IN THE SUPREME COURT OF THE UNITED STATES

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LONG ISLAND CARE AT HOME, LTD., :

ET AL., :

Petitioners :

v. : No. 06-593

EVELYN COKE. :

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Washington, D.C.

Monday, April 16, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

H. BARTOW FARR, ESQ., Washington, D.C.; on behalf of Petitioners.

DAVID B. SALMONS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

HAROLD C. BECKER, ESQ., Chicago, Ill; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-593, Long Island Care at Home versus Coke.

Mr. Farr.

ORAL ARGUMENT OF H. BARTOW FARR

ON BEHALF OF THE PETITIONERS

MR. FARR: Mr. Chief Justice, and may it please the Court:

In the 1974 amendments to the Fair Labor Standards Act, Congress made one thing very clear, that it wanted the Department of Labor to define the boundaries and fill in the details of the companionship services exemption. And I think that has two important implications for this case.

First of all, when the Department has filled in the details, after notice-and-comment rulemaking, its regulations should receive Chevron deference as long as they are permissible implementation of the statute.

Second, and particularly specific to this case, if there are ambiguities in the regulations, or as we have here, an apparent facial inconsistency, the Court should accept the Secretary's resolution of that ambiguity provided that it is a reasonable one. And

here we submit it's not only a reasonable one, it is by far the most sensible one.

Now I'd actually like to turn, if I may, to the second issue first, because I think that's a source of a lot of the concern in this case.

Plainly the two regulations, section 10 -- 552.109(a), which is the regulation directly at issue before this Court, and 552.3, which is the regulation relied on heavily by the Second Circuit to strike down the present regulation, have some inconsistency between them.

But it is also plain that the Department could not have intended to say at one and the same time that the only employers entitled to use the exemption were homeowners and then say in another section promulgated at the same time that also third-party employers are entitled to the exemption. So the question is, how does one resolve this apparent inconsistency?

And the Secretary says, well, the only regulation that we promulgated that, in fact, deals specifically with the issue of third-party employment is 552.109(a), which is in fact headed Third-Party Employment.

And that section 552.3, while containing some language that might be read to address that issue,

in fact deals with several other topics. Specifically it deals with the topic of what kinds of jobs are involved in domestic service, maids, chauffeurs, footmen, et cetera; where those have to be performed, in a private home; and in fact, somewhat more than that, in the private home of the person receiving the services.

So it's not enough, for example, for somebody to conduct a service like laundry or baby-sitting in his or her own house, it has to be in the house of the person receiving the services.

JUSTICE GINSBURG: I thought the words were the home of the person who employs, not who receives the services but who employs.

MR. FARR: Oh, that's correct, Justice Ginsburg. The literal language is not specifically what I was saying. What I'm talking about is the Secretary's attempt to resolve what is an apparent inconsistency between the literal language in 552.3 and the literal language of section 552.109(a).

JUSTICE GINSBURG: By -- by reading out the words "of the person who employs" her?

MR. FARR: Well, essentially reading them to say they, they were not intended to address directly the subject of third-party employment which is the subject addressed in 109(a). And I think if one is -- even

leaving aside the question of deference to the Secretary for a moment, Justice Ginsburg -- if one is simply talking about making a fair resolution of these conflicting provisions from the ground up, it seems to me the first thing that one would do is apply the canon that the specific provision controls the general.

And if one looks at the two provisions, section 109(a) is a provision that deals with one thing and one thing only: that is third-party employment.

And it says explicitly and straight out that persons who are employed by third-party employers are -- or third-party employers who employ persons performing domestic services are entitled to the exemption.

JUSTICE KENNEDY: I thought it also addressed, unlike the more general regulation, just people who have companionship services. So if you have a maid or a cook or a footman, who doesn't provide companionship, then 109 is inapplicable.

MR. FARR: That would be true. Now that would be inapplicable, of course --

JUSTICE SCALIA: What's a footman? I don't even know what a footman is.

(Laughter.)

JUSTICE SCALIA: What is a footman?

MR. FARR: I think that may be beyond my

expertise, Justice Scalia.

The -- of course that doesn't address anything beyond companionship services, of course, because there is not an exemption beyond that. And that's one of the interesting things about 552.3. In addition to generally dealing with this question of what kind of jobs are domestic service, it is, in fact, going well beyond anything that is necessary to a discussion of the exemption for companionship services, because jobs like chauffeurs, and maids, and all of that are not subject to the exemption. So it really looks at what 552.3 is doing despite the couple of words that -- at the beginning of it, is giving a general definition of what constitutes domestic employment, what constitutes domestic services for purposes not only of the exemption but, in fact, really for the purposes of coverage as well.

And the Department has taken that position. It says this is, in fact, the only definition of domestic service that we have in the regulations, and it is not just intended to be limited to the particular situation of the exemption. It applies more broadly than that to coverage as well.

So I think in all those senses, Justice Kennedy, 109 is a very specific provision; 552.3

deals with a number of other subjects.

Now, one other thing on the statutory interpretation part is that the reading of 552.3 that Respondent offers also leads to the problem that essentially sets up a tension with another one of the regulations which is 552.101(a). 552.101(a) which I'm sorry -- I don't have the right page number here -- it is on page 77a of the appendix to the petition -- has, carries over the language from 552.3 about "in the home of the employer" that Justice Ginsburg referred to. But then it also says that this includes people who are commonly referred to as "private household workers."

And the one thing we know from the Department of Labor submissions to Congress in 1974 and also from what the Department has said before this Court is that that term at the time was defined by the Department and known by Congress to constitute more than just employees employed by the homeowner. There was a special second category for people who worked in the home of the homeowner at the homeowner's request but were employed by a third-party agency.

Now somewhere underlying all of this question, I think, is statutory interpretation and indeed all of Respondent's arguments against deference to the Department is a basic underlying premise, which

is that Congress really would not have wanted, even if it didn't say so, for the exemption to apply to employees who work for third parties.

And I would just like to suggest that there really is no basis for thinking that Congress would have wanted that.

First of all, third-party employers such as private agencies provide services for the particular group of people which Congress was trying to assist with this exemption. People who by reason of age or disability are unable to care for themselves. Agencies acting as the employers specifically can do the hiring, they can do the vetting and the screening, the background screening for employees. They can provide necessary paperwork, filing Social Security documents and things like that.

So, in fact, for Congress to have some sort of bias against covered enterprises seems a little bit unusual.

JUSTICE SCALIA: Mr. Farr, I'm not sure I followed your argument with regard to 552,101(a).

MR. FARR: Uh-huh. Yes, Your Honor.

JUSTICE SCALIA: Page 77a as you said.

But what is your argument there? I mean, that seems to, that seems to reinforce the provision that you say we should ignore or at least should accept

the Secretary's reinterpretation of.

MR. FARR: Well perhaps, perhaps I wasn't as clear as I intended to be. The -- it does, as I indicated, have the language about the private home of the employer.

JUSTICE SCALIA: That's right.

MR. FARR: However, the -- the preceding sentence says the term -- referring to the term that is at issue in 552.3 -- "domestic service employment," includes persons who are frequently referred to as "private household workers." The fact is that those two statements are inconsistent with each other. The term cannot be limited to employees of the homeowner and also include persons who are frequently referred to as "private household workers", at least if one means all of the persons frequently referred to as --

JUSTICE SCALIA: Yes. I see. Is that clear in the -- in the specific Senate report that is referred to here?

MR. FARR: In the specific Senate reports, in both the '73 and the '74 reports --

JUSTICE SCALIA: This, the one that's cited in the regulation itself. Because I -- otherwise, I don't, I ignore those things. If it's cited in the regulation --

MR. FARR: Well, I'm --

JUSTICE SCALIA: -- does that report say it?

MR. FARR: What -- the report uses the term "private household workers" frequently interchangeably with the term "domestic employee." That is what is clear from the report itself.

Now, the Department of Labor when it was reporting to Congress, as Congress has required it to do, the Department of Labor used the term "private households workers", specifically defined in there by the Department, to say this means not just employees employed by the homeowner but also people who are employed by third parties.

So I think it is a fair assumption that when the Senate report was using that phrase, it was using it in the same manner that the Department of Labor reports had. And, in fact, at one point in the -- moving further backwards in the legislative history -- Senator Dominick actually quoted that language, the definition from the Department of Labor, on the Senate floor during the debates.

JUSTICE GINSBURG: I thought that the Department of Labor's first take on this was that the exemption did not apply to third-party employers. That was the original Department of Labor position, wasn't

it?

MR. FARR: No, Justice Ginsburg. And I believe that's not correct. There was a, an opinion letter from the Department in November of 1975 -- this is an opinion letter that's cited at page 21 of the Solicitor General's brief -- which specifically stated that the exemption applied whether the employee was an employee of the homeowner or of a public or private agency.

JUSTICE GINSBURG: I'm referring to the notice-and-comment rulemaking in which you place great stock. I thought the original notice-and-comment rulemaking said the exemption does not apply to third-party employers.

MR. FARR: I'm sorry, Justice Ginsburg. I misunderstood the time frame we were dealing with. In the notice of proposed rulemaking, actually I would disagree with that characterization also. The notice of proposed rulemaking made a division among third-party employers. It said the exemption would not be available to those third-party employers who were covered enterprises but it would be available to those who were not covered enterprises.

JUSTICE SCALIA: Well, wait. Does a notice of proposed rulemaking set forth the Agency's position?

MR. FARR: No, it does not.
JUSTICE SCALIA: I didn't think it did. They're just floating an idea. You know --
MR. FARR: That's correct.
JUSTICE SCALIA: Run it up the flagpole, see if --
MR. FARR: Well, that it solicited comments on that proposal. And after the comments, it changed its position to say no, in fact, all third-party employers will be exempt.
JUSTICE GINSBURG: And -- and gave no further discussion of it after -- after I'd sent out the notice of proposed ruling that said third-party employers will not be exempt, and then it said they will be exempt, did it give reasons for the change?
MR. FARR: Yes, if I can just -- if I can quibble with the premise of the question. The first time it said some third-party employers would be exempt and some wouldn't. Then when it changed --
JUSTICE GINSBURG: Some would be the ones that qualified as -- what is the phrase, "enterprises engaged in commerce"?
MR. FARR: That's correct -- those would be the ones under the proposed rulemaking that would have been denied the exemption. When in fact -- when, in

fact, the Labor Department said no, in fact, the exemption should apply to all third-party employers. It said it found that more consistent with the statutory language. And it also said it was more consistent with what it had done under other regulations which had been passed under the Fair Labor Standards Act.

JUSTICE STEVENS: Mr. Farr, would you agree that the position expressed in the notice would itself -- in the original notice would have been consistent with the statutory language?

MR. FARR: I'm not sure of that, Justice Stevens, to be honest with you. I mean one of the difficulties here in answering that is that I think, because the Department has such broad authority under 213(a)(15) to define and delimit the terms, I think what's consistent with the statute is expanded somewhat.

On the other hand, I have to say I don't really see where there would be in the language of the statute any basis for drawing a distinction between different kinds of third-party employers. The phraseology in the coverage provisions, the phraseology in the exemption provisions, really doesn't allow for that in terms of any sort of statutory interpretation.

JUSTICE STEVENS: Well there would be a basis in terms of the size of the third-party employer.

MR. FARR: I mean, it's possible, but as I say, the -- I mean, among the difficulties is covered enterprises is not just corporations and big and small corporations. Covered enterprises beginning in 1974 includes State and local Governments. So what Congress would have been addressing here, if it had been squarely facing the issue, would have not just been the question of how to treat large and small corporations, but whether it wanted to deny the exemption to covered enterprises such as State and local agencies who, in fact, do provide a lot of the direct employees who provide companionship care. They have a lot of employees who actually go into homes and care for people who are employed by State and local Governments. And I think it would be a little bit unusual for Congress, who is reasonably solicitous of State interests, to deny them an exemption that would have been of considerable importance to them. As the State of -- or the City of New York brief points out, this is a very extensive endeavor.

JUSTICE GINSBURG: Were they covered before, before there was any provision that dealt with household workers? If State and localities were considered "enterprises engaged in commerce," then presumably they were -- they had no exemption before, their companion

care people, just as their household workers, would be covered by the Fair Labor Standards Act.

MR. FARR: No, but I think, Justice Ginsburg, the important point is they were not covered prior to 1974. There were certain --

JUSTICE SOUTER: They were not treated as covered enterprises.

MR. FARR: That's correct. They were -- they were, if they worked in schools or institutions like hospitals. Other than that, they were not until 1974. That's exactly correct. This, in fact, would have been denying them an exemption at the very time that for other occupations aside from companionship services, they were first having coverage applied to them.

If there are no further questions, I'd like to reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you Mr. Farr.

Mr. Salmons.

ORAL ARGUMENT OF DAVID B. SALMONS

ON BEHALF OF UNITED STATES

AS AMICUS CURIAE SUPPORTING PETITIONERS

MR. SALMONS: Thank you, Mr. Chief Justice, and may it please the Court:

The FLSA's companionship services exemption

applies by its terms to any employee employed in domestic service employment to provide companionship services for the aged or infirm. The Act imposes no limitation based on the identity of the employer. And the Agency's regulation of 552.109 extending the exemption to employees of third parties is entitled to deference.

The Department expressly invoked its statutory rulemaking authority in adopting section 109, or 552.109. It utilized notice-and-comment rulemaking procedures both in 1975 and each time it considered amending the regulation. And States and care providers have relied upon it in devising systems to provide appropriate services to the aged and the infirm.

CHIEF JUSTICE ROBERTS: So if the Department of Labor had enacted its regulations as originally proposed, those regulations would have been invalid?

MR. SALMONS: No, I don't think so, Your Honor. If you're referring to the initial proposed rulemaking that would have exempted only some third parties, we think that would have been a permissible reading of the exemption given the fact that the Secretary is provided very broad defined limit authority. But we certainly think there's nothing in that exemption that precludes the construction that's

been adopted here. In fact, we think it is the most consistent with that language.

The language of 552.3 upon which Respondent relies does not change that conclusion. While if read in isolation that language could require that domestic service employees have to provide their services in the home of the employer, it should be not -- it should not be given that reading for the reasons explained in the Department's 2005 advisory memorandum.

The Department's construction of its own regulations contained in that memorandum is itself entitled to deference under Auer and Seminole Rock and its construction harmonizes the various provisions at issue here far better than Respondent's reading of 553 does.

CHIEF JUSTICE ROBERTS: Harmonizes --

JUSTICE GINSBURG: The statute treats together babysitters and elder-care people, but I take it the babysitters if they were working for an agency rather than for the householders, there wouldn't be any exemption? Is that right?

MR. SALMONS: That's correct, and that's tied to a specific term that only applies to the exemption as to babysitters. The only thing that's exempt with regard to babysitters is babysitting on a

casual basis. Congress certainly could have included a casual basis requirement with regard to the exemption for companionship services. We think it's very notable that it did not and we read from that that Congress wanted all domestic service employees providing companionship services to be exempt, and we think that's most consistent with the goal of ensuring that those individuals who most need this type of care have the opportunity to receive them at a reasonable cost.

JUSTICE GINSBURG: Isn't it odd that this -- the basic thing about the '74 legislation, it was going to add to the Fair Labor Standards Act people who were not covered before. So it added household workers. And yet you say that, while Congress had its mind trained on adding people, it also subtracted people who were covered before, took them out, removed them from the coverage of the Act.

MR. SALMONS: Well, we think that that is the consequence of the companionship services exemption, but we don't think that's odd based on the Department of Labor's view of what the purpose of that exemption is and based on the textual difference between, for example, the exemption for babysitting services and the exemption for companionship services.

The exemption here expresses no limitation

based on the identity of the employer and we think it was well within the Agency's discretion to conclude that what Congress had in mind here was a categorical exemption based on the type of services that are being provided; and while that may mean that there are certain workers who are now exempt who were not previously exempt, that's because Congress for the first time in 1974 focused on this problem of companionship services being provided to those who cannot care for themselves; and we think that follows from the text, and for the reasons Congress adopted that.

JUSTICE STEVENS: Mr. Salmons, can I ask you a question about the importance of the whole litigation? Am I correct in believing that there's a provision in the law that protects the defendants from damages liability if they relied in good faith on the regulation, so that what we're really talking about is whether the regulation would apply in the future rather than there being a damage issue in the case?

MR. SALMONS: Well, there is a safe-harbor provision that allows for reliance by employers on a -- advisory memorandum statement by the Agency.

JUSTICE STEVENS: That would clearly apply to this case, would it not?

MR. FARR: We certainly think it would. I

take it Respondents in this case would disagree and would point to the language of 552.3. I'm not sure, for example, how the Second Circuit would have resolved that question, given the way it viewed the statute here. But we do think that that would apply and so I think one view of that would be it's largely prospective.

JUSTICE STEVENS: So in your view we're really faced with a question of whether the regulation should be given prospective effect.

MR. SALMONS: I'm sorry? What would be given prospective effect?

JUSTICE STEVENS: As to whether the Government's position should be given prospective effect because the past liability doesn't -- the damage liability just doesn't exist.

MR. SALMONS: Well, that is our view. Again, I think that would be an issue that would be litigated and I'm sure litigated heavily in the hundreds of cases that are being filed under this provision. And I think it's -- one of the concerns I think of the Agency here was to provide a clear statement with regard to how these seemingly conflicting provisions of the regulation are to be reconciled and applied.

CHIEF JUSTICE ROBERTS: Not seemingly conflicting. They conflict.

MR. SALMONS: Well, I certainly don't take issue with that. I think that there are a variety of things that point to the conclusion that the language in 552.3 that refers to "in the home of the employer" simply cannot be read literally. It was borrowed from the Social Security context and if read the way Respondents do we think would raise a serious question about the scope of coverage because the Agency has always viewed 552.3, notwithstanding the initial line that says "For purposes of the exemption," to provide the relevant definition for coverage as well. And no party, or amici for that matter, before this Court nor the Department thinks that there's a difference between the identity of the employer for purposes of coverage. And we also think, given the language in 101 that refers to "private household workers", the definition of which was provided to Congress in a report by the Department of Labor and is relied upon in the advisory memorandum in 2005, which clearly applied to third-party employers, suggests that 552.3 cannot be read literally.

And of course we know that at the same time that the Agency adopted 552.3 it felt the need to adopt a specific regulation dealing with the question of third-party employment which would not be relevant -- which would not be necessary under Respondent's reading.

If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Salmons.

Mr. Becker.

ORAL ARGUMENT OF HAROLD C. BECKER

ON BEHALF OF THE RESPONDENT

MR. BECKER: Mr. Chief Justice, and may it please the Court:

On October 1, 1974, just five months after the 1974 amendments to the Fair Labor Standards Act took effect, the Department of Labor exercised its delegated lawmaking function to define this term "domestic service employment," which exists in the companionship exemption and nowhere else in the amendments. And they defined it clearly and explicitly to apply only to companions and babysitters employed by the household.

At the same time, DOL provided a persuasive explanation for that definition. The Department found that such companions and babysitters when employed by covered enterprises had been covered prior to the amendments and that it could not have been Congress's purpose, when amendments were explicitly designed to extend coverage, to at the same time contract coverage. The very preamble to the Act states that the purposes of the amendments are to expand the coverage of the Act.

Therefore, the DOL itself concluded in October of 1974 that it was not the purpose of those amendments to deny the Act's protection to previously covered domestic service employees.

The definition in 552.3, which expressly applies only to the exemption, conflicts directly with the final third-party regulation.

JUSTICE BREYER: Was that later?

MR. BECKER: Yes, Your Honor.

JUSTICE BREYER: How long? How much later?

MR. BECKER: The final regulations were promulgated in February of 2005.

JUSTICE BREYER: No, no. I thought that the provision that was read -- what is the number -- where they say 552.109; that didn't appear anywhere until many years later?

MR. BECKER: No, no, Your Honor. That was in the final regulations, which were promulgated in February -- excuse me -- in 1975, not 2005. I think I mis --

JUSTICE BREYER: I mean, you read --

MR. BECKER: In the final regulations.

JUSTICE BREYER: You read 3 and 3 said what you said it said. All right. How much later did they promulgate 109?

MR. BECKER: That was in the final regulations in February of '75.

CHIEF JUSTICE ROBERTS: The same time that 552.3 was finally promulgated.

MR. BECKER: That's correct.

CHIEF JUSTICE ROBERTS: They came out together, right?

MR. BECKER: That's correct.

JUSTICE BREYER: That's what I thought. So the same day they say, 3, you have to have these domestic workers employed by the old lady who's sick, and then in 109 they say you don't.

MR. BECKER: That's correct. There's a direct conflict.

JUSTICE BREYER: All right. Now, why is that a conflict? Let's imagine -- it sounds like a conflict. But it's easy for me to imagine a regulation that says birds for purposes of this are animals that fly, and then 15 pages later it says, but by the way, penguins don't and they're still covered. I mean, why is that a conflict? There are lots of -- there are specific situations. If I had read that, I would have thought, well, okay, they have an exception.

MR. BECKER: Your Honor, the definitional regulation, 552.3, explicitly defines a term used only

in the companionship services exemption, "domestic service employment." And it defines it clearly and explicitly to apply only to employment by the household.

Therefore, there is a direct conflict with the so-called third-party employer regulation, which appears to say that the exemption can apply to employees employed by third parties.

The importance of the conflict is twofold. One, when the original regulation was proposed the Department provided a persuasive explanation. Congress surely didn't intend to contract coverage in amendments designed explicitly to expand coverage.

JUSTICE BREYER: Did Congress intend to cover, which I guess is a growing situation, that there is an old woman or man and they're very sick and they live in their house, there's only one way to keep them from having to go to an institution. Their children hire a companion to look after them. Now, that's a third-party.

MR. BECKER: Your Honor, that question has been posed by some of the amici and it is a good question, but not the question before you.

JUSTICE BREYER: Because?

MR. BECKER: And I submit that if the Department construed section 552.3 to say when our words

say "employed by the household" that could include a broader notion of the household, for example a son or daughter living outside the household, that might be a permissible construction of the Department's own regulation. But the construction which simply takes those words --

JUSTICE BREYER: It doesn't say that. It says "about, in or about a private home of the person by whom he is employed." I live in San Francisco. My mother lives in Massachusetts. Now, if I hire a companion to live in Massachusetts, that companion does not work about a private home of the person, me, by whom she is employed. So if we're being literal and if you win this case, I don't see how -- and I'm worried about this, obviously -- however -- and I think it's probably very common, that all over the country it's the family, the children, the grandchildren, an aunt, an uncle, maybe a good friend, maybe they're not even related, who is paying for a companion for an old, sick person so they don't have to be brought to an institution.

And if you win this case, it seems to me suddenly there will be millions of people who will be unable to do it and, hence, millions of sick people who will move to institutions. Now, if I were to say that that isn't totally a legal point, it is of course a

legal point because it's a question of what people intended, but a worrisome point, I would be telling the truth. To me it is a very worrisome point.

MR. BECKER: It's a very important question of public policy and therefore let me answer in two ways. One, I think there is a proper procedure even under the existing regulations to address that concern. The elderly individual that you're concerned about who is severely disabled and thus needs this care, the child or family member who is employing the companion to care for them could do so as their guardian, and therefore as a technical legal matter would be doing so, the employment would be by the person who resides in the home, and is being taken care of.

JUSTICE SCALIA: It wouldn't take a whole lot of imagination for Justice Breyer to give the money to his mother, who could then hire the --

(Laughter.)

MR. BECKER: Exactly. So --

JUSTICE SCALIA: I mean, a clever lawyer would think of that, I think.

(Laughter.)

MR. BECKER: The clever lawyer from the previous case.

JUSTICE BREYER: And perhaps there are

people, lawyers in the Government, who try to see through that kind of thing.

MR. BECKER: But let me answer the second --

JUSTICE BREYER: And there are many -- maybe Justice Scalia has the answer.

MR. BECKER: Let me answer in a second way to what is a very serious concern. And the second way the situation could be dealt with is by the Department of Labor. They could look at their regulation and say, the industry has changed and therefore, in a way which could certainly be consistent with Congress's intent because it would not be withdrawing coverage from a previously covered employee who was employed by an enterprise, we could say that the exemption applies to companions and babysitters employed by private individuals, including the homeowner, the son or daughter, et cetera.

JUSTICE STEVENS: If you're saying it's permissible to change the rules because the industry has changed, is it not possible that the industry changed at about the time the statute was enacted? That the prevalence of third-party employers is something that really developed later?

MR. BECKER: As an empirical matter, that is clearly the case, Justice Stevens. However, we know

several things about Congress in 1974. We know that the enterprise coverage was relatively new. It had been adopted it in 1961, expanded in 1966, and indeed expanded these very amendments in 1974. So Congress was aware of the prior coverage. We know that the Department of Labor, in the very reports which have been cited by the Petitioner, stated both in January of 1973 and in January of 1974 in their reports to Congress on the Act, stated that there was prior coverage of domestics employed by third parties. We know there was enforcement activity by the Department of Labor against such third-party employers.

So while the industry has certainly changed, there were enterprises who employed domestics, including companions, in 1974, and Congress was aware of it and stated over and over again in the preamble, in the committee reports, which indeed, the House committee report said, "Our intention is to expand the Act to the extent of Federal power."

CHIEF JUSTICE ROBERTS: How -- putting aside -- putting 552.109 aside, how is 552.3 a plausible interpretation of the statute?

MR. BECKER: Your Honor, we think it is the most plausible interpretation for the following reasons:

Number one, contrary to what has been

suggested, the language in the exemption is not identical to the language in the extension provisions extending the minimum wage and overtime requirements. There is an important difference, and that difference is the word "employment." Now that's important for several reasons. Number one, of course, coverage provisions are to be read broadly and exemptions narrowly. So there's an additional word and that can would suggest it should be read as a term of limitation.

Number two, that difference must be given significance, if possible. The word should not be read to mean the same as the coverage provisions when it doesn't exist in the coverage provisions.

And number three, we should avoid redundancy. There is a reading of that unique language, "domestic service employment," which makes sense and in fact, is exactly the reading given by the Department.

Congress did not intend to --

CHIEF JUSTICE ROBERTS: What employment would someone who's hired by a third-party be engaged in if not domestic service employment?

MR. BECKER: The word domestic service employment is not necessary to describe what you have described, Mr. Chief Justice. If that is what the Congress intended to describe, it could have said simply

an employee employed to provide companionship services.

JUSTICE SCALIA: Well, it could have said a lot of things. But I find it -- you're hanging your case upon the proposition that there is a difference between domestic service employment and "employed in domestic service employment."

Wow. You know, I just don't see how there's any difference in those two at all.

MR. BECKER: Your Honor --

JUSTICE SCALIA: You say we have to find some difference no matter how imaginative the difference might be. If there were a difference, I'm not sure it's the difference that you're arguing for.

MR. BECKER: What I'm suggesting is not that our case relies or hangs on that word. What I'm suggesting is if that word, that phrase, "domestic service employment," is given the definition which the Department of Labor itself gave it, it avoids reading two phrases which are different to mean the same thing. It avoids redundancy. And moreover, it is wholly consistent with every other piece of evidence we have about Congress's intent.

Even the Department of Labor suggested it surely could not have been Congress's intent to retract coverage. The definition is consistent with that.

JUSTICE SCALIA: Can I ask you what your proposal is with regard to the contradictory regulations, 552.3 and 552. -- what is it, 109?

I think they are contradictory.

Now, the Agency has come up with a solution. We will interpret the former quite unrealistically to mean something that it doesn't seem to us to say but -- you know -- close enough for Government work.

What is your solution for solving the inconsistency? Are both of the regulations bad?

MR. BECKER: My solution, Your Honor, has two parts but leads to the same conclusion. Our solution is that in applying the Act -- which is the question here, does the Act apply to Ms. Coke's employment -- this Court should apply the definitional regulations for two reasons, the definitional regulation for two reasons. One, it is the regulation, which no one disputes, and was promulgated in the exercise of the Department's lawmaking function. The Department expressly defined and delimited its term "domestic service employment" in 552.3 and expressly said it was not doing so in the third-party regulation. So it's entitled to greater deference for that reason. But moreover --

JUSTICE SCALIA: What's your other reason?

MR. BECKER: It is the only definition which makes sense, which doesn't lead to a whole series of problems.

JUSTICE SCALIA: Because of employed and domestic employment versus --

MR. BECKER: For the following --

JUSTICE SCALIA: -- domestic employment?

MR. BECKER: For the following five reasons, Your Honor. One, it avoids reading a term in the statute, not only a term of the regulation but a term in the statute, completely out of the statute. And that is the term "employment."

Secondly, as the Department found, it is consistent with what was Congress's clear intent, to expand and not to contract coverage.

Thirdly, if one looks at the debates, and there was extensive and vigorous debate about these amendments, the exclusive focus in Congress was the household. The opponents were exclusively concerned with the extension of coverage to the household. So applying the exemption to protect only household employers is wholly consistent with what was Congress's exclusive --

JUSTICE SCALIA: Well, you're getting into arguments now that are not about the regulation but

they're about the statute. I'm assuming that we have regulations that are entitled to deference. And you have two regulations that are conflicting. Now, how do you decide which one prevails? Counsel for the other side says the specific governs the general, certainly an ancient prescription.

Counsel also says that this is an Agency regulation. The Agency is given great deference in the interpretation of it own regulations. And even if the Agency had said well, you know, they do conflict, we admit it, they totally conflict, we won't even try to reinterpret 552.3, we think that's the one that's wrong, why wouldn't we accept their statement to that effect?

MR. BECKER: Your Honor, of course setting aside, as you do, our argument that Congress had a specific intent on this question, and looking only at the regulations --

JUSTICE SCALIA: That's statutory. I just want to focus on the regulation arguments, not the statutory.

MR. BECKER: Let me answer in several ways. First, this Court has clearly held that an agency does not have unbounded discretion to construe its own regulations. When the terms of the regulations are unambiguous, they cannot be construed away. Now here --

JUSTICE SCALIA: They aren't unambiguous. They contradict each other. The Agency has to do something about it, and here the Agency has made a choice. Even if I assume the choice was we're going to disregard 552.3, we're going to strike out those words, they were the mistake. One or the other had to be the mistake. We decide it was this one. Why shouldn't we take their word on it?

MR. BECKER: Again, for two reasons, Your Honor. There's a difference between conflict and ambiguity. The words are unambiguous, and it's not simply the -- there's two sets of words which they attempt to read out of the regulation. One are the unambiguous words that require employment by the person who's living in the home, and the other is the prefatory language which says the regulation only applies to the exemption. So in the guise of deference, the Solicitor General and the Petitioners actually suggest to this Court that it should take apart the regulation and ignore two of its three operative provisions.

JUSTICE ALITO: And if they're flatly contradictory, doesn't your argument have to be that .109(a) has lesser status? That's what it boils down to, isn't it?

MR. BECKER: That is certainly my primary

argument, that this statute is relatively unique in that it vested two very different sorts of authority in the Department of Labor, one a clear law making authority to actually define and delimit, to specify what the terms in the law mean, and the other general --

JUSTICE ALITO: I'm puzzled by what you think that -- what you think the Department of Labor was doing when it promulgated 109(a). It was thinking in effect the following: We have the power to issue a regulation here that has the force and effect of law, and we're going to go through the procedure that would be necessary to issue such a regulation. But we're not invoking that power here because we want this interpretation which we think is the correct interpretation of the statute not to be followed -- not to get as much deference from the courts as it would if we were invoking our power.

Does that make any sense? That an agency would proceed in that way?

MR. BECKER: Your Honor, it not only makes sense, it's been the Department's pattern since the Act was adopted. That is, the Department since the Act was adopted has split its regulations into those under the exemptions -- for example the primary exemption for professional, executive and administrative employees -- has split its regulations under those exemptions into

those which define and delimit, into those which do not define and delimit, or rather general statements of policy or interpretations .

JUSTICE SCALIA: Yes, but interpretive regulations are in other areas fully valid before the courts and entitled to Chevron deference, at least if they're adopted by notice-and-comment rulemaking. There's nothing -- what should I say -- subordinate about interpretive regulations. In fact, probably most of the significant regulations of the most important agencies are interpretive regulations.

MR. BECKER: The important difference here, Justice Scalia, is the statute. The statute, like the tax statute which was interpreted by this Court in Vogel and Rowan, creates two types of authority. And not only under the Fair Labor Standards Act, if you compare --

JUSTICE SCALIA: I understand that you say it creates two types, but there is no indication that it intended one type of authority to be entitled to less respect from the courts than the other. What do you rely on for that?

MR. BECKER: Your Honor --

JUSTICE SCALIA: Where is the proposition that an interpretive regulation is somehow not a full-fledged binding regulation?

MR. BECKER: Well, let me qualify the question, if I might. The Petitioner would suggest that we're relying on simply a label, this is in the interpretive section and the other is in the general regulation section. Far from it. We are relying on a very clear statement both in the regulations, 552.2(c), as well as in both the proposed regulations and the final regulations, which clearly state that only those in part A define and delimit. Why is that an important distinction? It's an important distinction because Congress clearly meant these two grants to be different. Otherwise, why would it have granted an express power to define and delimit which would otherwise be redundant of the general rulemaking authority?

JUSTICE SCALIA: They're different but not necessarily of different -- entitled to different respect from the courts. A defined -- what is it, define and delimit? These are regulations that don't even purport to be an interpretation of any language in the statute, but the use of authority given to the Agency to cut out certain areas, to say the -- this rule won't apply to companies over this -- that can't possibly be an interpretation of the statute.

So Congress says we're going to give the Agency that authority. In addition, of course, we're

going to give this agency the authority that every other Agency has, which is to interpret -- interpret the language of the statute.

MR. BECKER: Well, Your Honor, I think we can safely presume that in 1974 when Congress created these two types of authority, it did so with knowledge of the law. And this Court, if you compare its decision in Addison to its decision in Skidmore, clearly itself distinguished between the exercise of those two different interpretive or rulemaking authority. Clearly in Addison, construing a very similar term in a different exemption, giving the Department of Labor the power to define a particular term in the exemption, said that is lawmaking authority. And we will follow what the Department of Labor says unless it's clearly inconsistent with the statutory -- with Congress's intent.

In Skidmore, where that type of express, delegated lawmaking authority to define and delimit was not at issue, the Court said we will accord only that degree of deference to which the regulation --

JUSTICE SCALIA: Skidmore was before a rather significant case called Chevron.

MR. BECKER: Absolutely, Your Honor. But it was also before the 1974 amendment. So if the question

is, what was Congress intending in creating two types of rulemaking authority, the power to define and delimit, and the general rulemaking authority, I think we need to consider Congress's intent at that time.

JUSTICE SCALIA: You mean we're going to divide all administrative law now into those -- those regulations -- those provisions that were adopted by Congress pre-Chevron and thosethat were adopted by Congress post-Chevron, and for the ones adopted pre-Chevron we're going to treat regulation as essentially suggestions by the Agency which we give Skidmore deference to, and the ones after Chevron, we're going to treat differently. Do you have any case of ours that suggests something like that, which seems to me a very strange manner of proceeding?

MR. BECKER: Well, Your Honor, let me answer in two ways, Your Honor. One, it would not be any case. Here we have a particular statutory scheme that is -- here we have the case essentially described by Justice Kennedy in Hager, where we have a different statutory scheme combined with a explicit statement by the Agency as to which part of that scheme the Agency is operating under. But the case I would cite, or the cases would be Vogel and Rowan which have not --

JUSTICE BREYER: Since we're into that,

we're into this fascinating subject, I thought that possibly they had -- they promulgated the whole thing pursuant to the rulemaking power under that particular statute, because that's what it says in 552.2. It says "this part" -- it doesn't say subpart, it says part -- and part is 552. And both regs we are talking about are in the part. And B says interpretations, but they don't mean interpretive rules, because when you look at those interpretations, they have a whole lot of numbers in them, and divide by 32. Nobody thinks that Congress meant in this statute divide by 32, as opposed by divide by 33.

So as I read that, I thought the whole thing is promulgated pursuant to their rulemaking authority. Part A has more general things. Part B has more specific things. Where am I wrong?

MR. BECKER: Well, I think the question, Your Honor, is which of the regulations were promulgated pursuant to the specific authority --

JUSTICE BREYER: All of them. All of them is what it says unless I missed something.

MR. BECKER: Well, I think what you missed is that a simple citation to the exemption does not translate into an exercise of the power to define and delimit. Because the Department was very, very specific

as to when it was exercising that power. In 552.2(c) it says the definitions required by the legislation are provided in the following sections and it enumerates them and it does not include the third-party regulation.

Now Petitioners would suggest well, that's just definitions. They also have the power to delimit. However, both the notice of proposed rulemaking and the notice of final rulemaking said that we are exercising our power to define and delimit in subpart A.

JUSTICE BREYER: Okay. I got the point.

MR. BECKER: Subpart B is different. So --

JUSTICE BREYER: Right. Right.

CHIEF JUSTICE ROBERTS: Why are you sure there's a conflict in the first place? You know, 552.3 says that the term "domestic service employment," refers to services performed in the home of the employer. It doesn't say it only refers to that. And then you go down and 109 says it also includes employees who are employed by a third-party.

I mean, can't they be reconciled in that way?

MR. BECKER: I don't think so, Your Honor. And it's certainly not the way that the --

CHIEF JUSTICE ROBERTS: It's not the way the Agency has done it. But you don't think we should defer

to them, anyway. So --

(Laughter.)

MR. BECKER: That's correct. But the regulation -- 552.3 defines a statutory term which only exists in the exemption, "domestic service employment."

CHIEF JUSTICE ROBERTS: Yes, but it says it refers to something. It doesn't say as many of these regulations and statutes do, is, you know, it "is defined as."

And particularly when you're confronted with what would otherwise be a conflict, maybe "refers to" should be read to mean "includes" rather than is defined as.

MR. BECKER: Well, I think we have to read the definitional regulations together. That is, all of the terms in the exemption, "companionship services," "babysitting services," "casual basis," "domestic service employment," are all defined in the set of regulations, point 3, point 4, point 5, point 6. And it is clear from the prefatory language of each one that what the Department of Labor intended to do was define the terms in the statute.

And so when it said that that term "refers to" --

CHIEF JUSTICE ROBERTS: Well it is interesting when you look at -- I mean, they're -- it's a good point. It's interesting when you look at the other definitions, the babysitting, it says this provision "shall mean." Here it just says it "refers to."

Let's see, the other ones -- casual basis, shall mean. Companionship services, "shall mean."

This one doesn't say "shall mean." It says it refers to this. I'm just wondering if that's something that suggests it's not intended to be as exclusive as the other definitions.

MR. BECKER: I do not believe so, Your Honor. It is an exercise of the power to define the term and I don't think we can take that language "refers to" to be non-exclusive. When the Department said "referred to" it was defining a statutory term as it said it was. If we have any doubt about what the Department intended, it actually of course reiterated that definition under the interpretive classification. And it again said that the term "refers to," "is defined as," employment by the household. If we had any doubt, even after that reiteration --

JUSTICE GINSBURG: Mr. Becker --

CHIEF JUSTICE ROBERTS: No, there it says -- there it says includes. And if you're talking about

552.101, there it says the term includes persons frequently referred to as "private household workers."

MR. BECKER: I'm referring to an earlier provision of the same regulation, not the reference to "private household workers", but where it states that the definition includes those individuals who are employed by the household, that is in 552.101(a). But if we had any further doubt, the -- that regulation refers to, as its source of the language, the regulation adopted under the Social Security Act, now 20 C.F.R. 404.1057. It was originally numbered differently, but at the time, in 1974, that regulation which was explicitly the source of the language the Department of Labor used, said not once, not twice, but three times, that the individual had to be employed by the household.

JUSTICE GINSBURG: Mr. -- Mr. Becker, if there is room for the Agency to read this statute either way, one way that the third-party employees would come under the Fair Labor Standards Act, the other that they would not be treated the same way as the person employed by the elderly person himself or herself. But if the concern of Congress in making this exemption was for the householder with limited funds, if the Agency is subject to the Fair Labor Standards Act, it's going to end up being the householder paying for it anyway.

So why isn't the most reasonable interpretation of what Congress meant by the exemption that the exemption would apply across the board, so that all workers in this category would be exempt?

MR. BECKER: Your Honor, setting aside, of course, all the reasons about Congress's intent in 552.3 which we've already explained, we would not say that that there is any credible evidence in the legislative history or the text of the Act to suggest that cost was a factor.

And let me explain why. The Department for the first time when it promulgated its advisory memorandum suggested that this was the basis of the third party regulation. It said nothing of the sort in 1975. As support for the assertion it cited four isolated comments in the legislative history. None of them except the last -- and there is only one of them related in any way to the exemption. The one that related to the exemption in fact directly supports our position, because it describes those people who are not within the exemption as the professional domestics.

So we don't think that there's any basis for suggesting that cost was the underlying rationale; and, in fact, it is really implausible. Because at the same time, for example, Congress extended the provisions of

the Act which covered nursing homes. At the same time, as has been pointed out, Congress only exempted casual babysitters. Now we would submit that if Congress was concerned about cost, in creating this babysitter-and-companionship exemption, the primary intended beneficiaries of that would have been working families where both people worked and therefore who required a full-time babysitter --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. BECKER: -- but a full-time babysitter is not covered.

Thank you very much.

CHIEF JUSTICE ROBERTS: Mr. Farr, you have three minutes remaining.

REBUTTAL ARGUMENT OF H. BARTOW FARR,
ON BEHALF OF PETITIONERS

MR. FARR: Thank you Mr. Chief Justice.

Respondent in response to Justice Scalia's question about how Respondent would reconcile the regulation 552.3 and 109(a) actually did not I believe attempt any reconciliation. If I understand Respondent's position correctly, it's simply that 109(a) has to be invalidated and 552.3 stands in its entirety.

I think that's incorrect for several reasons. First of all, the basis for it is essentially

this apparent distinction between the define-and-delimit authority and the more general authority to enact necessary rules and regulations. But, in fact, as Justice Breyer pointed out in his question, both grants of authority were invoked by the Department when it enacted both regulations simultaneously, not limited to either subpart A or subpart B, and for the reasons that Justice Alito points out, it is a very odd thing to attribute to the Department to say that it would exercise two different legislative powers in different parts of the -- of the regulations.

There's no reason it would do that. The subpart B regulations clearly are regulations that delimit the terms of the exemption in 213(a)(15). There's no question about that. So why in fact if it was doing what Congress authorized it to do under 213(a)(15), would it instead of relying on the grant of authority in that provision, rely on some other general grant of authority? It makes no logical sense to attribute that to the Department.

And it seems to me, in -- excuse me -- in fact, that that argument points up one of the difficulties here. It seems to me that the arguments here are a way of simply trying to push the Department aside so that the courts can ultimately do the final job

of exposition on this exemption. That is not only contrary to the basic principle of Chevron, which is that -- where there is ambiguity in the statute, or room for interpretation, the agencies are given the opportunity to do that within reasonable bounds; it is also contrary to the statute.

It is clear as I said at the beginning of my argument, the Department was the Agency chosen by Congress to do the work of defining and delimiting the exemption.

Now I'd like to say just one other thing in response to Justice Stevens' question about the particular nature of the litigation. This is a suit for damages. It is a suit claiming willful damages.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon the case in the above-entitled matter was submitted at 12:05 p.m.)

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