No. 09-837

IN THE

Supreme Court of the United States

MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH; MAYO CLINIC; and REGENTS OF THE UNIVERSITY OF MINNESOTA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the definition of full time employment in the Treasury Regulation validated by the court below may be applied to health sciences residents and, if so, whether that standard has applicability in determining whether residents are students or employees in other legal contexts.

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INTEREST OF THE BOARD OF AMICUS CURIAE[1]

The Board of Trustees of the University of Illinois (hereinafter the "University") is a body corporate and politic of the State of Illinois originally chartered in 1867 as the state's land-grant university. *See* 110 ILCS § 305/1 et seq. With campuses in Urbana-Champaign, Chicago and Springfield, the University enrolls 70,000 undergraduate, graduate and professional students, and awards 18,500 degrees annually. It has a $4.2 billion annual operating budget, including $645 million in sponsored research, ranking it among top research-intensive universities in the country. Its Health Sciences Center is comprised of Colleges of Medicine, Dentistry, Pharmacy, Public Health, Applied Health Services, and Nursing, making it one of only seven academic health centers across the country to include a full complement of health sciences curricula on one campus. Solely to support its educational and public services missions, the University operates a 483-bed tertiary care hospital with 19,924 admissions per year, and an outpatient clinic providing more than 440,000 outpatient visits per year.

The University's College of Medicine is the largest medical school in the country with an enrollment of 1,382 medical students. It also conducts postgraduate (post

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The Petitioners have filed a blanket consent and the consent of the Respondent is being submitted herewith. The parties have been given at least 10 days notice of amicus' intention to file.

M.D. degree) medical resident education programs for 1,163 residents in 69 different medical specialties and sub-specialties. Each residency is accredited by the Accreditation Council for Graduate Medical Education. Much of that postgraduate medical resident education occurs in the University of Illinois Hospital, but also at University sites in Peoria, Rockford, and Urbana, Illinois. The University's College of Dentistry has 320 dental students and conducts 6 postgraduate (post D.D.S.) dental education residency training programs for 90 dental residents. Its programs are accredited by the Commission on Dental Accreditation. Considering the postgraduate health sciences residency programs of the Colleges of Medicine and Dentistry together, the University conducts one of the largest health sciences postgraduate resident education programs in the country.

The University is interested in the outcome of this Petition because it has been involved in a multi-year dispute with the Illinois Department of Unemployment Compensation (hereinafter "IDES") concerning whether its health sciences residents, both medical and dental, are eligible for unemployment compensation upon dismissal from or completion of their residencies. Recently, IDES found one of the University's ex-residents eligible based upon the Treasury Regulation relied on in the decision below.[2] It is expected that, if the decision below stands, IDES will continue to rely on the Treasury Regulation and the University will resultantly incur significant costs in the future in paying unemployment compensation to its departed health sciences residents.

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[2] Treas. Reg. § 3121(b)10)-2(c)-(d)(e)(2004)

REASONS FOR GRANTING THE PETITION

Apart from the conflicts between the Circuits and the importance of the question involved as described by the Petitioners, this Court should grant the petition for a writ since this case has far-reaching jurisprudential significance outside the confines of the Federal Insurance Contribution Act ("FICA") and its definition of "student" as codified in 26 U.S.C. § 3121(b)(10). As stated above, in Illinois, the reasoning in the decision below and the Treasury Regulation has been used by IDES as a basis to find that student exceptions in the Illinois Unemployment Compensation Act do not cover the education of health science residents by the University, principally because they spend more than 40 hours per week in educational activity, the benchmark employed in the Treasury Regulation.

By way of background, in 1937 Illinois enacted the Illinois Unemployment Insurance Act, 820 ILCS § 405/100, establishing a system of weekly benefits payable to unemployed workers if terminated from employment due to no fault of their own. Funding of benefits is through charges to employers, in the case of state workers through a separate appropriation. 820 ILCS § 405/1403. Practically speaking, the University funds benefits awarded to its former employees by making contributions to IDES. Benefits are paid based on "wages" earned, including every form of "remuneration for personal services." 820 ILCS §§ 405/234, 405/500E. There are numerous exceptions to "wages" earned for benefits purposes, including for services of students performed in the employment of a school, college, or university, 820 ILCS § 405/224; services by students in

programs which combine academic instruction with work experience, 820 ILCS § 405/227; and services by an "'intern' . . . in the employ of a hospital. . . . ," 820 ILCS § 405/230. Further, "wages" do not include financial assistance under any student aid program administered by an agency of the government received by a person who is enrolled as a full-time or part-time student at any public or private university. 820 ILCS § 405/401.5.

Applicants denied benefits under the statutory scheme or employers ordered to pay benefits have the right to protest and to a review through a multi-step process leading to a decision by a hearing officer known as a "referee," 820 ILCS § 800, and then to a board of review, the final step before administrative review in state court. 820 ILCS § 803.

In recent years, health sciences residents in several different states have applied for and have been awarded unemployment benefits upon termination from residency training based on the erroneous conclusion that they are workers engaged in gainful employment for the hospital in which residency education occurs. *See, e.g., Unemployment Compensation Bureau v. Detroit Medical Center*, 267 Mich. App. 500 (Mich. Ct. App. 2005). They have done so either after they fail to progress academically or after they complete the program and graduate.

The University has recently experienced a number of such filings and has contested the residents' applications for benefits because of the added financial burden associated with paying these benefits and in

apprehension that this practice may become widespread. Results of the University's protests demonstrate the impact of the decision below on this issue. In a decision reached by IDES Hearing Referee David W. Ott on November 12, 2008, before the decision below, IDES supported the University's appeal, finding that the stipend paid to the resident in that case was not in the form of "wages" under the Illinois Unemployment Act. (See Appendix A). However, after the decision below, on December 17, 2009, IDES Hearing Referee William Naurich, specifically relying on the Treasury Regulation and implicitly the thinking of the Eighth Circuit, confirmed the award of unemployment benefits to another health services resident. (See Appendix B). Tracking the wording of the Regulation, Referee Naurich stated:

> The services of a full-time employee are not incident to and for the purpose of pursing a course of study. The determination of whether and (sic) employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee . . . The determination of an employee's normal work schedule is not affected by the fact that the services performed by the employee may have educational, instructional, or training aspect.

Remarkably, IDES took this position even though the Seventh Circuit Court of Appeals in *University of*

Chicago Hospitals v. United States, 545 F.3d 564 (7th Cir. 2008), cast serious doubt on the validity of the Treasury Regulation insofar as it provides a definition of "student" for FICA purposes. Had Referee Naurich followed the thinking in *University of Chicago Hospitals*, he should have reached the opposite conclusion and declined to award unemployment benefits to the University's ex-resident.

Considering the aforedescribed development in the context of unemployment benefits, it is foreseeable that the extremely narrow definition of "student" as contained in the Treasury Regulation could be employed in still other legal contexts to argue for reclassification of health science residents as workers, not students. This could be particularly so in recurring cases concerning judicial abstention in review of academic decision making. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). Frequently that issue arises in cases concerning the scope of due process rights in the context of an academic decision to terminate a student, *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), including academic decisions about health sciences residents. *See Fenje v. Feld*, 398 F.2d 620 (7th Cir. 2005) (decision to deny a prospective resident the right to matriculate based on false statement was academic); *Shaboon v. Duncan*, 252 F.3d 722 (5th Cir. 2001) (resident's failure to address mental problems furnished academic basis for dismissal); *Davis v. Mamm*, 882 F.2d 967 (5th Cir. 1989) (resident's dismissal from residency training was academic decision). Were residents to be regarded as employees in cases involving decisions to dismiss or terminate them, then the outcome of these cases could be dramatically different.

Considering the potential impact of the Treasury Regulation as outlined above, it is critical that this Court resolve the conflict between the circuits described by the Petitioners, hopefully in a way which recognizes that residents are students enrolled in an educational program, not employees hired to perform gainful services. Such a result is merited because the record before the district court demonstrates that the Treasury Regulation's arbitrary and irrational application of a "40 hour rule" to the educational pursuits of health sciences residents is erroneous and unsupportable and that the Treasury Regulation is invalid for that reason. It is also invalid because it ignores the overwhelming evidence included in the record below that, while the training of health sciences residents is unquestionably intense, its purpose is singularly educational with no aspect of gainful employment.

The experience of the University in its ongoing dispute with IDES shows that the Treasury Regulation, and implicitly the thinking in the decision below, can be used in unanticipated ways to resolve the question of whether a resident is a student or employee in legal contexts other than just FICA withholding. That thinking could affect other contexts where the legal status of a resident is relevant to the outcome. Therefore, this Court should grant the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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