No. 09-837

FEB 16 2010

IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, AND ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES IN SUPPORT OF PETITIONERS

JONATHAN S. FRANKLIN*
ROBERT A. BURGOYNE
TILLMAN J. BRECKENRIDGE
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* *Counsel of Record* — *Counsel for Amici Curiae*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page(s)**

TABLE OF AUTHORITIES—Continued

Blank Page

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INTEREST OF AMICI CURIAE

The Association of American Medical Colleges ("AAMC") is a nonprofit educational association whose members include all 131 accredited medical schools in the United States, approximately 400 major teaching hospitals and health systems, and

nearly 90 scientific societies.[1] Collectively, these institutions and organizations sponsor the vast majority of the nation's medical residents. AAMC's mission is to improve the nation's health by strengthening the quality of medical education and training, enhancing the search for biomedical knowledge, advancing health services research, and integrating education and research into the provision of effective health care.

The American Council on Education ("ACE") was founded in 1918 and is the nation's unifying voice for higher education. Its more than 1,800 members include colleges and universities throughout the United States. ACE represents all sectors of American higher education and serves as a consensus leader on key issues affecting higher education. ACE participates as an amicus curiae only in cases that raise issues of widespread importance to institutions of higher education. ACE, for example, has filed briefs in this Court in recent years in cases such as *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007) and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002).

The Association of American Universities ("AAU") is a nonprofit association of 60 U.S. and two Canadian preeminent public and private research universities. Founded in 1900, AAU focuses on na-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of the intent to file this brief more than ten days in advance of the due date, and have consented to its filing.

tional and institutional policies that promote strong programs of university research and undergraduate, graduate, and professional education. Well over half of AAU member universities have medical schools and medical residency programs, and all have strong programs of biomedical research and advanced education that will provide the future doctors, researchers, and medical breakthroughs that will enhance the health and well-being of the nation.

Founded in 1887, the Association of Public and Land-grant Universities (A·P·L·U) is an association of public research universities, land-grant institutions, and many state public university systems. A·P·L·U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement.

Amici have a substantial interest in the outcome of this case. Their member medical schools and teaching hospitals provide a clinical education for medical residents and are therefore directly affected by the Eighth Circuit's holding that residents are categorically ineligible for the student exemption to the Federal Insurance Contribution Act ("FICA"). Amici are also committed to protecting the student status of medical residents. Education is the predominant consideration in developing and implementing medical residency programs. Medical residents are students, learning to execute the tasks necessary to ensure patient wellness. This structure is the basis for the United States' ability to provide the best

medical care in the world, and the importance of the residency component of medical education should not be diminished or disregarded.

If allowed to stand unreviewed, however, the decision below threatens to do just that. In conflict with the decisions of four other circuits, the Eighth Circuit has held that the Internal Revenue Service ("IRS") may categorically exclude all residents from the student exemption on the ground that they are not "students." This decision followed 20 years of expensive and protracted litigation in which other courts uniformly rejected the IRS's position on the ground that the governing statute unambiguously allows residents to qualify for the exemption. Given the stark split in the circuits, the time has come for this Court to decide the issue and bring certainty to the law. Although the IRS has sought to overturn the rulings against it by writing regulations espousing its rejected position, no regulation could ever alter the decisions of four circuits holding that the relevant statutory language is unambiguous. Accordingly, there is no cause to subject amici's members, and the medical residents they educate, to additional years or decades of litigation before the law is clarified. The Court should grant certiorari now, and should reverse the Eighth Circuit so that residency programs will enjoy a uniform legal status that recognizes and protects their educational missions.

INTRODUCTION

The time has come for this Court to decide the important question raised by this case. For more than 20 years, the IRS has sought categorically to exclude medical residents and their educational institutions from claiming the FICA student

exemption. After years of expensive litigation and thousands of refund claims involving billions of dollars, four circuits squarely rejected that position. The Eighth Circuit, however, has now disagreed with the view of its sister circuits that the statute unambiguously rules out the IRS's interpretation.

Even though the Eighth Circuit ruled in the context of revised IRS regulations, there is no basis for this Court to forestall its review of the underlying statutory issue. As the Eighth Circuit itself recognized, if it had adopted the views of the other circuits it would have been required to rule the other way in this case. Thus, further litigation would provide no additional insight on the question at issue: whether the IRS can categorically exclude medical residents from the student exemption. The IRS should not be able to force medical schools, teaching hospitals, and their students to endure years, if not decades, of additional expensive litigation merely by writing new regulations that contradict judicial determinations.

The issue, moreover, is of critical importance to residents and the educational institutions that sponsor them. Billions of dollars are at stake, and the issue affects hundreds of educational institutions and more than 100,000 medical residents. Residents are students who receive limited stipends during this phase of their medical training, and residency programs are not intended to generate profits for their sponsoring institutions. Accordingly, subjecting these students to additional taxes meant for non-student employees—with the concomitant taxes that the sponsoring institutions must pay—may reduce incentives for institutions to sponsor this critical training, at a time when the nation needs to be increasing the number of physicians it trains. And

subjecting amici's members to another round of expensive litigation across the nation will only further reduce the resources available for these educational activities.

REASONS FOR GRANTING THE WRIT

I. THE SPLIT IN THE CIRCUITS SHOULD BE RESOLVED WITHOUT DELAY.

A. After Twenty Years Of Litigation, The Circuits Are Irreconcilably Divided.

The split in the circuits is real and direct. The statute exempts from FICA taxes any "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10). Four circuits have held that this language unambiguously allows medical residents to claim the exemption by showing that they are, in fact, students engaged in educational activities. *See United States* v. *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2nd Cir. 2009) ("We agree with the Sixth, Seventh, and Eleventh Circuits that the statute is unambiguous and that whether medical residents are 'students' * * * is a question of fact, not a question of law."). Underscoring this understanding, lower courts have had little difficulty holding that medical residents qualify for the exemption when their educational programs are individually scrutinized.[2]

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[2] *See, e.g., Ctr. for Family Med.* v. *United States*, No. 05-4049, 2008 WL 3245460 at *8-11 (D.S.D. Aug. 6, 2008) (residents entitled to claim student exemption); *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669 at *2 (S.D. Fla. July 28, 2008) ("[w]hile the United States contends that the 'tipping point' for the student exemption for FICA taxes is graduation from medical school

These decisions followed a 20-year campaign by the IRS to categorically exclude medical residents from claiming the exemption. As the Eighth Circuit noted below, this has resulted in an "avalanche" of litigation that has "exploded across the country." Pet. App. 3a. The government began its campaign by targeting petitioner the University of Minnesota (the "University"). *See Minnesota* v. *Apfel*, 151 F.3d 742, 744 (8th Cir. 1998). It initiated an investigation in 1989 and issued a formal notice of statutory assessment the following year. *Id.* Following an unsuccessful administrative appeal, the University filed a civil action in the district court. *Id.* After nine years of administrative and court litigation, the Eighth Circuit held that a categorical rule excluding medical residents from the student exemption was inconsistent with governing regulations. *Id.* at 748.

Following *Apfel*, residency programs and their residents filed more than 7,000 administrative claims seeking refunds of FICA taxes, Pet. App. 4a., many at considerable expense. *See* Douglas M. Mancino & Robert C. Louthian III, *Eighth Circuit Again Allows Refund of Medical Residents' FICA Taxes*, 15 Tax'n of Exempts 195, 199 (2004) (noting that some programs "fil[ed] full (and expensive to prepare) claims for refund with the IRS"). The IRS once again required the issue to be litigated in court. Then, in 2007, the

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* * *, the more compelling evidence establishes that the actual 'tipping point' is the completion of the full residency" because that "marks the end of the formal, supervised, curriculum-directed learning"); *United States* v. *Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 999 (D. Minn. 2003) (Mayo residents are "students" under the student exemption's plain language); Pet. App. 64a (University of Minnesota residents are "students" under the student exemption's plain language).

Eleventh Circuit held that the governing statute unambiguously precludes a bright-line rule excluding medical residents from claiming the student exemption. *See United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1252 (11th Cir. 2007).

The Seventh Circuit agreed a year later, holding that "a case-by-case analysis is required to determine whether medical residents qualify for the statutory exemption from FICA taxation." *Univ. of Chicago Hosps.* v. *United States*, 545 F.3d 564, 570 (7th Cir. 2008). In 2009, the Second and Sixth Circuits joined the Eleventh and Seventh. *See Mem'l Sloan-Kettering*, 563 F.3d at 28 ("'the statute unambiguously does not categorically exclude medical residents from eligibility for the student exception'") (citation omitted); *United States* v. *Detroit Med. Ctr.*, 557 F.3d 412, 417 (6th Cir. 2009) ("[w]e assume that in the absence of a congressional definition of 'student,' this common word in Section 3121 was intended to have its usual and ordinary meaning of a person pursuing studies at an appropriate institution").

The IRS, however, has continued to proceed undaunted. In the Eighth Circuit, it filed a suit against petitioner Mayo Foundation in 2002 to recover money refunded to Mayo as a result of its student exemption claim. *United States* v. *Mayo Found. for Med. Educ. & Research* ("*Mayo I*"), 282 F. Supp. 2d 997, 999 (D. Minn. 2003). The district court, however, expressly rejected the government's characterization of medical residency as "'on the job' training," *id.* at 1017, and concluded that Mayo residents "were 'students' within the meaning of Section 3121(b)(10), enrolled in and regularly attending classes," *id.* at 1019.

The government appealed this decision, but later dismissed the appeal. Pet. App. 5a. Rather than seek an immediate ruling from the Eighth Circuit, it set about writing new regulations in an effort to re-define the statutory term—"student"—which the *Mayo I* court, and later the Second, Sixth, Seventh and Eleventh circuits, held unambiguously encompassed medical residents. The regulations were finalized in December 2004. As applied to medical residents, the lynchpin of the regulations is the IRS's blanket rule that any person who works more than 40 hours per week is categorically ineligible for the student exemption, regardless of whether that work is part of a student's education. *See* 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii). This excludes medical residents, who do not satisfy the regulatory threshold according to the IRS. *See*, *e.g.*, Pet. App. 19a.

Even though Mayo had already prevailed in *Mayo I*, the IRS forced it and the University to file new cases for additional refunds. In 2008, the district court ordered the refunds under the rationale adopted in *Mayo I* and later circuit cases. The court held that the regulations had no effect on the outcome because agency regulations cannot override unambiguous statutory language. As it explained, the IRS's categorical threshold changes nothing because "Congress did *not* put any limitation on [the term] 'student' with regard to how much that individual might be working in some ancillary capacity." Pet App. 40a (emphasis in original). The IRS's categorical rule "arbitrarily narrows this definition by providing that a 'fulltime' employee is not a 'student' even if the educational aspect of an employee's service predominates over the service

aspect." *Id.* And the rule "denies 'student' status to medical residents even though the services they provide are primarily for educational purposes and essential to becoming fully qualified physicians." *Id.*

On appeal, however, the Eighth Circuit expressly disagreed with its four sister circuits. It recognized that if the four other circuits' "interpretation of the statute is correct, we must affirm." Pet. App. 9a. But it held that "this interpretation * * * cannot be correct." *Id.* at 10a. Accordingly, unlike the Second, Sixth, Seventh and Eleventh Circuits, the Eighth Circuit held that medical residents can be made categorically ineligible for the student exemption. The split is thus real and direct and, as the Eighth Circuit made clear, dispositive of this case.

B. This Court Should Resolve The Issue Now, Without Forcing Amici's Members To Endure Additional Expensive And Protracted Litigation.

It is immaterial that the Eighth Circuit, unlike the other circuits, ruled against the backdrop of the 2004 regulations. As the Eighth Circuit itself stated, the regulations make no difference because if that court had followed the statutory interpretation adopted by every other circuit to have considered the issue, it would have affirmed the district court's decision. Pet. App. 9a. The IRS cannot avoid this Court's review by promulgating regulations that conflict with judicial interpretations of unambiguous statutory language and then forcing affected parties to relitigate the same issue again and again in the lower courts. The expensive whipsaw already inflicted by the IRS on Mayo and Minnesota should not be repeated with other institutions before this Court is able to clarify the law.

An agency cannot change the meaning of an unambiguous statute by promulgating a new regulation that is inconsistent with the judiciary's interpretation. "A court's prior judicial construction of a statute trumps an agency construction" where, as here, "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). *See also Neal* v. *United States*, 516 U.S. 284, 295 (1996) ("[W]e need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law."). Thus, the IRS cannot re-start the 20-year process that brought the student exemption to this Court simply by promulgating a regulation that attempts to redefine an unambiguous statutory term. Four circuit courts have ruled that the student exemption is unambiguous in not categorically excluding medical residents based on how long they work, without consideration of the educational import of their activities. As the Eighth Circuit itself recognized, the IRS's categorical contrary rule could not change the law in those circuits.

A decision by this Court to deny review would sanction regulatory gamesmanship, at the expense of amici's members, the residents they sponsor, and their educational missions. According to the government, medical residents and their sponsoring institutions are assessed $700 million dollars in FICA taxes every year, and more than 7,000 refund

claims for such taxes have already been filed, with pending claims amounting to at least $2.1 billion. *See* Pet. 20. Those numbers will only increase every year until the issue is definitively resolved by this Court.

In the meantime, if review is denied in this case, residents and their institutions will unnecessarily be forced to endure, once again, the same kind of protracted litigation that has already brought us to this place. The IRS has already subjected both Mayo and the University of Minnesota to multiple rounds of litigation. The IRS went after the University and lost in *Apfel*. Then it went after Mayo in the same circuit and lost in *Mayo I*. But rather than accept that loss, or even challenge it through the normal method—an appeal—the IRS dismissed its appeal in *Mayo I*, attempted to create new law by regulatory fiat, and then started all over against both parties, forcing them both to file new refund claims.

The IRS should not be able to re-start the litigation clock by promulgating an inconsistent regulation when it receives an unfavorable statutory interpretation. Four circuits have already rejected the IRS's position, and it cannot avoid the import of those rulings simply by memorializing that rejected position in a regulation. And it should not be able to forestall this Court's resolution by forcing affected institutions and residents to file repetitive cases in those circuits. While the IRS continues its decades-long crusade to deny medical residents the statutory exemption, the only result will be more litigation costs by educational institutions that can ill-afford them, more billions in refund claims, and continued uncertainty across the country. As Congress itself determined in another context, the costs of defending

litigation involving residency programs "divert[s] the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research." 15 U.S.C. § 37b(a)(1)(E) (involving antitrust litigation). The time has come for this Court to intervene in order to bring uniformity to this important area of law.

II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

The issue is also one of national importance. The sheer magnitude of the claims demonstrates the widespread significance of the issue, which affects all or nearly all of the hundreds of medical school and teaching hospitals that sponsor residents and the approximately 100,000 residents whose education they sponsor. Moreover, reflecting their educational mission, residency programs—unlike employment—are accredited by a national education organization, the Accreditation Council of Graduate Medical Education ("ACGME"). ACGME requires that the institutions that sponsor residency programs provide "appropriate financial support and benefits to ensure that residents are able to fulfill the responsibilities of their educational programs." ACGME, *Institutional Requirements* § III.B (www.acgme.org/acWebsite/irc/irc_IRCpr703.asp). Thus, taxing these students as if they were ordinary full-time employees will only decrease the incentives for institutions to sponsor this type of medical training and further burden the students themselves.

Contrary to the IRS's longstanding position, residents are not simply engaging in on-the-job training for long-term employers. Rather, as virtually every court to have considered the issue has

held, residents' long hours are spent on rigorous educational activities sponsored by their universities or teaching hospitals. "It is well-known that the primary purpose of a residency program is not employment or a stipend, but the academic training and the academic certification for successful completion of the program." *Davis* v. *Mann*, 882 F.2d 967, 974 (5th Cir. 1989). Thus, as the district court found in *Mayo I*, no resident has any expectation of continued employment with Mayo following their residencies, and "the residents' purpose in participating in [Mayo's] residency programs was for education and not for earning a living." 282 F. Supp. 2d at 1017. The Mayo residency programs include core curriculum and primary care conferences, grand rounds, morbidity and mortality conferences, and journal clubs. *Id.* at 1016. In all, internal medicine residents are "expected to attend approximately 900 lectures and conferences dedicated to resident training" over three years, which does not even include mandatory daily teaching rounds. *Id.*

The district court below made similar factual findings with respect to the University's residency program. *See* Pet. App. 63a ("residents regularly attended conferences and lectures throughout the week"). Indeed, those educational methods and characteristics are common to residency programs all over the country. There are nearly 8,500 accredited residency programs in the United States providing education to over 107,000 residents. ACGME, *The ACGME's Approach to Limit Resident Duty Hours 2007-08* (www.acgme.org/acWebsite/dutyHours/dh_achievesum0708.pdf). "Residents are first and foremost students, rather than employees, and all accreditation standards and activities reflect this

distinction." ACGME, *Memorandum* (March 1, 2000) (www.acgme.org/acWebsite/reviewComment/rev_residentEmployee.asp). And "the principal classroom for residents must be the clinical setting because patient care in a medical specialty is what residents are receiving training for." *Mayo I*, 282 F. Supp. 2d at 1015. To be accredited, a residency program must have "[r]egularly scheduled didactic sessions" and "[d]idactic and clinical education must have priority in the allotment of residents' time." ACGME, *Common Program Requirements* 6, 11 (2007) (www.acgme.org/acWebsite/dutyHours/dh_dutyhoursCommonPR07012007.pdf). The common educational mission of all accredited residency programs reflects the residents' status as students over anything else.

Given their educational mission, residency programs are not intended to generate profits for their sponsoring institutions. *Cf. Mayo I*, 282 F. Supp. 2d at 1013 n.30 (Mayo "spends more on medical education and research than it receives from patient care"). The students receive limited stipends calculated to maintain "'a minimum standard of living during the period of time that [they] are engaged in their education.'" *United States* v. *Mount Sinai Med. Ctr. of Fla., Inc.*, No. 02-22715-CIV, 2008 WL 2940669 at *6 (S.D. Fla. July 28, 2008) (citation omitted). In 2008, the average first-year resident received a stipend of approximately $45,000. GAO Report GAO-09-438R at 4 (May 4, 2009) (www.gao.gov/new.items/d09438r.pdf). However, given that the average medical student graduates with $155,000 in student debt, the loan payment alone could reach almost *half* a first-year resident's

monthly stipend income if he or she does not qualify for loan assistance. *Id.*[3]

Given these economic realities, imposing a $700 million annual tax on residency programs—in addition to the substantial costs of further litigating the issue—will further burden residents and leave their institutions with fewer resources to spend on education, research, and patient care. This is especially important now as, based on census data, it has been estimated that the United States will face a severe shortage of doctors in the coming years, and that by 2025 there will be nearly 160,000 fewer physicians than needed to meet demand under the most plausible scenario. See AAMC, *The Complexities of Physician Supply and Demand: Projections Through 2025* at 6 (2008). Combating this expected shortfall will require large increases in residency programs now. This needed expansion, however, will only be hindered if the IRS continues to collect its $700 million tax on residency programs every year, and continues to require institutions and residents to litigate, and then re-litigate, the exemption issue for years or decades to come.

Requiring amici's members to spend considerable resources to continually litigate this issue in circuit after circuit while the courts remain divided will only further exacerbate the financial situation at many institutions that sponsor residency programs. Given the split in the Circuits, residents are now subject to different federal tax regimes depending solely on where they happen to train. It has taken two decades for the question to become ripe for this

[3] Even if all of a resident's debt is fully eligible for the federal graduated repayment plan, the resident still must spend about 10% of his or her stipend on student loan payments. *Id.*

Court's review. The time has come for the Court to review the issue and bring uniformity to the law.

CONCLUSION

For these reasons, and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

JONATHAN S. FRANKLIN*
ROBERT A. BURGOYNE
TILLMAN J. BRECKENRIDGE
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* *Counsel of Record* *Counsel for Amici Curiae*

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