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 :
8	x
9	Washington, D.C.
10	Monday, November 8, 2010
11	
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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Τ	PROCEEDINGS
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.
б	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.
- 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 --
- 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?
- 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.
- 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?
- 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,
- 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 --
- 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 --
- 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.
- 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 --
- JUSTICE SOTOMAYOR: You don't think
- 23 receiving \$50,000 or \$60,000 a year is enough to make
- 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 --
- 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.
- MR. OLSON: Well --
- JUSTICE SOTOMAYOR: He's being supervised by
- the general counsel, his work's being reviewed, and he's
- 21 attending classes at night.
- 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 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 --
- 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.
- 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.
- Now, that --
- 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?
- 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 --
- 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.
- 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?
- 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.
- 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.
- So why doesn't it make sense simply to refer
- 20 to -- defer to the Service's interpretation?
- MR. OLSON: Well --
- 22 CHIEF JUSTICE ROBERTS: You go back and --
- 23 both of you go back and forth with hypotheticals, each
- 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.
- 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 --
- JUSTICE BREYER: All right.
- 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
- 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.
- 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 --
- 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 Oh, by the way --MR. OLSON: 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 --JUSTICE SOTOMAYOR: At any job, actually. 6 7 MR. OLSON: -- the Justices of this Court are exempt from Social Security taxes, so --8 9 (Laughter.) CHIEF JUSTICE ROBERTS: You're not 10 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 --JUSTICE BREYER: No, no, it didn't as 2.1 22 interpreted. You see, it's not -- it's that -- I 23 concede everything you say: It's a total learning experience, and it's a special learning experience. The 24 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.
- 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.
- 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.
- 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.
- 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.)
- 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.
- 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 --
- 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 --
- MR. OLSON: I accept the word "incident" --
- JUSTICE ALITO: Why do you accept the word
- 15 "incident"? Incident is not in the statute.
- 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
- 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.
- 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.
- 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?
- 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 --
- 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.
- 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.
- 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.
- 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.
- 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?
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- 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.
- 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 --
- JUSTICE GINSBURG: But it certainly can if
- 23 they're a -- if they can be a student in the last year
- 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.
- 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?
- 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.
- 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?
- 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.
- 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.
- 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
- 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.
- MR. OLSON: Yes.
- JUSTICE SOTOMAYOR: So, why is this any
- 21 different?
- 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?
- 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
- 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.
- 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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