

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 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.

1 However, that and the other parade of horrors 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

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?

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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<p>A</p> <p>above-entitled 1:12 39:11</p> <p>absolutely 12:2</p> <p>academic 33:7</p> <p>accept 19:5 23:13 23:14 29:20,23</p> <p>accepting 23:22</p> <p>accompanying 20:25</p> <p>accomplished 18:20</p> <p>accreditation 3:24 4:1 21:14</p> <p>accredited 3:15,24 5:1</p> <p>ACGME 5:1</p> <p>achieve 5:14 9:9,10 9:14 11:8</p> <p>achieved 28:18</p> <p>Act 19:8,22 34:9,15 34:17</p> <p>action 8:23</p> <p>actions 28:13</p> <p>activities 31:10,24</p> <p>activity 14:21</p> <p>ad 37:9</p> <p>addition 28:7 34:12</p> <p>additional 25:19</p> <p>address 17:20</p> <p>addressed 38:4</p> <p>addressing 35:8</p> <p>adhere 34:11</p> <p>administration 12:16 34:9,13</p> <p>Administration's 34:7</p> <p>admit 14:9 16:9</p> <p>adopt 14:22</p> <p>advance 11:19</p> <p>affirmed 34:25</p> <p>agencies 36:17</p> <p>ago 36:10 37:16 38:25</p> <p>AL 1:4</p>	<p>Alito 23:14,18,25 25:10 26:3,25 30:15 31:13,20 32:2</p> <p>amount 8:1,5 29:17</p> <p>amounts 25:4</p> <p>analysis 29:5</p> <p>anomaly 33:11 38:10,16,21</p> <p>answer 5:21 15:5 17:25 23:18 32:18</p> <p>antidiscrimination 19:12</p> <p>anybody 14:4</p> <p>appeals 14:7 34:25 36:13 38:22,22</p> <p>APPEARANCES 1:15</p> <p>applied 8:14</p> <p>applies 24:25 37:24</p> <p>apply 7:20 12:9 20:11 37:17 38:2</p> <p>applying 32:10</p> <p>apprentice 13:25</p> <p>apprentices 26:13 26:23</p> <p>apprenticeship 33:18</p> <p>apprenticeships 24:23 26:21 27:14</p> <p>approach 33:20</p> <p>appropriate 36:7 38:8</p> <p>approximately 4:10</p> <p>arbitrary 16:14 21:25 29:10</p> <p>architect 10:6,9</p> <p>arduously 21:8</p> <p>areas 19:7</p> <p>argument 1:13 2:2,5 2:8 3:3,7 16:23 19:17 20:6 24:10 27:4 35:4</p> <p>arguments 16:24</p>	<p>arising 22:19</p> <p>aside 37:12</p> <p>asked 32:18</p> <p>aspect 23:19</p> <p>asserted 28:14</p> <p>assigned 12:15</p> <p>Assistant 1:18</p> <p>assume 6:23 8:16 12:19 31:16</p> <p>Assuming 33:24</p> <p>attending 3:13 4:14 5:8,18,22 6:2,21 7:14 8:21 10:12 25:2 26:19</p> <p>attention 35:12</p> <p>average 26:25</p> <p>aware 4:25 5:4,4 33:8</p> <p>a.m 1:14 3:2 39:10</p> <p>B</p> <p>b 1:16 2:3,9 3:7 20:24 35:4</p> <p>back 13:22,23 25:8 34:10</p> <p>backward 22:18</p> <p>backwards 38:15</p> <p>balance 24:6</p> <p>balancing 37:10</p> <p>bargain 19:9</p> <p>based 8:23 14:17</p> <p>basically 13:24 20:22 27:3 36:11</p> <p>basis 19:2 27:19,22 27:22</p> <p>beginning 8:4,11</p> <p>behalf 1:16,20 2:4,7 2:10 3:8 24:11 35:5</p> <p>benefits 25:7 34:3 34:24 35:11</p> <p>big 16:4,6 21:1</p> <p>bit 22:7</p> <p>board 5:14 9:10,22</p>	<p>10:4 21:9</p> <p>Boeing 37:15</p> <p>Breyer 15:4,14,17 16:8 17:21 18:7,10 18:21 20:23 21:24 22:9,11,16,19 23:3 23:11</p> <p>brief 33:23</p> <p>briefs 6:12 9:2 20:7 31:14,14 35:13</p> <p>bright 27:25</p> <p>broad 6:1 24:23</p> <p>broader 33:17</p> <p>building 28:17</p> <p>bulk 18:5</p> <p>bulks 15:24</p> <p>C</p> <p>C 2:1 3:1</p> <p>capacity 31:10</p> <p>capricious 22:1</p> <p>care 7:15 28:24 31:8</p> <p>Carroll's 18:13</p> <p>case 3:4 4:3 6:5 8:23 8:25 9:7 12:3,25 13:7,13,15 16:24 22:13 23:23 25:25 33:1 37:13,14,15 37:15 38:4 39:3,3 39:8,10</p> <p>cases 4:23 9:18 10:3 11:7 14:21 20:18 21:17 36:12,14 37:21</p> <p>case-by-case 27:19</p> <p>categorical 14:2,9 14:24 38:13</p> <p>categories 12:23 27:7 32:10</p> <p>categorized 31:1</p> <p>certain 19:23 29:17 30:18</p> <p>certainly 4:3 30:22</p> <p>certification 5:14</p>	<p>9:10</p> <p>certified 9:22 10:4 21:9,22</p> <p>cetera 10:17</p> <p>challenged 9:8</p> <p>challenging 9:6 17:11</p> <p>change 20:20 29:5 36:23</p> <p>Chevron 37:9,14,24 38:2</p> <p>Chief 3:3,9 13:12,22 14:23 17:10 24:5,5 24:7,12 29:1,19,25 30:6 35:2,6 37:7 37:24 39:6,8</p> <p>Circuit 20:16,16,17 20:18,20 35:9 39:3</p> <p>circuits 20:19 35:11 36:2</p> <p>circumstance 9:18 29:16</p> <p>circumstances 5:11 9:24 20:13 30:18 36:24</p> <p>cited 35:12 37:13,14</p> <p>clarification 36:24</p> <p>clarify 36:17</p> <p>class 5:9 30:11</p> <p>classes 3:13,16 4:14 5:8,12 6:13,21,24 6:24 7:1 8:21 10:13 20:2 21:19 25:2 26:19 31:23 38:6</p> <p>classic 20:7 21:25</p> <p>classification 29:20 29:24</p> <p>clear 9:17 14:8 24:22 25:18</p> <p>clerical 12:16</p> <p>clerks 26:12</p> <p>clinical 3:18 5:9 9:11 21:16 29:2 30:15</p>
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