C)(ii), which deem their services as "employee[s]" to be covered "employment." See note 8, *supra*. And 15 U.S.C. 37b(b)(1)(D)'s definition of "student"—"any individual who *seeks to be admitted* to a graduate medical education program"—does not include residents, who have already been admitted. Instead, Section 37b(b)(1)(D) describes individuals still in medical school who are applying to, but are not yet participants in, residency programs.

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[11] Contrary to petitioners' contention (Br. 29-30), *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978), and *Regents of the Univ. of Mich.* v. *Ewing*, 474 U.S. 214 (1985), do not support their arguments. Those cases concerned students who had not yet graduated from medical school, and they presented questions concerning the process the Constitution demands before such students may be dismissed from state-operated schools. The Court's decisions in *Horowitz* and *Ewing* have no bearing on the very different question whether residents, who have already graduated from medical school, are "students" within the meaning of Section 3121(b)(10).

Numerous other statutes, moreover, characterize residents as "employees" rather than students. Most directly relevant are the FICA and Social Security Act provisions stating that services provided by medical residents as "employee[s]" of the United States and the District of Columbia constitute covered "employment." See 26 U.S.C. 3121(b)(6)(B) and (7)(C)(ii), 42 U.S.C. 410(a)(6)(B) and (D)(ii); note 8, *supra*. Statutes governing Veterans Administration (VA) residency programs also characterize residents as employees rather than students. See 38 U.S.C. 7405(a)(1)(D) (distinguishing between "residents" and "students"), 7406(b) (referring to "employment" of residents).

Courts and agencies similarly have concluded that residents are "employee[s]" entitled to engage in collective bargaining under state and federal statutes. See, *e.g.*, *Regents of the Univ. of Cal.* v. *Public Employees Relations Bd.*, 715 P.2d 590 (Cal. 1986) (*Regents*); *University Hosp.* v. *State Employment Relations Bd.*, 587 N.E.2d 835 (Ohio 1992); *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999) (*BMC*); *Physicians Nat'l Housestaff Ass'n*, 7 F.L.R.A. 434 (1981). Several of those courts have specifically held that residents do not fall within exemptions for "students," reasoning that their employment responsibilities, rather than their educational activities, predominate. *Regents*, 715 P.2d at 601-6604; *University Hosp.*, 587 N.E.2d at 839-840; see also *BMC*, *supra* (holding that residents are "employees" under the National Labor Relations Act, 29 U.S.C. 152(3), despite precedent—recently reaffirmed in *Brown Univ.*, 342 N.L.R.B. 483 (2004)—that individuals who

are "primarily students" are not statutory "employees").[12]

D. Petitioners' Reliance On *National Muffler* Is Misplaced

Petitioners also contend (Br. 36-44) that the Treasury's full-time employee rule is invalid under the multifactor test set forth in *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979). The validity of the regulation is not properly determined under *National Muffler*, however, because that decision has been superseded by *Chevron*, and the considerations on which petitioners rely are largely irrelevant to *Chevron* analysis.

When it decided *National Muffler*, this Court had not fully developed its approach to judicial review of federal agency regulations. The Court in *Chevron* subsequently clarified the appropriate analysis, holding that courts must defer to an interpretation embodied in an agency's regulation if the statute does not directly address the question at issue and the agency's interpretation reflects a permissible construction of the statute. 467 U.S. at 842-843. In *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001), the Court further clarified that *Chevron*'s analysis applies whenever an agency with authority to engage in notice-and-comment rulemaking

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[12] Petitioners are also wrong in stating that "[f]our circuits have held that medical residents enrolled and regularly attending classes at a sponsoring institution unambiguously qualify for the Student Exemption." Br. 32. Those courts did not hold that residents "unambiguously qualify" for the exemption. They held only that "the statute unambiguously does not categorically exclude medical residents from eligibility," and they remanded for factual proceedings to determine whether the particular residents at issue were exempt. *University of Chi. Hosps.* v. *United States*, 545 F.3d 564, 570 (7th Cir. 2008); see *Sloan-Kettering*, 563 F.3d at 27-28; *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417-418 (6th Cir. 2009); *Mount Sinai*, 486 F.3d at 1252-1253.

uses that authority to address a gap, whether implicit or explicit, in a statute that the agency administers.

The Treasury is authorized by 26 U.S.C. 7805(a) to "prescribe all needful rules and regulations for the enforcement of" the Internal Revenue Code, including the Code provisions added by FICA. The agency exercised that authority when it used notice-and-comment rulemaking to promulgate the full-time employee rule. 69 Fed. Reg. at 8604; T.D. 9167, *supra*. Accordingly, the rule's validity should be evaluated under the *Chevron* test. See *Swallows Holding, Ltd.* v. *Commissioner*, 515 F.3d 162, 168-170 (3d Cir. 2008) (*Chevron*, rather than *National Muffler*, governs the validity of Treasury regulations promulgated using notice-and-comment rulemaking).

This Court has applied *Chevron* in evaluating the validity of other Treasury regulations. *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382, 387-389 (1998); *Boyle*, 469 U.S. at 246 n.4. And, although the Court has occasionally cited *National Muffler* for the general proposition that a Treasury regulation will be upheld if it is reasonable, the Court has not, since *Chevron*, subjected any Treasury regulation to the full multi-factor test in *National Muffler*. See *Cleveland Indians Baseball Co.*, 532 U.S. at 219; *Cottage Sav. Ass'n* v. *Commissioner* 499 U.S. 554, 560-561 (1991).

Some of the *National Muffler* factors overlap with considerations relevant under *Chevron*. In particular, "the plain language of the statute, its origin, and its purpose," *National Muffler*, 440 U.S. at 477, shed light on whether the statute directly resolves the issue addressed by a regulation and, if not, whether the regulation reflects a permissible construction of the statute. But, contrary to petitioners' arguments (Br. 37-40), the

language, origin, and purpose of Section 3121(b)(10) all indicate that the full-time employee rule is a permissible construction of that provision. See pp. 24-30, *supra*.

The other *National Muffler* factors on which petitioners rely (Br. 40-44) are largely irrelevant under *Chevron* to the validity of the full-time employee rule. Thus, although petitioners contend (Br. 40-41, 42) that the reasonableness of the rule is undermined by the recency of its adoption, this Court has held that, under *Chevron*, "neither antiquity nor contemporaneity with the statute is a condition of [a regulation's] validity." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996). The fact that Congress has not directly "scrutiniz[ed]" the rule (Pet. Br. 42) (quoting *National Muffler*, 440 U.S. at 477) likewise has no bearing on whether it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In any event, the full-time employee rule is a refinement of the predominance requirement, which has been in the Treasury's regulations for almost 60 years and has not been disapproved by Congress, despite repeated reenactments and amendments of the relevant statutory provision.

Petitioners also argue that the full-time employee rule is unreasonable because it was enacted "to overturn judicial decisions" interpreting the student exemption. Br. 41-42. Under *Chevron*, however, agencies may adopt regulations that reject prior judicial decisions provided the regulations reflect a reasonable interpretation of an ambiguous statute. See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-985 (2005) (*Brand X*); see also *Smiley*, 517 U.S. at 741 (The fact that a "regulation was prompted by litigation" is "irrelevant.").

Finally, petitioners contend (Br. 42-44) that the full-time employee rule is unreasonable because the Treasury's interpretation of the student exemption has purportedly been inconsistent. Under *Chevron*, however, the fact that an agency has changed its position "is not fatal" so long as the agency provides a reasoned explanation for its current interpretation. *Smiley*, 517 U.S. at 742; see *Brand X*, 545 U.S. at 981-982; *Chevron*, 467 U.S. at 863-864. Here, the Treasury provided a detailed explanation of the reasons behind its adoption of the full-time employee rule. See 69 Fed. Reg. at 8604-8605, 8606-8608.

Moreover, although the Treasury's approach has evolved in certain respects, its interpretation of the student exemption has been consistent. As discussed above, the Treasury has always interpreted the exemption as limited to individuals who are predominantly students and only incidentally employees. That interpretation has been reflected for nearly 60 years in Treasury regulations requiring that a qualifying individual's employment services be "incident to" the individual's student activities. And although the Treasury historically used a case-by-case, facts-and-circumstances approach to determine if the predominance requirement was met, the Treasury repeatedly indicated that the number of hours worked was a relevant factor and that full-time employees generally did not satisfy the requirement. Based on its experience in dealing with a deluge of refund claims after *Apfel*, the Treasury qualified its case-by-case approach by adopting a categorical rule to address full-time employees, including those whose work has a training or educational component. The adoption of a categorical rule to address that recurring situation was entirely reasonable. See pp. 33-34, *supra*.

Nor has the government been inconsistent on the specific question whether medical residents qualify for the student exemption. Long before *Apfel*, the SSA expressed the view that residents are not covered by the student exception. SSR 78-3, *supra*. And the government's position that residents are covered under FICA was widely accepted, as evidenced by the fact that *Apfel* triggered approximately 7000 refund claims, including claims seeking the return of more than $480 million in FICA taxes paid with respect to residents for periods before *Apfel* was decided.[13] As petitioners acknowledge (Br. 43), in litigating refund claims, Treasury has consistently taken the position that residents do not qualify for the student exemption, even under the prior regulations. The Chief Counsel Advices cited by petitioners are not inconsistent with that view (and are, in any event, non-binding, internal guidance for agency personnel, see 26 U.S.C. 6110(k)(3)). The Advices recognized that the prior regulations took a facts-and-circumstances approach to determining student status, but they did not suggest that residents would qualify for the exemption under that approach. On the contrary, the 2000 Advice expressed doubt that residents could qualify, 2000 Advice 25 n.44, and the 2002 Advice concluded,

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[13] We are informed by the IRS that, after the decision in *Apfel*, many taxpayers filed protective refund claims seeking refunds of $1 or a similar nominal amount. Such claims did not apprise the IRS of the actual amount of FICA taxes paid for the applicable tax periods. Thus, while the total face amount of the relevant refund claims was approximately $480 million, the actual amount of FICA taxes paid by all taxpayers seeking refunds for periods before *Apfel* appears to have been significantly greater.

based on a review of a representative sample of cases, that residents could not qualify, 2002 Advice 66.[14]

Petitioners are also incorrect in asserting (Br. 13, 43) that the Treasury has now "conceded" that residents were "students" under the prior regulations. For administrative reasons, the Treasury decided to settle claims pending under the prior regulations by "accept[ing] the position" that residents were exempt from FICA under Section 3121(b)(10) for periods ending prior to April 1, 2005, when the amended regulations took effect. I.R.S. News Release IR-2010-25 (Mar. 2, 2010), http://www.irs.gov/pub/irs-tege/nr-2010_25.pdf. The Treasury's decision to settle the pending claims on that basis did not constitute a legal concession about the correct interpretation of the prior regulations or the statute. Instead, it reflected a practical determination that continuing to litigate each residency program's claim on its particular facts and circumstances was not a wise expenditure of financial or administrative resources, especially since the amended regulations, including the full-time employee rule, had clarified the issue on a prospective basis.

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[14] Rev. Proc. 98-16, which expressly states that "the services performed by [residents] cannot be assumed to be incidental to and for the purpose of pursuing a course of study," 1998-1 C.B. 403, is also fully consistent with the view that residents do not qualify for the exemption.

CONCLUSION

The judgment of the court of appeals is correct and should be affirmed.

Respectfully submitted.

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[*] The Acting Solicitor General is recused in this case.

APPENDIX

1. Section 3101 of Title 26, United States Code, provides, in pertinent part:

Rate of tax

(a) Old-age, survivors, and disability insurance

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) Hospital insurance

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

2. Section 3111 of Title 26, United States Code, provides, in pertinent part:

Rate of Tax

(a) Old age, survivors, and disability insurance

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percen-

tages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) Hospital insurance

In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

3. Section 3121 of Title 26, United States Code, provides, in pertinent part:

Definitions

(a) Wages

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; * * *

* * * * *

(b) Employment

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either,

(i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

* * * * *

(10) service performed in the employ of—

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commis-

sioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

* * * * *

4. For services performed before April 1, 2005, 26 C.F.R. 31.3121(b)(10)-2 (2004) provides, in pertinent part:

Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.

(a) (1) Services performed in the employ of a school, college, or university (whether or not such organization is exempt from income tax) is excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university.

* * * * *

(b) For purposes of this exception, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, * * * and (2) the status of the employee as a student enrolled and regularly attending classes at the

school, college, or university by which he is employed or with which his employer is affiliated.

(c) The status of the employee as a student performing the services shall be determined on the basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

(d) The term "school, college, or university" within the meaning of this exception is to be taken in its commonly or generally accepted sense.

* * * * *

5. For services performed on or after April 1, 2005, 26 C.F.R. § 31.3121(b)(10)-2 provides in pertinent part:

Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.

(a) *General rule.* (1) Services performed in the employ of a school, college, or university within the meaning of paragraph (c) of this section (whether or not the organization is exempt from income tax) are excepted from employment, if the services are performed by a student within the meaning of paragraph (d) of this section who is enrolled and is regularly attending classes at the school, college, or university.

* * * * *

(b) *Statutory tests.* For purposes of this section, if an employee has the status of a student within the meaning of paragraph (d) of this section, the amount of remuneration for services performed by the employee, the type of services performed by the employee, and the place where the services are performed are not material. The statutory tests are:

(1) The character of the organization in the employ of which the services are performed as a school, college, or university within the meaning of paragraph (c) of this section, or as an organization described in paragraph (a)(2) of this section, and

(2) The status of the employee as a student enrolled and regularly attending classes within the meaning of paragraph (d) of this section at the school, college, or university within the meaning of paragraph (c) of this section by which the employee is employed or with which the employee's employer is affiliated within the meaning of paragraph (a)(2) of this section.

(c) *School, College, or University.* An organization is a *school, college, or university* within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. See section 170(b)(1)(A)(ii) and the regulations thereunder.

(d) *Student Status—general rule.* Whether an employee has the status of a student performing the services shall be determined based on the relationship of the employee with the organization employing the employee. In order to have the status of a student, the em-

ployee must perform services in the employ of a school, college, or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university. An employee who performs services in the employ of an affiliated organization within the meaning of paragraph (a)(2) of this section must be enrolled and regularly attending classes at the affiliated school, college, or university within the meaning of paragraph (c) of this section in pursuit of a course of study within the meaning of paragraphs (d)(1) and (2) of this section. In addition, the employee's services must be incident to and for the purpose of pursuing a course of study within the meaning of paragraph (d)(3) of this section at such school, college, or university.

(1) *Enrolled and regularly attending classes.* An employee must be enrolled and regularly attending classes at a school, college, or university within the meaning of paragraph (c) of this section at which the employee is employed to have the status of a student within the meaning of section 3121(b)(10). An employee is enrolled within the meaning of section 3121(b)(10) if the employee is registered for a course or courses creditable toward an educational credential described in paragraph (d)(2) of this section. In addition, the employee must be regularly attending classes to have the status of a student. For purposes of this paragraph (d)(1), a class is an instructional activity led by a faculty member or other qualified individual hired by the

school, college, or university within the meaning of paragraph (c) of this section for identified students following an established curriculum. Traditional classroom activities are not the sole means of satisfying this requirement. For example, research activities under the supervision of a faculty advisor necessary to complete the requirements for a Ph.D. degree may constitute classes within the meaning of section 3121(b)(10). The frequency of these and similar activities determines whether an employee may be considered to be regularly attending classes.

(2) *Course of study.* An employee must be pursuing a course of study in order to have the status of a student. A course of study is one or more courses the completion of which fulfills the requirements necessary to receive an educational credential granted by a school, college, or university within the meaning of paragraph (c) of this section. For purposes of this paragraph, an educational credential is a degree, certificate, or other recognized educational credential granted by an organization described in paragraph (c) of this section. A course of study also includes one or more courses at a school, college or university within the meaning of paragraph (c) of this section the completion of which fulfills the requirements necessary for the employee to sit for an examination required to receive certification by a recognized organization in a field.

(3) *Incident to and for the purpose of pursuing a course of study.* (i) *General rule.* An employee's services must be incident to and for the purpose of pursuing a course of study in order for the employee to have the status of a student. Whether an employee's services are incident to and for the purpose of pursuing a course of

study shall be determined on the basis of the relationship of the employee with the organization for which such services are performed as an employee. The educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, must be predominant in order for the employee's services to be incident to and for the purpose of pursuing a course of study. The educational aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The service aspect of the relationship is evaluated based on all the relevant facts and circumstances related to the employee's employment. The 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. Except as provided in paragraph (d)(3)(iii) of this section, whether the educational aspect or the service aspect of an employee's relationship with the employer is predominant is determined by considering all the relevant facts and circumstances. Relevant factors in evaluating the educational and service aspects of an employee's relationship with the employer are described in paragraphs (d)(3)(iv) and (v) of this section respectively. There may be facts and circumstances that are relevant in evaluating the educational and service aspects of the relationship in addition to those described in paragraphs (d)(3)(iv) and (v) of this section.

* * * * *

(iii) *Full-time employee.* The services of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the em-

ployer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee. An employee's normal work schedule is not affected by increases in hours worked caused by work demands unforeseen at the start of an academic term. However, whether an employee is a full-time employee is reevaluated for the remainder of the academic term if the employee changes employment positions with the employer. An employee's work schedule during academic breaks is not considered in determining whether the employee's normal work schedule is 40 hours or more per week. The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have an educational, instructional, or training aspect.

(iv) *Evaluating educational aspect.* The educational aspect of an employee's relationship with the employer is evaluated based on all the relevant facts and circumstances related to the educational aspect of the relationship. The educational aspect of an employee's relationship with the employer is generally evaluated based on the employee's course workload. Whether an employee's course workload is sufficient in order for the employee's employment to be incident to and for the purpose of pursuing a course of study depends on the particular facts and circumstances. A relevant factor in evaluating an employee's course workload is the employee's course workload relative to a full-time course workload at the school, college or university within the meaning of paragraph (c) of this section at which the employee is enrolled and regularly attending classes.

(v) *Evaluating service aspect.* The service aspect of an employee's relationship with the employer is evaluated based on the facts and circumstances related to the employee's employment. Services of an employee with the status of a full-time employee within the meaning of paragraph (d)(3)(iii) of this section are not incident to and for the purpose of pursuing a course of study. Relevant factors in evaluating the service aspect of an employee's relationship with the employer are described in paragraphs (d)(3)(v)(A), (B), and (C) of this section.

(A) *Normal work schedule and hours worked.* If an employee is not a full-time employee within the meaning of paragraph (d)(3)(iii) of this section, then the employee's normal work schedule and number of hours worked per week are relevant factors in evaluating the service aspect of the employee's relationship with the employer. As an employee's normal work schedule or actual number of hours worked approaches 40 hours per week, it is more likely that the service aspect of the employee's relationship with the employer is predominant. The determination of an employee's normal work schedule and actual number of hours worked is not affected by the fact that some of the services performed by the employee may have an educational, instructional, or training aspect.

(B) *Professional employee.* (*1*) If an employee has the status of a professional employee, then that suggests the service aspect of the employee's relationship with the employer is predominant. A professional employee is an employee—

(*i*) Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by

a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

(*ii*) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(*iii*) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(*2*) *Licensed, professional employee.* If an employee is a licensed, professional employee, then that further suggests the service aspect of the employee's relationship with the employer is predominant. An employee is a licensed, professional employee if the employee is required to be licensed under state or local law to work in the field in which the employee performs services and the employee is a professional employee within the meaning of paragraph (d)(3)(v)(B)(1) of this section.

(C) *Employment Benefits.* Whether an employee is eligible to receive one or more employment benefits is a relevant factor in evaluating the service aspect of an employee's relationship with the employer. For example, eligibility to receive vacation, paid holiday, and paid sick leave benefits; eligibility to participate in a retirement plan or arrangement described in sections 401(a), 403(b), or 457(a); or eligibility to receive employment benefits such as reduced tuition (other than qualified tuition reduction under section 117(d(5) provided to a teaching or research assistant who is a graduate student), or bene-

fits under sections 79 (life insurance), 127 (qualified educational assistance), 129 (dependent care assistance programs), or 137 (adoption assistance) suggest that the service aspect of an employee's relationship with the employer is predominant. Eligibility to receive health insurance employment benefits is not considered in determining whether the service aspect of an employee's relationship with the employer is predominant. The weight to be given the fact that an employee is eligible for a particular employment benefit may vary depending on the type of benefit. For example, eligibility to participate in a retirement plan is generally more significant than eligibility to receive a dependent care employment benefit. Additional wight is given to the fact that an employee is eligible to receive an employment benefit if the benefit is generally provided by the employer to employees in positions generally held by non-students. Less weight is given to the fact that an employee is eligible to receive an employment benefit if eligibility for the benefit is mandated by state or local law.

(e) *Examples.* The following examples illustrate the principles of paragraphs (a) through (d) of this section:

Example 1. (i) Employee C is employed by State University T to provide services as a clerk in T's administrative offices, and is enrolled and regularly attending classes at T in pursuit of a B.S. degree in biology. C has a course workload during the academic term which constitutes a full-time course workload at T. C is considered a part-time employee by T during the academic term, and C's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term C works 40 hours or

more during a week. C is compensated by hourly wages, and receives no other compensation or employment benefits.

(ii) In this *example*, C is employed by T, a school, college, or university within the meaning of paragraph (c) of this section. C is enrolled and regularly attending classes at T in pursuit of a course of study. C is not a full-time employee based on T's standards, and C's normal work schedule does not cause C to have the status of a full-time employee, even though C may occasionally work 40 hours or more during a week due to unforeseen work demands. C's part-time employment relative to C's full-time course workload indicates that the educational aspect of C's relationship with T is predominant. Additional facts supporting this conclusion are that C is not a professional employee, and C does not receive any employment benefits. Thus, C's services are incident to and for the purpose of pursuing a course of study. Accordingly, C's services are excepted from employment under section 3121(b)(10).

Example 2. (i) Employee D is employed in the accounting department of University U, and is enrolled and regularly attending classes at U in pursuit of an M.B.A. degree. D has a course workload which constitutes a half-time course workload at U. D is considered a full-time employee by U under U's standards and practices.

(ii) In this *example*, D is employed by U, a school, college, or university within the meaning of paragraph (c) of this section. In addition, D is enrolled and regularly attending classes at U in pursuit of a course of study. However, because D is considered a full-time employee by U under its standards and practices, D's ser-

vices are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 3. (i) The facts are the same as in Example 2, except that D is not considered a full-time employee by U, and D's normal work schedule is 32 hours per week. In addition, D's work is repetitive in nature and does not require the consistent exercise of discretion and judgment, and is not predominantly intellectual and varied in character. However, D receives vacation, sick leave, and paid holiday employment benefits, and D is eligible to participate in a retirement plan maintained by U described in section 401(a).

(ii) In this *example*, D's half-time course workload relative to D's hours worked and eligibility for employment benefits indicates that the service aspect of D's relationship with U is predominant, and thus D's services are not incident to and for the purpose of pursuing a course of study. Accordingly, D's services are not excepted from employment under section 3121(b)(10).

Example 4. (i) Employee E is employed by University V to provide patient care services at a teaching hospital that is an unincorporated division of V. These services are performed as part of a medical residency program in a medical specialty sponsored by V. The residency program in which E participates is accredited by the Accreditation Counsel for Graduate Medical Education. Upon completion of the program, E will receive a certificate of completion, and be eligible to sit for an examination required to be certified by a recognized organization in the medical specialty. E's normal work schedule, which includes services having an educational,

instructional, or training aspect, is 40 hours or more per week.

(ii) In this *example*, E is employed by V, a school, college, or university within the meaning of paragraph (c) of this section. However, E's normal work schedule calls for E to perform services 40 or more hours per week. E is therefore a full-time employee, and the fact that some of E's services have an educational, instructional, or training aspect does not affect that conclusion. Thus, E's services are not incident to and for the purpose of pursuing a course of study. Accordingly, E's services are not excepted from employment under section 3121(b)(10) and there is no need to consider other relevant factors, such as whether E is a professional employee or whether E is eligible for employment benefits.

Example 5. (i) Employee F is employed in the facilities management department of University W. F has a B.S. degree in engineering, and is completing the work experience required to sit for an examination to become a professional engineer eligible for licensure under state or local law. F is not attending classes at W.

(ii) In this *example*, F is employed by W, a school, college, or university within the meaning of paragraph (c) of this section. However, F is not enrolled and regularly attending classes at W in pursuit of a course of study. F's work experience required to sit for the examination is not a course of study for purposes of paragraph (d)(2) of this section. Accordingly, F's services are not excepted from employment under section 3121(b)(10).

Example 6. (i) Employee G is employed by Employer X as an apprentice in a skilled trade. X is a subcon-

tractor providing services in the field in which G wishes to specialize. G is pursuing a certificate in the skilled trade from Community College C. G is performing services for X pursuant to an internship program sponsored by C under which its students gain experience, and receive credit toward a certificate in the trade.

(ii) In this *example*, G is employed by X. X is not a school, college or university within the meaning of paragraph (c) of this section. Thus, the exception from employment under section 3121(b)(10) is not available with respect to G's services for X.

Example 7. (i) Employee H is employed by a cosmetology school Y at which H is enrolled and regularly attending classes in pursuit of a certificate of completion. Y's primary function is to carry on educational activities to prepare its students to work in the field of cosmetology. Prior to issuing a certificate, Y requires that its students gain experience in cosmetology services by performing services for the general public on Y's premises. H is scheduled to work and in fact works significantly less than 30 hours per week. H's work does not require knowledge of an advanced type in a field of science or learning, nor is it predominantly intellectual and varied in character. H receives remuneration in the form of hourly compensation from Y for providing cosmetology services to clients of Y, and does not receive any other compensation and is not eligible for employment benefits provided by Y.

(ii) In this *example*, H is employed by Y, a school, college or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Y in pursuit of a course of study. Factors indicating the educational aspect of H's relationship with

Y is predominant are that H's hours worked are significantly less than 30 per week, H is not a professional employee, and H is not eligible for employment benefits. Based on the relevant facts and circumstances, the educational aspect of H's relationship with Y is predominant. Thus, H's services are incident to and for the purpose of pursuing a course of study. Accordingly, H's services are excepted from employment under section 3121(b)(10).

Example 8. (i) Employee J is a graduate teaching assistant at University Z. J is enrolled and regularly attending classes at Z in pursuit of a graduate degree. J has a course workload which constitutes a full-time course workload at Z. J's normal work schedule is 20 hours per week, but occasionally due to work demands unforeseen at the start of the academic term J works more than 40 hours during a week. J's duties include grading quizzes and exams pursuant to guidelines set forth by the professor, providing class and laboratory instruction pursuant to a lesson plan developed by the professor, and preparing laboratory equipment for demonstrations. J receives a cash stipend and employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b). In addition, J receives qualified tuition reduction benefits within the meaning of section 117(d)(5) with respect to the tuition charged for the credits earned for being a graduate teaching assistant.

(ii) In this *example*, J is employed by Z, a school, college, or university within the meaning of paragraph (c) of this section, and is enrolled and regularly attending classes at Z in pursuit of a course of study. J's full-time course workload relative to J's normal work

schedule of 20 hours per week indicates that the educational aspect of J's relationship with Z is predominant. In addition, J is not a professional employee because J's work does not require the consistent exercise of discretion and judgment in its performance. On the other hand, the fact that J receives employment benefits in the form of eligibility to make elective employee contributions to an arrangement described in section 403(b) indicates that the employment aspect of J's relationship with Z is predominant. Balancing the relevant facts and circumstances, the educational aspect of J's relationship with Z is predominant. Thus, J's services are incident to and for the purpose of pursuing a course of study. Accordingly, J services are excepted from employment under section 3121(b)(10).

(f) *Effective date*. Paragraphs (a), (b), (c), (d) and (e) of this section apply to services performed on or after April 1, 2005.

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