

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LONG ISLAND CARE AT HOME, LTD., :

4 ET AL., :

5 Petitioners :

6 v. : No. 06-593

7 EVELYN COKE. :

8 - - - - - x

 Washington, D.C.

 Monday, April 16, 2007

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

15 APPEARANCES:

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17 Petitioners.

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21 supporting Petitioners.

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

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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

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

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

6 Plainly the two regulations, section 10 --
7 552.109(a), which is the regulation directly at issue
8 before this Court, and 552.3, which is the regulation
9 relied on heavily by the Second Circuit to strike down
10 the present regulation, have some inconsistency between
11 them.

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

19 And the Secretary says, well, the only
20 regulation that we promulgated that, in fact, deals
21 specifically with the issue of third-party employment is
22 552.109(a), which is in fact headed Third-Party
23 Employment.

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

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

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

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

14 MR. FARR: Oh, that's correct,
15 Justice Ginsburg. The literal language is not
16 specifically what I was saying. What I'm talking about
17 is the Secretary's attempt to resolve what is an
18 apparent inconsistency between the literal language in
19 552.3 and the literal language of section 552.109(a).

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

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

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

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

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

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

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

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

23 (Laughter.)

24 JUSTICE SCALIA: What is a footman?

25 MR. FARR: I think that may be beyond my

1 expertise, Justice Scalia.

2 The -- of course that doesn't address
3 anything beyond companionship services, of course,
4 because there is not an exemption beyond that. And
5 that's one of the interesting things about 552.3. In
6 addition to generally dealing with this question of what
7 kind of jobs are domestic service, it is, in fact, going
8 well beyond anything that is necessary to a discussion
9 of the exemption for companionship services, because
10 jobs like chauffeurs, and maids, and all of that are not
11 subject to the exemption. So it really looks at what
12 552.3 is doing despite the couple of words that -- at
13 the beginning of it, is giving a general definition of
14 what constitutes domestic employment, what constitutes
15 domestic services for purposes not only of the exemption
16 but, in fact, really for the purposes of coverage as
17 well.

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

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

1 deals with a number of other subjects.

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

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

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

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

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

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

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

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

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

22 JUSTICE SCALIA: Page 77a as you said.

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

1 the Secretary's reinterpretation of.

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

6 JUSTICE SCALIA: That's right.

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

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

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

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

1 MR. FARR: Well, I'm --

2 JUSTICE SCALIA: -- does that report say it?

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

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

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

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

1 it?

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

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

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

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

1 MR. FARR: No, it does not.

2 JUSTICE SCALIA: I didn't think it did.
3 They're just floating an idea. You know --

4 MR. FARR: That's correct.

5 JUSTICE SCALIA: Run it up the flagpole, see
6 if --

7 MR. FARR: Well, that it solicited comments
8 on that proposal. And after the comments, it changed
9 its position to say no, in fact, all third-party
10 employers will be exempt.

11 JUSTICE GINSBURG: And -- and gave no
12 further discussion of it after -- after I'd sent out the
13 notice of proposed ruling that said third-party
14 employers will not be exempt, and then it said they will
15 be exempt, did it give reasons for the change?

16 MR. FARR: Yes, if I can just -- if I can
17 quibble with the premise of the question. The first
18 time it said some third-party employers would be exempt
19 and some wouldn't. Then when it changed --

20 JUSTICE GINSBURG: Some would be the ones
21 that qualified as -- what is the phrase, "enterprises
22 engaged in commerce"?

23 MR. FARR: That's correct -- those would be
24 the ones under the proposed rulemaking that would have
25 been denied the exemption. When in fact -- when, in

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

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

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

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

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

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

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

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

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

6 JUSTICE SOUTER: They were not treated as
7 covered enterprises.

8 MR. FARR: That's correct. They were --
9 they were, if they worked in schools or institutions
10 like hospitals. Other than that, they were not until
11 1974. That's exactly correct. This, in fact, would
12 have been denying them an exemption at the very time
13 that for other occupations aside from companionship
14 services, they were first having coverage applied to
15 them.

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

18 CHIEF JUSTICE ROBERTS: Thank you Mr. Farr.
19 Mr. Salmons.

20 ORAL ARGUMENT OF DAVID B. SALMONS

21 ON BEHALF OF UNITED STATES

22 AS AMICUS CURIAE SUPPORTING PETITIONERS

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

25 The FLSA's companionship services exemption

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

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Harmonizes --

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

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

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

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

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

25 The exemption here expresses no limitation

1 based on the identity of the employer and we think it
2 was well within the Agency's discretion to conclude that
3 what Congress had in mind here was a categorical
4 exemption based on the type of services that are being
5 provided; and while that may mean that there are certain
6 workers who are now exempt who were not previously
7 exempt, that's because Congress for the first time in
8 1974 focused on this problem of companionship services
9 being provided to those who cannot care for themselves;
10 and we think that follows from the text, and for the
11 reasons Congress adopted that.

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

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

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

25 MR. FARR: We certainly think it would. I

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Not seemingly
25 conflicting. They conflict.

1 MR. SALMONS: Well, I certainly don't take
2 issue with that. I think that there are a variety of
3 things that point to the conclusion that the language in
4 552.3 that refers to "in the home of the employer"
5 simply cannot be read literally. It was borrowed from
6 the Social Security context and if read the way
7 Respondents do we think would raise a serious question
8 about the scope of coverage because the Agency has
9 always viewed 552.3, notwithstanding the initial line
10 that says "For purposes of the exemption," to provide
11 the relevant definition for coverage as well. And no
12 party, or amici for that matter, before this Court nor
13 the Department thinks that there's a difference between
14 the identity of the employer for purposes of coverage.
15 And we also think, given the language in 101 that refers
16 to "private household workers", the definition of which
17 was provided to Congress in a report by the Department
18 of Labor and is relied upon in the advisory memorandum
19 in 2005, which clearly applied to third-party employers,
20 suggests that 552.3 cannot be read literally.

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

1 If the Court has no further questions.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Salmons.

4 Mr. Becker.

5 ORAL ARGUMENT OF HAROLD C. BECKER

6 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

8 JUSTICE BREYER: Was that later?

9 MR. BECKER: Yes, Your Honor.

10 JUSTICE BREYER: How long? How much later?

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

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

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

21 JUSTICE BREYER: I mean, you read --

22 MR. BECKER: In the final regulations.

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

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

3 CHIEF JUSTICE ROBERTS: The same time that
4 552.3 was finally promulgated.

5 MR. BECKER: That's correct.

6 CHIEF JUSTICE ROBERTS: They came out
7 together, right?

8 MR. BECKER: That's correct.

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

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

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

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

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

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

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

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

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

23 JUSTICE BREYER: Because?

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

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

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

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

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

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

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

18 (Laughter.)

19 MR. BECKER: Exactly. So --

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

22 (Laughter.)

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

25 JUSTICE BREYER: And perhaps there are

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

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

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

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

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

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

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

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

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

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

25 Number one, contrary to what has been

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

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

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

18 Congress did not intend to --

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

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

1 an employee employed to provide companionship services.

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

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

9 MR. BECKER: Your Honor --

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

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

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

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

4 I think they are contradictory.

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

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

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

25 JUSTICE SCALIA: What's your other reason?

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

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

6 MR. BECKER: For the following --

7 JUSTICE SCALIA: -- domestic employment?

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

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

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

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

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

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

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

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

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

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

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

21 JUSTICE ALITO: And if they're flatly
22 contradictory, doesn't your argument have to be that
23 .109(a) has lesser status? That's what it boils down
24 to, isn't it?

25 MR. BECKER: That is certainly my primary

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

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

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

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

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

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

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

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

22 MR. BECKER: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: Since we're into that,

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

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

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

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

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

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

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

10 JUSTICE BREYER: Okay. I got the point.

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

12 JUSTICE BREYER: Right. Right.

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

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

22 MR. BECKER: I don't think so, Your Honor.

23 And it's certainly not the way that the --

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

1 to them, anyway. So --

2 (Laughter.)

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

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

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

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

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

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

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

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

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

23 JUSTICE GINSBURG: Mr. Becker --

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

1 552.101, there it says the term includes persons
2 frequently referred to as "private household workers."

3 MR. BECKER: I'm referring to an earlier
4 provision of the same regulation, not the reference to
5 "private household workers", but where it states that the
6 definition includes those individuals who are employed
7 by the household, that is in 552.101(a). But if we had
8 any further doubt, the -- that regulation refers to, as
9 its source of the language, the regulation adopted under
10 the Social Security Act, now 20 C.F.R. 404.1057. It was
11 originally numbered differently, but at the time, in
12 1974, that regulation which was explicitly the source of
13 the language the Department of Labor used, said not
14 once, not twice, but three times, that the individual
15 had to be employed by the household.

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

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

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

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

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

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

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

12 Thank you very much.

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

15 REBUTTAL ARGUMENT OF H. BARTOW FARR,

16 ON BEHALF OF PETITIONERS

17 MR. FARR: Thank you Mr. Chief Justice.

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

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

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

12 There's no reason it would do that. The
13 subpart B regulations clearly are regulations that
14 delimit the terms of the exemption in 213(a)(15).
15 There's no question about that. So why in fact if it
16 was doing what Congress authorized it to do under
17 213(a)(15), would it instead of relying on the grant of
18 authority in that provision, rely on some other general
19 grant of authority? It makes no logical sense to
20 attribute that to the Department.

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

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

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

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

15 Thank you, Your Honor.

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

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

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