1   IN THE SUPREME COURT OF THE UNITED STATES

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3   MAYO FOUNDATION FOR MEDICAL   :

4   EDUCATION AND RESEARCH, ET AL.,   :

5   Petitioners   :

6   v.   :   No. 09-837

7   UNITED STATES   :

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9   Washington, D.C.

10   Monday, November 8, 2010

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12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 11:02 a.m.

15   APPEARANCES:

16   THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf

17   of Petitioners.

18   MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor

19   General, Department of Justice, Washington, D.C.; on

20   behalf of Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:02 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in Case 09-837, Mayo Foundation for Medical

5   Education and Research v. The United States.

6   Mr. Olson.

7   ORAL ARGUMENT OF THEODORE B. OLSON

8   ON BEHALF OF THE PETITIONERS

9   MR. OLSON: Mr. Chief Justice, and may it

10   please the Court:

11   Congress expressly exempted from Social

12   Security taxes wages paid to a student who is enrolled

13   and regularly attending classes. The medical residents

14   at Petitioners' schools are enrolled and pursuing a

15   formal accredited curriculum that has a rigorous core

16   curriculum, as I said; hundreds of classes, conferences,

17   lectures; laboratory research; written exams; grades;

18   and intensive, hands-on clinical patient training under

19   the supervision of faculty members.

20   JUSTICE GINSBURG: Mr. Olson, are -- are all

21   institutions that employ residents schools?

22   MR. OLSON: I don't know -- I don't know

23   whether all -- as I understand, the resident program,

24   which is accredited by the Accreditation Council for

25   Graduate Medical Education, does involve an

1   accreditation program which would probably fit -- where

2   it's taking place, would probably fit the definition of

3   schools. That is certainly not an issue in this case.

4   There are -- these -- the institutions that we

5   represent --

6   JUSTICE GINSBURG: But it might -- it might

7   be relevant, because it would be unseemly, perhaps, to

8   have residents who are not working at, quote, "schools,"

9   subject to the FICA tax, and other residents whose

10 training is approximately the same escape the tax.

11   MR. OLSON: Well, that was a judgment that

12 Congress made. Congress made the exemption with respect

13 to students, and it tied specifically in to someone who

14 is enrolled and regularly attending classes --

15   JUSTICE GINSBURG: But you can't give me the

16 reality there. Are all resident programs conducted in

17 schools, or are there resident programs that would not

18 qualify because they take place in institutions that are

19 not schools?

20   MR. OLSON: The only reason I'm hesitating,

21 Justice Ginsburg, is I don't know the entire universe

22 out there. Every program, residents' program, that has

23 been involved in the various cases that have discussed

24 this have been at schools or universities or colleges.

25 I'm aware of no program that involves residency and

1   resident programs accredited by the ACGME that is not

2   involve in and does not take place in a school or a

3   university or college. So it could be something out

4   there that I am not aware of, but I'm not aware of

5   anything of that nature.

6   It is undisputed that these individuals in

7   these residents' programs are enrolled and that they are

8   regularly attending classes by various definitions of

9   the word "class." The clinical experience that they are

10 receiving in hospital rooms, in lecture halls, in all

11 circumstances that they're involved in, are educational.

12 They are classes, and it is undisputed -- undisputed --

13 that the purpose of these programs is to educate doctors

14 so that they can achieve board certification and

15 hospital privileges.

16   JUSTICE SOTOMAYOR: Mr. Olson, are residents

17 supervised their entire 40 to 80 hours? Is there an

18 attending physician standing over their shoulder and

19 looking at what they're doing?

20   MR. OLSON: Well, there's two parts to that

21 question. The answer to the second part is: Of course

22 not. There is not a supervising attending physician

23 standing over their shoulder at every moment, but they

24 are being supervised at all of the time during their

25 residency program; that is to say that the work that

1   they do is under the supervision, in that broad sense,

2   of an attending physician who looks over what they do,

3   comments on what they do, and so forth.

4   JUSTICE SOTOMAYOR: What I -- how I look at

5   this case is: How do you draw the line between a

6   student who is working and a worker who is studying? So

7   the issue for me is: Is the Treasury Department's

8   identification of how to draw that line unreasonable?

9   Do we owe them deference?

10   MR. OLSON: Well --

11   JUSTICE SOTOMAYOR: Let's use the example

12   that's been floated around the briefs: the general

13   counsel of the university who takes classes to increase

14   his knowledge. Is he a student who is working, or is he

15   a worker who's studying?

16   MR. OLSON: There is -- well, the various

17   courts that have considered this have found the

18   statutory provision -- that Congress has spoken to the

19   subject. It has provided an exemption for students, and

20   it has provided its own limitations. You have to be

21   enrolled and regularly attending classes --

22   JUSTICE SOTOMAYOR: Why isn't the general

23   counsel who's going to, let's assume, either three

24   classes a week or 6 -- 6 hours of classes, is working

25   40 hours as general counsel, and he's regularly enrolled

1   in classes.

2   MR. OLSON: Well --

3   JUSTICE SOTOMAYOR: Why isn't he part of the

4   exemption?

5   MR. OLSON: The -- the Internal Revenue

6   Service imposes a predominance requirement with respect

7   to this. The courts that have considered it have said:

8   This is not a question of law; it is a question of fact.

9   Is someone really a student or not? Common sense and

10   common understanding of the word "students" would lead

11   one to the conclusion of that. I --

12   JUSTICE SOTOMAYOR: So why wouldn't common

13   sense lead you to the conclusion that if someone is

14   working 40 unsupervised hours without an attending

15   physician at their side, taking care of patients, that

16   that's really not a student? That's what the Treasury

17   Department is saying.

18   MR. OLSON: Well, that is what the Treasury

19   Department is saying. But, first of all, you have to be

20   an employee for this provision to apply at all. This

21   provision --

22   JUSTICE SOTOMAYOR: You don't think

23   receiving $50,000 or $60,000 a year is enough to make

24   you an employee of someone?

25   MR. OLSON: No. No. In fact, the

1   government will say that the amount of remuneration is

2   immaterial. The government says that in its

3   regulations. The IRS says that, and it has said it for

4   many, many, many years. And right from the beginning,

5   the amount of the remuneration has no significance at

6   all.

7   The fact is, as every court that has

8   considered the question has concluded, is that these

9   residents are under supervision. It -- you may be

10   supervised if someone's not standing over your shoulder.

11   If they review at the end of the day or at the beginning

12   of the -- of the course what you've done, what you --

13   what you -- what situations you've encountered, the

14   standards that are being applied --

15   JUSTICE SOTOMAYOR: But why doesn't that --

16   assume it's not the general counsel of the university

17   but a lawyer working in the general counsel's office.

18   MR. OLSON: Well --

19   JUSTICE SOTOMAYOR: He's being supervised by

20   the general counsel, his work's being reviewed, and he's

21   attending classes at night.

22   MR. OLSON: Well, in the first place, that

23   is a different case. This is a refund action based upon

24   the situation -- the facts are on the ground with

25   respect to these residents. That is not the case here.

8

1   However, that and the other parade of horribles that the

2   Government mentions in its briefs -- what about the

3   professor -- I mean, what about the university

4   president, what about the general counsel? -- all would

5   be excluded by the predominant requirement --

6   predominancy requirement, which we're not challenging,

7   which is not involved in this case, and the Government

8   hasn't challenged here.

9   These individuals cannot achieve what they

10   need to achieve for board certification and hospital

11   privileges except by having clinical experience. That

12   is --

13   JUSTICE SOTOMAYOR: Well, what they want to

14   achieve is a higher long-term pay, but they can go out

15   and work as doctors.

16   MR. OLSON: They could -- well, very little.

17   The -- the record is very, very clear that almost in no

18   cases, in -- in a very, very narrow circumstance can

19   they work as doctors. They won't have hospital

20   privileges. They won't --

21   JUSTICE SOTOMAYOR: I understood that 15

22   percent of the physicians were not board certified.

23   MR. OLSON: And -- and many of them may be

24   in the military or in circumstances -- but the -- but

25   the record, as examined by the various courts that have

1 considered it, said, for all intents and purposes in the

2 modern world, that physicians that are going to be

3 treating you and me in the vast majority of cases will

4 be board certified. It's an enormous impediment, and --

5   JUSTICE SOTOMAYOR: So how about the

6 architect residents who are working in universities?

7 Are they medical -- like medical residents as well?

8   MR. OLSON: Well, they may be. I haven't

9 studied whether an architect, if they are in a school --

10 Congress decided what this exemption would cover. It

11 says: If you are a student enrolled in a school,

12 university, or college, and you are regularly attending

13 classes, then you would be covered.

14   Now, that --

15   JUSTICE GINSBURG: Mr. Olson, why not read

16 that provision -- now we are going to the statute -- if

17 such service is performed by a student, et cetera, as

18 saying, look, there's a student status, and the service

19 is distinct from the student's status?

20   Take the typical work/study program in a

21 college. That would seem to fit this language to a tee.

22 There's a student, and the student is working part time,

23 but you are -- there -- there is no independent

24 significance to the term "student" as you read the text;

25 that is, the student and the services are all together.

1   It's not, "I am a student here and I perform services

2   there." It's -- the student is -- the education is the

3   service.

4   MR. OLSON: Well, the services are performed

5   for the purpose of receiving an education. As -- as the

6   Internal Revenue Service construed this provision, up

7   until the fact that they lost several cases, was that if

8   your purpose was to achieve or pursue a course of

9   studies -- that's the old regulation. If your --

10   JUSTICE GINSBURG: But wouldn't -- wouldn't

11 this fit the work/study student who is studying

12 philosophy and then he's working in the, say, speech

13 department?

14   MR. OLSON: I didn't hear that last word.

15   JUSTICE GINSBURG: The -- it seems to me

16 that -- what came into my mind when I read these words

17 was a work/study program where the student is studying

18 and that's the status of student. The work is separate

19 from that. It's not necessarily to advance the person's

20 education. It's to give the student some money. So

21 that's what I thought -- I thought that this was -- this

22 was describing student status, okay; and the student is

23 also working for some money.

24   But you seem to say that the service --

25 that -- that it's -- the student status is not

1   independent from the service.

2   MR. OLSON: Well, this -- absolutely, that's

3   true in this case. The students -- the service that the

4   students are performing in hospital rooms, looking at

5   patients, listening to lectures, working in

6   laboratories, is a part of what they're getting paid

7   for.

8   So they have to be an employee to begin

9   with, in order for this exemption to apply. They

10   have -- it might be -- it's -- I don't know whether you

11   have in mind someone being paid for -- by someone

12   outside the school, but this --

13   JUSTICE GINSBURG: No, I have in mind the

14   typical work/study program. The -- the student signs up

15   for work/study and may be assigned to work in the

16   administration, helping out with clerical things there.

17   But the student status is one thing; the services are

18   another.

19   Now, that, I assume, would be covered, that

20   the earnings of the student in the work/study program

21   would not be subject to FICA?

22   MR. OLSON: Well, the government's got

23   various categories of examples. The situation that

24   you've just described sort of falls close to one of

25   those examples, but this is -- that is not this case.

1   The government would say, I would think,

2   that if you are a student, even though your service is

3   unrelated to your education, you would fall within the

4   exemption. I think that's one of the examples that the

5   government gives.

6   I might have guessed that it would come out

7   differently. But in this case, the purpose for the

8   service is education. The goal of the service is

9   education. It's not to earn a living. And -- and it's

10   -- and the goal of the universities is not to make

11   money. It is to provide --

12   CHIEF JUSTICE ROBERTS: Well, you keep

13   focusing, Mr. Olson, on -- on this case. And one of the

14   things that I think is important in the tax code is that

15   you not have litigation of each different case, so the

16   different courts are coming out with different rules.

17   And, at the end of the day, you put one next to the

18   other, and it looks pretty hard to tell the difference.

19   So why doesn't it make sense simply to refer

20   to -- defer to the Service's interpretation?

21   MR. OLSON: Well --

22   CHIEF JUSTICE ROBERTS: You go back and --

23   both of you go back and forth with hypotheticals, each

24   of which sort of supports, but this basically a very

25   familiar situation of an apprentice who is both an

1   employee and both a student, and to try to draw the line

2   in some categorical way doesn't make sense. The only

3   way you can draw the line is to have somebody say: This

4   is going to be the line. And if anybody is going to say

5   it, it ought to be the IRS.

6   MR. OLSON: Well, I know we're in the

7   Supreme Court, but five courts of appeals that

8   considered this said that the language is clear. It

9   does not admit to a categorical exclusion of residents

10   in programs like this. It --

11   JUSTICE SOTOMAYOR: Well, those five courts

12   did it before -- most of those opinions were rendered

13   before the new regulation.

14   MR. OLSON: That's right. And what the

15   government having --

16   JUSTICE SOTOMAYOR: Only one of them --

17   MR. OLSON: The government having lost based

18   upon the words of the statute and the regulations that

19   they had promulgated that had to do with the goals, the

20   purpose, the objective, and the nature of the

21   activity -- lost every one of those cases and said:

22   We're going to adopt a regulation that does have the

23   virtue that the Chief Justice mentioned of -- of being

24   categorical.

25   It's the same as saying, if you're

14

1 left-handed, you're not going to be covered by this

2 student exemption, or if you're only doing it during the

3 daytime --

4   JUSTICE BREYER: Is it -- is it -- the --

5 the answer to Justice Ginsburg's question -- I was

6 uncertain. Suppose a student is working 45 hours a week

7 in the grounds department cutting lawns, and he does --

8 cutting the school lawn, and he earns enough money to

9 help with his way through college. Now, I thought,

10 under this, that he is not within this statute because

11 it's 45 hours and not 40?

12   MR. OLSON: Oh, yes. The -- the United

13 States --

14   JUSTICE BREYER: All right.

15   MR. OLSON: -- would take the position that

16 it's not 45 hours.

17   JUSTICE BREYER: That it's not -- okay.

18 So -- so, what they're doing is -- it started out with

19 the word "student" and the word "service performed" in

20 the statute. Then, for many, many years, they have

21 talked about the employment, how it has to be an

22 incident to the study. And "incident" is the key word.

23   And so now what they've done is interpret

24 their own word "incident" as saying if it bulks too

25 large in comparison with the -- with the studying, it's

1   not incident to the study; it's a separate thing. And

2   that's true whether it happens to be medical school or

3   it happens to be lawn mowing. They can't -- they don't

4   want it as so big in comparison to the study that it's

5   not really part of trying to get the study. It's just

6   too big. And they use the 40 for that.

7   MR. OLSON: Yes, they have.

8   JUSTICE BREYER: All right. Now, if you're

9   going to admit the word "incident to," if you're saying

10   they have the right to put the word "incident to," why

11   don't they have the right to define "incident to" in

12   part in terms of 40 hours a week?

13   MR. OLSON: Well, because it's both

14   arbitrary and it's irrational. If what the student is

15   doing, what the individual is doing, what the resident

16   is doing, is learning the craft that he needs to perform

17   a doctor --

18   JUSTICE SOTOMAYOR: Mr. Olson --

19   MR. OLSON: The government is saying -- and

20   the government is saying --

21   JUSTICE SOTOMAYOR: -- everyone learns.

22   Aren't you learning today -- sitting here and watching

23   this -- maybe you're not -- your own argument, but the

24   arguments before? Aren't we learning in every case that

25   we're hearing? I -- I --

1   MR. OLSON: Oh, by the way --

2   JUSTICE SOTOMAYOR: It's -- it's, in my

3   mind, difficult to separate out what makes a person or

4   stops a person from learning on a job.

5   MR. OLSON: Well, the fact is --

6   JUSTICE SOTOMAYOR: At any job, actually.

7   MR. OLSON: -- the Justices of this Court

8   are exempt from Social Security taxes, so --

9   (Laughter.)

10   CHIEF JUSTICE ROBERTS: You're not

11   challenging that, are you, Mr. Olson?

12   (Laughter.)

13   MR. OLSON: No, you're okay.

14   JUSTICE SOTOMAYOR: I opted in, Mr. Olson --

15   MR. OLSON: But -- but the --

16   JUSTICE SOTOMAYOR: -- for the very reason

17   the residents might want to.

18   MR. OLSON: Congress -- Congress decided to

19   provide an exemption for students. And I want to

20   address what Justice --

21   JUSTICE BREYER: No, no, it didn't as

22   interpreted. You see, it's not -- it's that -- I

23   concede everything you say: It's a total learning

24   experience, and it's a special learning experience. The

25   problem I was having that I wanted your answer to is

1   that they have for many, many years said: Just because

2   it's a pure learning experience and nothing but a pure

3   learning experience, you still can't get this exemption

4   unless the work is incident to that experience. And by

5   "incident" we mean it can't bulk too large --

6   MR. OLSON: Well --

7   JUSTICE BREYER: -- in respect to the whole.

8   So the problem for you is not that it's not education.

9   MR. OLSON: That -- that --

10   JUSTICE BREYER: It's that the work is the

11   education.

12   MR. OLSON: That last step that you made is

13   just like Humpty Dumpty in Lewis Carroll's "Through the

14   Looking Glass": A word is what I say it is.

15   It -- the work that the -- the residents do,

16   the services they perform are all incident to the

17   educational process. There's no dispute that the goal

18   is the education, both from the standpoint of the

19   university and from the standpoint of the student, that

20   that is what is accomplished. And what --

21   Justice Breyer, what they've said is because you are

22   doing that, the -- the service is incident to the

23   education until you do it for 40 hours. Then it's no

24   longer incident.

25   So someone who may be a student under the --

1   under the government's interpretation is a student until

2   they work that 40th hour a week on a regular basis; then

3   somehow they're no longer a student.

4   JUSTICE GINSBURG: Mr. Olson, there has been

5   a concern expressed that if we accept your position that

6   residents are students, it will have ramifications for

7   other areas of the law, notably, the National Labor

8   Relations Act. Suppose the residents wanted to organize

9   and collectively bargain. If they're students, they

10   can't do that.

11   And let's take the Title VII and the other

12   antidiscrimination in employment statutes. If they're

13   not employed, if they're students rather than employees,

14   then they wouldn't be covered by that legislation.

15   MR. OLSON: That is the fallacy that the

16   government is making, that you have to either be a

17   student or an employee. That argument is not correct,

18   because in all other respects, these residents are

19   employees. The exemption provided in 3121(b)(10) does

20   not come into play unless you are an employee.

21   So for all those purposes, Title VII, the

22   Fair Labor Standards Act, and so forth -- those are

23   other statutes that define the term in a certain way.

24   What the -- what the code says in 3121(b)(10) -- that

25   you are an employee, but if you are an employee of a

1   college or a university and you are a student, which

2   means you are enrolled in classes and regularly taking a

3   program for the purpose of education, then you don't pay

4   FICA taxes. It doesn't have any other implication.

5   And the Government's position in that

6   respect, and the argument that's made in the other

7   briefs, is -- are classic red herrings. They distract

8   from the real issue.

9   You don't have to be either an employee or a

10   student. In fact, you have to be both for this

11   exemption to apply, and that is what is happening here.

12   Now, again, this is -- there may be

13   circumstances where there might be something that's

14   close to the line and the government might say, well,

15   you're not really a student. And the government really

16   tried that in the Second Circuit, in the Sixth Circuit,

17   and the Eleventh Circuit, and -- and the Seventh

18   Circuit. And in each one of those cases, the court --

19   and uniformly, all five circuits, including the Eighth

20   Circuit -- until the government decided to change the

21   regulation to say, essentially, residents are out --

22   that's basically what they said.

23   JUSTICE BREYER: I looked it up in the

24   dictionary, and the meaning number 1 b of "incident" is:

25   an accompanying minor occurrence or -- occurrence or

1   condition. Minor. In other words, there's the big

2   thing, and then there's the incident.

3   Now, if that's the meaning, well, this says

4   40 is trying to get at whether it's minor or the whole

5   --

6   MR. OLSON: That's the same dichotomy that

7   doesn't exist. The -- the person is a student. They're

8   just doing it long and arduously, and they're doing it

9   for several years so that they can be board certified as

10   good doctors in their specialty.

11   The idea that somehow you are a student if

12   you do it for 39 hours, and if you do it for 41 hours --

13   the programs are rigorous. They -- they have been

14   designed by the accreditation programs to be rigorous,

15   so that the -- a doctor will see lots of patients, do

16   lots of clinical work, because that, according to all of

17   the record in all of the cases, is where the education

18   takes place.

19   You need the classes. You need the

20   laboratory. But you need to work with patients doing

21   the things that we want doctors to be doing with respect

22   to us when they are certified as a specialist in

23   neurology or whatever it might be.

24   So Justice Breyer, the idea that -- this is

25   a classic definition of not only an arbitrary but a

1   capricious and irrational regulation. It says that

2   if -- even if you are a student, you're -- you're doing

3   the things where you would have to be a student, and

4   you're doing the types of things that you would make --

5   make you a student, and you're doing it for the purpose

6   that would make you for a student, but if you do it a

7   little bit too much, you're too much of a student, and,

8   therefore, you're not a student.

9   JUSTICE BREYER: Well, that's because --

10   MR. OLSON: It doesn't make sense.

11   JUSTICE BREYER: -- of the second meaning

12   here. It's very surprising, I found, first reading the

13   statute in the last case, and now I'm reading the

14   dictionary.

15   (Laughter.)

16   JUSTICE BREYER: And here what it says is --

17   JUSTICE SCALIA: We don't know whether

18   that's a step forward or backward.

19   JUSTICE BREYER: It says: something arising

20   or resulting from something else of greater or principal

21   import.

22   So they're trying to work out, with that

23   word "incident," is the studying of greater or principal

24   import? And what they're saying is, when it's 40 hours

25   a week, this other thing, the studying, is not of

1   greater import.

2   MR. OLSON: But that --

3   JUSTICE BREYER: Rather, it's, let's say, of

4   equal import.

5   MR. OLSON: I submit that that makes no

6   sense at all, because if you're -- if you're studying,

7   and you're doing it for 39 and a half hours, you're a

8   student, and if you do it for 40 and a half hours, all

9   of a sudden you're not doing the same thing? You are

10   not a student? The incident --

11   JUSTICE BREYER: If you have to draw the

12   line --

13   MR. OLSON: I accept the word "incident" --

14   JUSTICE ALITO: Why do you accept the word

15   "incident"? Incident is not in the statute.

16   MR. OLSON: No, it isn't. I'm saying, for

17   purposes --

18   JUSTICE ALITO: Well, why isn't the answer

19   that the -- that the noneducational aspect of the

20   service has to be incidental to what they're doing?

21   MR. OLSON: Well, that might be also. What

22   we're -- what we're saying -- I don't -- I'm accepting

23   the word "incident" for the purposes of this case, that

24   there is no question that the work that's being done,

25   the services that are being performed, Justice Alito,

1   are incident to the education. They are a part of the

2   educational process. They are subservient to the

3   educational process. In fact, they make the educational

4   process.

5   If I may, Chief -- Mr. Chief Justice, may I

6   reserve the balance of my time?

7   CHIEF JUSTICE ROBERTS: Thank you,

8   Mr. Olson.

9   Mr. Roberts.

10   ORAL ARGUMENT OF MATTHEW D. ROBERTS

11   ON BEHALF OF THE RESPONDENT

12   MR. ROBERTS: Mr. Chief Justice, and may it

13   please the Court:

14   FICA student exemption covers individuals

15   who are predominantly students but perform incidental

16   employment for their schools. It does not cover

17   Petitioners' medical residents. They are full-time

18   employees, and the Treasury Department has reasonably

19   concluded that an employee's paid work does not make him

20   an exempt student, even if he also learns from his job.

21   And that's true for three reasons. First,

22   the text of the student exemption makes clear that it's

23   not a broad exclusion for apprenticeships and other

24   learning jobs. Instead, it's a narrow exemption that

25   applies only to students performing services for a

1 school, college, or university where they're enrolled

2 and regularly attending classes.

3   And, second, when employees are working long

4 hours and being paid substantial amounts, they and their

5 employers should be helping to fund the Social Security

6 system, and they should be earning credit towards

7 benefits so that they and their families will have

8 something to fall back on if they become disabled or

9 die.

10   JUSTICE ALITO: If the question is whether

11 someone is predominantly a student or an employee, why

12 shouldn't we ask: Why are they enrolled in this

13 program, and why is the institution enrolling them in

14 the program?

15   Why are residents enrolled in the program?

16 Are they enrolled in the program to make money, or are

17 they enrolled in the program either because it's a

18 licensing hurdle they have to clear or they want

19 additional education, and why is the institution hiring

20 them? Is the institution hiring them to get the value

21 of their services or is it hiring them for educational

22 purposes?

23   MR. ROBERTS: It's probably both, Your

24 Honor, but it's not workable to determine student status

25 by looking in a particular case whether the predominant

1 motive or the motive of the employee or the employer is

2 education. People who --

3   JUSTICE ALITO: Well, in general, though.

4 In general, why are residents -- why do medical school

5 graduates become residents? Do they do -- are they

6 doing that because they want to earn the 40 to $50,000 a

7 year that they're paid, or are they doing it for some

8 other reason?

9   MR. ROBERTS: I think they're doing it for

10 both -- for both reasons, Your Honor. But many, many

11 individuals pursue their jobs for the primary purpose of

12 learning, like judicial law clerks, like other

13 apprentices. But they're not excluded -- they're not

14 covered by this exemption.

15   JUSTICE GINSBURG: Because they don't work

16 at schools.

17   MR. ROBERTS: Because they don't work at

18 schools, colleges, and universities, and they, you know,

19 may not be enrolled and regularly attending classes.

20 And so the Treasury reasonably concluded that because

21 this isn't a general exemption for apprenticeships, that

22 they shouldn't construe it as providing a special

23 exemption for apprentices who happen to be employed by

24 schools, colleges, and universities. And --

25   JUSTICE ALITO: What if they -- on average

1   they were paid $10,000 a year? Would it be the same?

2   MR. ROBERTS: Yes. If they would -- if

3   their work -- I mean, here, basically, they have work,

4   and the argument is that that work qualifies them as

5   students. And what the -- what the Treasury Department

6   has concluded is that it's going to treat work and study

7   as distinct categories in deciding whether somebody is

8   predominantly a student, and that it's not going to

9   count the work as study even if there's some educational

10   component to it.

11   And that's reasonable for several reasons,

12   as I said. First, because the statute just isn't a

13   general provision that's designed to cover

14   apprenticeships. And, second, because when people are

15   primarily workers and they're working for long hours,

16   they should be covered and participating in the FICA

17   system.

18   And, finally, it -- it would be very

19   difficult to determine on a case-by-case basis what's

20   their purpose, what the employer's purpose. You know,

21   is this job more like study? Is this job more like

22   work? And on that basis -- and to, on that basis,

23   decide whether that should make them a student.

24   So considering all of those things, the

25   Treasury has decided to draw a bright line and say:

 1   Study is study; work is work; and if you're not a

 2   student independently of that, then your work doesn't

 3   make you a student. And the Treasury has also decided

 4   that if you're working full-time, that then you're

 5   predominantly an employee rather than predominantly a

 6   student, and you're not covered by the exemption.

 7   In addition, FICA's historical development

 8   indicates that the student exemption doesn't cover

 9   medical residents, because at the same time that

10   Congress enacted the student exemption, it also enacted

11   a separate exemption for medical interns, and it decided

12   not to include residents in that exemption. And those

13   actions would have made little sense if the student

14   exemption had the scope asserted by Petitioners.

15   And then, in 1965, Congress repealed the

16   intern exemption in order to give young doctors an

17   earlier start in building up Social Security coverage.

18   And that repeal also wouldn't have achieved its purpose

19   if many and most residents were covered -- were excluded

20   from FICA under the student exemption.

21   These -- these residents are people.

22   They're working between 50 and 80 hours a week. They're

23   working over a long period of time, and they're

24   providing critical patient care with minimal

25   supervision.

1   CHIEF JUSTICE ROBERTS: What if -- what if

2   the school said: You have to get all this clinical

3   experience, but we're going to pay you for the first two

4   hours of the day that you're doing that. Does that

5   change the analysis at all?

6   You seem to be focusing on how many hours

7   they're working. But what if the school says: Well,

8   look, we recognize some of this is going to school and

9   some of this is working; so, just like the IRS, we're

10   going to have an arbitrary rule and we're going to say

11   you're being paid for the first two hours.

12   MR. ROBERTS: Well, the rule is that the

13   paid work doesn't count towards student status, and it

14   wouldn't -- it doesn't count whether you're doing it for

15   4 hours, for 10 hours, or for 40 hours. So, in a

16   circumstance where they're only being paid -- they're

17   only working for paid time for a certain amount, that

18   then that work -- you would have to look there, I --

19   CHIEF JUSTICE ROBERTS: It looks more -- if

20   you accept their classification, it looks more like the

21   work is incidental to their status as a student. The

22   other way around.

23   MR. ROBERTS: If you accept the

24   classification in your hypothetical of two hours --

25   CHIEF JUSTICE ROBERTS: Yes.

1   MR. ROBERTS: -- and the other eight hours?

2   But those -- that other work wouldn't necessarily

3   qualify as a course of study, either, Your Honor. I

4   mean, if what they're doing is providing services but

5   providing --

6   CHIEF JUSTICE ROBERTS: It would if they --

7   and presumably, you would say it does if they don't pay

8   them anything.

9   MR. ROBERTS: No, not necessarily, Your

10   Honor. What -- the Treasury regulations define what a

11   class is and what a course of study is, and the -- the

12   individuals have to be engaging in that to qualify as

13   students and performing -- giving somebody something of

14   value.

15   JUSTICE ALITO: But I thought clinical work

16   could qualify as a course. Is that wrong?

17   MR. ROBERTS: Clinical work can qualify as a

18   course under certain circumstances. But the clinical

19   work that medical students are doing, if you're

20   referring to that, is of an entirely different order

21   than the work --

22   JUSTICE GINSBURG: But it certainly can if

23   they're a -- if they can be a student in the last year

24   of medical school, and they -- they're doing

25   subintern-level work. That's a clinical program where

1   they would be categorized as students.

2   MR. ROBERTS: Yes, it's clinical work, but

3   it's -- but it's very different than the work that the

4   residents are doing.

5   First, there's the distinction that the

6   residents are getting paid and that the medical students

7   are paying tuition. But, secondly, from that the

8   residents are providing valuable patient care. Medical

9   students are primarily participating in the clinical

10   activities solely in an educational capacity. And I can

11   -- if I can describe the different things that they're

12   doing.

13   JUSTICE ALITO: We now have a lot of

14   briefs -- we now have a lot of briefs filed in this

15   Court by -- in which a lot of the work is done by

16   students in law school. I assume they're getting credit

17   for that. Is that -- is that not a course?

18   MR. ROBERTS: They're not getting paid for

19   it.

20   JUSTICE ALITO: But is it a course? Is it

21   not a course?

22   MR. ROBERTS: It -- it might be a course,

23   Your Honor, but they're also engaged in other classes

24   and other activities that make them regularly enrolled,

25   and it's part of a degree program. So it's one small --

1   the clinical course is one small part of that.

2   JUSTICE ALITO: I understand that. I'm --

3   I'm questioning why you're resisting the proposition

4   that clinical work can constitute a course.

5   MR. ROBERTS: I'm not resisting the

6   proposition that clinical work can constitute a course.

7   What I'm saying is that when you're -- when you're being

8   paid to provide services, that doesn't count as a

9   course, because the IRS has decided to treat work and

10 study as distinct categories in -- in applying this

11 exemption, and that that's a perfectly reasonable

12 distinction.

13   Nothing in the statute precludes them from

14 doing that, and Petitioners concede that -- that it's

15 reasonable to interpret the statute as limited to

16 individuals that are predominantly students.

17   JUSTICE GINSBURG: Mr. Roberts, do you know

18 the answer to the question I asked Mr. Olson; that is:

19 Are all hospitals with resident programs schools?

20   MR. ROBERTS: No, Your Honor, they're not.

21 First of all, under the IRS's regulations, the IRS

22 defines schools, colleges, and universities to include

23 only institutions whose primary function is the

24 provision of formal instruction.

25   And, second of all, if -- on J.A. 27a, in

1 the record in this case, there's an example of residency

2 programs that are not students. The -- one of the

3 hospitals that -- the Hennepin County Hospital that has

4 University of Minnesota residents also has its own

5 residents. And just looking on page 27a, if you have

6 the J.A., there's a question: Do the Hennepin County

7 residents -- are they enrolled in any academic

8 institution that you are aware? Not at the present

9 time.

10   So, that is an example of one, Your Honor.

11 And that does point out an anomaly about Petitioners'

12 interpretation of the exemption. Medical residents who

13 work for hospitals that are operated by schools,

14 colleges, and universities would be exempt from FICA

15 tax, but residents who work for other hospitals wouldn't

16 be exempt, even though their work is equally

17 educational. That's just an illustration of the broader

18 principle that this isn't an apprenticeship exemption,

19 and that's why, because of that, the Treasury has taken

20 this approach to the situation where people are learning

21 on the job.

22   JUSTICE GINSBURG: Mr. Roberts, the

23 Petitioners' brief says twice that there's some

24 question. Assuming that we hold that the -- the

25 residents are subject to the FICA tax, there's some

1 question whether, even if they had to pay the tax,

2 whether they would be eligible to receive Social

3 Security benefits or, I take it, credit for four

4 quarters in full.

5   MR. ROBERTS: There's no -- there's no

6 question, Your Honor. It's always been the Social

7 Security Administration's position that medical

8 residents are not students exempt from the Social

9 Security Act. The Social Security Administration stated

10 that in a Social Security ruling as far as back as 1978,

11 and they continue to adhere to that position.

12   In addition, as a practical matter, the way

13 the Social Security Administration determines whether

14 people get coverage for a particular period under the

15 Social Security Act is they look at the W-2's that come

16 in, and if FICA tax has been paid, then they put them

17 down as being covered under the Social Security Act. So

18 as a practical matter, it works that way as well.

19   As I said before, these workers who are

20 working between 50 and 80 hours a week over many years

21 for substantial salaries are precisely the kind of

22 workers whose employers should be supporting the Social

23 Security system and who should be earning credit towards

24 disability and survivor benefits. And we would ask that

25 the judgment of the court of appeals be affirmed.

1   Thank you.

2   CHIEF JUSTICE ROBERTS: Thank you, counsel.

3   Mr. Olson, 5 minutes remaining.

4   REBUTTAL ARGUMENT OF THEODORE B. OLSON

5   ON BEHALF OF THE PETITIONERS

6   MR. OLSON: Thank you, Mr. Chief Justice.

7   With respect to the question that

8   Mr. Roberts was addressing with you, Justice Ginsburg,

9   the record is very unclear. In the Eighth Circuit,

10   residents may not be eligible for Social Security

11   benefits. It's quite unclear in the other circuits.

12   And I invite your attention -- and this is cited in the

13   briefs -- to 20 C.F.R. 404.1028, which is a Social

14   Security regulation. It says: "If your main purpose is

15   pursuing a course of study rather than earning a

16   livelihood" -- and it's unquestioned that that is what

17   is happening here -- "we consider you to be a student,

18   and your work is not considered employment."

19   JUSTICE GINSBURG: Mr. Olson, you're not

20   taking issue with what Mr. Roberts just said? That is,

21   in practice the -- Social Security looks to see -- they

22   look at the W-2, see if the FICA tax was paid, and if it

23   was, then -- then they get credit for Social Security.

24   MR. OLSON: Well, that may be what they do,

25   and that may be dependent upon what happens with the

1   FICA taxes, which is going to be determined -- which has

2   been determined in four circuits as not being payable

3   with respect to the residents' programs.

4   The fact is that the government has taken a

5   position for many, many years. Talk about deference for

6   a moment, the National Muffler factors, which we

7   understand still to be appropriate to evaluate deference

8   given to an IRS regulation. This is not a

9   contemporaneous regulation. It is something that came

10 along just a couple of years ago. It's a

11 result-oriented regulation. It's basically saying, we

12 lost all these cases on the facts in the court of

13 appeals, and now we will pronounce that we will win

14 these cases, because we know all these residents

15 programs involve more than --

16   JUSTICE SOTOMAYOR: We have said that

17 agencies can clarify situations that have been litigated

18 and positions that they've lost on.

19   MR. OLSON: Yes.

20   JUSTICE SOTOMAYOR: So, why is this any

21 different?

22   MR. OLSON: This is very different, because

23 it -- there's -- not because of any change in

24 circumstances or facts. It isn't a clarification. It

25 is a reversal. Because for all those years, the

1   government said that we had this predominance test. If

2   your goal is to pursue a course of study, you are a

3   student.

4   Now the government is saying, if your goal

5   is to produce a course of study, but you do it for

6   41 hours a week, you are not a student. It is a --

7   CHIEF JUSTICE ROBERTS: Why are we talking

8   about National Muffler? I thought the whole point of

9   Chevron was to get away from that kind of multifactor ad

10 hoc balancing?

11   MR. OLSON: Well, I -- this is up to the

12 Court. The Court has never set aside National Muffler.

13 The Court cited the National Muffler case in the Cottage

14 Savings case, which is subsequent to Chevron. It cited

15 Cottage Savings case in the Boeing case just a couple of

16 years ago. You may tell me that the factors in National

17 Muffler are no longer something that you would apply,

18 but they're all sensible factors with respect to whether

19 you would give deference to a regulation that pops up

20 65 years after the enactment of the statute, after the

21 government has lost five cases on the facts which are

22 directly relevant to the facts here, and it's a new

23 regulation, and there has been no reliance.

24   CHIEF JUSTICE ROBERTS: If Chevron applies,

25 those considerations are irrelevant, right?

37

1   MR. OLSON: You don't need to get to the

2   part 2, because we submit Chevron would apply and would

3   stop you at step 1. Government -- the Congress

4   addressed the factor at issue in this case. It said

5   what students are: People who are regularly -- are

6   enrolled and taking classes.

7   To the extent that you get to the second

8   phase, those factors seem to be appropriate to consider.

9   If this is important, and if there is some

10   anomaly out there, what the government should have done

11   is turn to Congress, which enacted the regulation that

12   described student and described what the limitations

13   were. It had said nothing to do about a categorical

14   limitation that if you're too much of a student, you're

15   not a student. It is backwards. If there is some

16   anomaly, and if the government wants to collect the

17   funds from these programs that it has really never

18   collected them from before, then it should turn to

19   Congress.

20   There has been no reliance and -- well, the

21   intern -- the intern anomaly, one of the court of

22   appeals that -- the court of appeals that considered

23   that said it relies completely on non sequiturs. It

24   relies for the interpretation of one statute with the

25   repeal of another statute 45 years ago and draws

1 inference from the legislative history with respect to

2 that which -- the repeal took place 1 year after the

3 St. Luke's case. The St. Luke's case, the Sixth Circuit

4 decided that interns were not residents, residents were

5 not interns.

6   CHIEF JUSTICE ROBERTS: Thank you, counsel.

7   MR. OLSON: Thank you, Your Honor.

8   CHIEF JUSTICE ROBERTS: The case is

9 submitted.

10   (Whereupon, at 11:46 a.m., the case in the

11 above-entitled matter was submitted.)

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