

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

9 Washington, D.C.

10 Monday, April 16, 2007

11

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:

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

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

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

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1 P R O C E E D I N G S

2 (11:06 a.m.)

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

6 Mr. Farr.

7 ORAL ARGUMENT OF H. BARTOW FARR

8 ON BEHALF OF THE PETITIONERS

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

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

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

21 Second, and particularly specific to this
22 case, if there are ambiguities in the regulations, or as
23 we have here, an apparent facial inconsistency, the
24 court should accept the Secretary's resolution of that
25 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 the
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 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 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 -- 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 --

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

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

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

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

23 JUSTICE SCALIA: Page 77a as you said.

24 But what is your argument there? I mean,
25 that seems to, that seems to reinforce the provision

1 that you say we should ignore or at least should accept
2 the Secretary's reinterpretation of.

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

7 JUSTICE SCALIA: That's right.

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

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

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

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

1 regulation. Does that report say it?

2 MR. FARR: What? The report uses the term
3 private households workers frequently interchangeably
4 with the term domestic employees. That is what is clear
5 from the report itself.

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

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

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

1 MR. FARR: No, Justice Ginsburg. I believe
2 that's correct. There was a, an opinion letter from the
3 Department in November of 1975 -- this is an opinion
4 letter that's cited at page 21 of the Solicitor
5 General's brief -- which specifically stated that the
6 exemption applied whether the employee was an employee
7 of the homeowner or of a public or private --

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

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

22 JUSTICE SCALIA: Well, wait. Does the
23 notice of proposed rulemaking set forth the agency's
24 position?

25 MR. FARR: No, it does not.

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

3 MR. FARR: That's correct.

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

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

10 JUSTICE GINSBURG: And -- and there was no
11 further discussion of it after -- after it sent out the
12 notice of proposed ruling that said third party
13 employees will not be exempt, and then it said they will
14 be exempt, did it give reasons for the change?

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

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

22 MR. FARR: That's correct -- those would be
23 the ones under the proposed rulemaking that would have
24 been denied the exemption. When in fact -- when, in
25 fact, the Labor Department said no, in fact, the

1 exemption should apply to all third-party employers, it
2 said it found that more consistent with the statutory
3 language. And it also said it was more consistent with
4 what it had done under other regulations which had been
5 passed under the Fair Labor Standards Act.

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

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

1 MR. FARR: I mean, it's possible, but as I
2 say, the -- I mean, among the difficulties that 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 household workers, would be covered
2 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 exception 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 exception to employees of third parties is entitled to
7 deference.

8 The Department expressly invoked its
9 statutory rulemaking authority in adopting Section 109,
10 552.109. It utilized ed 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 5523 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 *Our* 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 JUSTICE GINSBURG: The statute treats
17 together babysitters and elder care people, but I take
18 it the babysitters if they were working for an agency
19 rather than for the householders, there wouldn't be any
20 exemption? Is that right?

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

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

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

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

24 The exemption here expresses no limitation
25 based on the identity of the employer and we think it

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

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

19 MR. SALMONS: Well, there is a safe harbor
20 provision that allows for reliance by employers on a
21 statement by the agency.

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

24 MR. FARR: We certainly think it would. I
25 take it Respondents in this case would disagree and

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Not seemingly
24 conflicted. They conflict.

25 MR. SALMONS: Well, I certainly don't take

1 issue with that. I think that there are a variety of
2 things that point to the conclusion that the language in
3 552.3 that refers to "in the home of the employer"
4 simply cannot be read literally. It was borrowed from
5 the Social Security context and if read the way
6 Respondents do we think would raise a serious question
7 about the scope of coverage because the agency has
8 always viewed 552.3, notwithstanding the initial line
9 that says "For purposes of the exemption," to provide
10 the relevant definition for coverage as well. And no
11 party, or amici for that matter, before this Court nor
12 the Department thinks that there's a difference between
13 the identity of the employer for purposes of coverage.
14 And we also think, given the language in 101 that refers
15 to private household workers, the definition of which
16 was provided to Congress in a report by the Department
17 of Labor and is relied upon in the advisory memorandum
18 in 2005, which clearly applies to third party employers,
19 suggests that 553 cannot be read literally.

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

25 If the Court has no further questions --

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

3 Mr. Becker.

4 ORAL ARGUMENT OF HAROLD C. BECKER
5 ON BEHALF OF THE RESPONDENT

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

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

16 At the same time, DOL provided a persuasive
17 explanation for that definition. The Department found
18 that such companions and baby sitters when employed by
19 covered enterprises had been covered prior to the
20 amendments and that it could not have been Congress'
21 purpose, when amendments were explicitly designed to
22 extend coverage, to at the same time contract coverage.
23 The very preamble to the Act states that the purposes of
24 the amendments are to expand the coverage of the Act.
25 Therefore, the DOL itself concluded in October of 1974

1 that it was not the purpose of those amendments to deny
2 the Act's protection to previously covered domestic
3 service employees.

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

7 JUSTICE BREYER: Was that later?

8 MR. BECKER: Yes, Your Honor.

9 JUSTICE BREYER: How much later?

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

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

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

19 JUSTICE BREYER: I mean, you read --

20 MR. BECKER: In the final regulations.

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

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

1 CHIEF JUSTICE ROBERTS: The same time that
2 552.3 was finally promulgated.

3 MR. BECKER: That's correct.

4 CHIEF JUSTICE ROBERTS: They came out
5 together, right?

6 MR. BECKER: That's correct.

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

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

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

22 MR. BECKER: Your Honor, the definitional
23 regulation, 552.3, explicitly defines a term used only
24 in the companionship services exemption, "domestic
25 service employment." And it defines it clearly and

1 explicitly to apply only to employment by the household.

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

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

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

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

21 JUSTICE BREYER: Because?

22 MR. BECKER: And I submit that if the
23 Department construed section 552.3 to say when our words
24 say "employed by the household" that could include a
25 broader notion of the household, for example a son or

1 daughter living outside the household, that might be a
2 permissible construction of the Department's own
3 regulation. But the construction which simply takes
4 those words --

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

19 And if you win this case, it seems to me
20 suddenly there will be millions of people who will be
21 unable to do it and, hence, millions of sick people who
22 will move to institutions. Now, if I were to say that
23 that isn't totally a legal point, it is of course a
24 legal point because it's a question of what people
25 intended, but a worrisome point, I would be telling the

1 truth. It is a very worrisome point.

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

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

16 MR. BECKER: Exactly.

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

19 (Laughter.)

20 MR. BECKER: A clever lawyer could do this.

21 JUSTICE SCALIA: And perhaps there are
22 people, lawyers in the Government, who try to see
23 through that kind of thing.

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

25 JUSTICE BREYER: And there are many -- maybe

1 Justice Scalia has the answer.

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

14 JUSTICE STEVENS: You're saying it's
15 permissible to change the rules because the industry has
16 changed. Is it not possible that the industry changed
17 at about the time the statute was enacted? That the
18 prevalence of third-party employers is something that
19 really developed later?

20 MR. BECKER: As an empirical matter, that is
21 clearly the case, Justice Stevens. However, we know
22 several things about Congress in 1974. We know that the
23 enterprise coverage was relatively new. They adopted it
24 in 1961, expanded it in 1966, and indeed expanded these
25 very amendments in 1974. So Congress was aware of the

1 prior coverage. We know that the Department of Labor,
2 in the very reports which have been cited by the
3 petitioner, stated both in January of 1973 and in
4 January of 1974 in their reports to Congress on the Act,
5 stated that there was prior coverage of domestics
6 employed by third parties. We know there was
7 enforcement activity by the Department of Labor against
8 such third-party employers.

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

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

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

21 Number one, contrary to what has been
22 suggested, the language in the exemption is not
23 identical to the language in the extension provision
24 extending the minimum wage and overtime requirements.
25 There is an important difference, and that difference is

1 the word employment. Now that's important for several
2 reasons. Number one, of course, coverage provisions are
3 to be read broadly and exemptions narrowly. So there's
4 an additional word that can and would suggest it should
5 be read as a term of limitation.

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

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

14 Congress did not intend to --

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

18 MR. BECKER: The word domestic service
19 employment is not necessary to describe what you
20 described, Mr. Chief Justice. If that is what the
21 Congress intended to describe, it could have said simply
22 an employee employed to provide companionship services.

23 JUSTICE SCALIA: Well, it could have said a
24 lot of things. But I find it -- you're hanging your
25 case upon the proposition that there is a difference

1 between domestic service employment and employed in
2 domestic service employment.

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

5 MR. BECKER: Your Honor --

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

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

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

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

25 I think they are contradictory.

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

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

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

21 JUSTICE SCALIA: What's your other reason?

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

25 JUSTICE SCALIA: Because of employed and

1 domestic employment versus --

2 MR. BECKER: For --

3 JUSTICE SCALIA: -- domestic service?

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

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

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

20 JUSTICE SCALIA: Well, you're getting into
21 arguments now that are not about the regulation but
22 they're about the statute. I'm assuming that we have
23 regulations that are entitled to deference. And you
24 have two regulations that are conflicting. Now, how do
25 you decide which one prevails? Counsel for the other

1 side says the specific governs the general, certainly an
2 ancient prescription.

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

10 MR. BECKER: Your Honor, of course setting
11 aside, as you do, our argument that Congress has
12 specific intent on this question, looking only at the
13 regulation --

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

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

22 JUSTICE SCALIA: They aren't unambiguous.
23 They contradict each other. The agency has to do
24 something about it, and here the agency made a choice.
25 Even if I assume the choice was, we're going to

1 disregard 552.3, we're going to strike out those words,
2 they were the mistake. One or the other had to be the
3 mistake. We decided it was this one. Why shouldn't we
4 take their word on it?

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

17 JUSTICE ALITO: But if they're flatly
18 contradictory, doesn't your argument have to be that
19 .109(a) has lesser status? That's what it boils down
20 to, isn't it?

21 MR. BECKER: That is certainly my primary
22 argument, that this statute is relatively unique in that
23 it vested two very different sorts of authority in the
24 Department of Labor, one a clear law making authority to
25 actually define and delimit, to specify what the terms

1 in the law mean --

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

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

15 MR. BECKER: Your Honor, it not only makes
16 sense, it's been the Department's pattern since the Act
17 was adopted. That is, the Department since the Act was
18 adopted has split its regulations into those under the
19 exemptions -- for example the primary exemption for
20 professional, executive and administrative employees --
21 has split its regulations under those exemptions into
22 those which define and delimit, into those which do not
23 define and delimit, or other general statements that
24 apply to their interpretation.

25 JUSTICE SCALIA: Yeah, but interpretive

1 regulations are in other areas wholly valid before the
2 courts and entitled to Chevron deference, at least if
3 they're adopted by notice and comment rulemaking. You
4 know, we have nothing, what should I say, subordinate
5 about interpretive regulations. In fact, probably most
6 of the significant regulations of the most important
7 agencies are interpretive regulations.

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

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

18 MR. BECKER: Your Honor --

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

22 MR. BECKER: Well, let me qualify the
23 question, if I might. The Petitioner would suggest that
24 we're relying on simply a label, this is in the
25 interpretive section and the other is in the general

1 regulation section. Far from it. We are relying on a
2 very clear statement both in the regulations, 552.2(c),
3 as well as in both the proposed regulations and the
4 final regulations, which clearly state that only those
5 in Part A define and delimit. Why is that an important
6 distinction? It's an important distinction because
7 Congress clearly meant these two grants to be different.
8 Otherwise, why would it have granted an express power to
9 define and delimit which would otherwise be redundant of
10 the general rulemaking authority?

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

20 So Congress says we're going to give the
21 agency that authority. In addition, of course, we're
22 going to give this agency the authority that every other
23 agency has, which is to interpret -- interpret the
24 language of the statute.

25 MR. BECKER: Well, Your Honor, I think we

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

14 In Skidmore, where that type of expressed
15 delegated law making authority to define and delimit was
16 not at issue, the Court said we will record only that
17 degree of deference to which the regulation --

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

20 MR. BECKER: Absolutely, Your Honor. But it
21 was also before the 1974 amendment. So if the question
22 is, what was Congress intending in creating two types of
23 rulemaking authority, the power to define and delimit,
24 and the general rulemaking authority, I think we need to
25 consider Congress's intent at that time.

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

12 MR. BECKER: Let me answer in two ways, Your
13 Honor. One, it would not be any case. Here we have a
14 particular statutory scheme that is contrary to --

15 CHIEF JUSTICE ROBERTS: Ought not to get as
16 much deference from the courts.

17 MR. BECKER: Here we have a case essentially
18 described by Justice Kennedy in *& Haga*, where we have a
19 different statutory scheme combined with a explicit
20 statement by the Agency as to which part of that scheme
21 the Agency is operating under. But the case I would
22 cite, or the cases would be *Rolo* and *Rove* which have not
23 --

24 JUSTICE BREYER: Since we're into that,
25 we're into this fascinating subject, I thought that

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

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

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

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

21 MR. BECKER: Well, I think what you missed
22 is that a simple citation to the exemption does not
23 translate into an exercise of the power to define and
24 delimit. Because the Department was very, very specific
25 as to when it was exercising that power. In 552.2(c) it

1 says the definitions required by the legislation are
2 provided in the following sections and it enumerates
3 them and does not include the third-party regulation.

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

9 JUSTICE BREYER: Okay. I got the point.

10 MR. BECKER: But part B is different.

11 JUSTICE BREYER: Right. Right.

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

19 I mean, can't they be reconciled in that
20 way.

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

23 CHIEF JUSTICE ROBERTS: It's not the way the
24 Agency has done it. But you don't think we should defer
25 to them, anyway. So --

1 (Laughter.)

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

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

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

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

23 And so when it said that that term refers
24 to --

25 CHIEF JUSTICE ROBERTS: Well it is

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

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

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

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

21 JUSTICE GINSBURG: Mr. Becker --

22 CHIEF JUSTICE ROBERTS: There it says
23 --there it says includes. And if you're talking about
24 552.101, there it says the term includes persons
25 frequently referred to as private household workers.

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

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

24 So why isn't the most reasonable
25 interpretation of what Congress meant by the exemption

1 that the exemption would apply across the board, so that
2 all workers in this category would be exempt?

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

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

20 So we don't think that there's any basis for
21 suggesting that cost was the underlying rationale; and,
22 in fact, it is really implausible. Because at the same
23 time, for example, Congress extended the provisions of
24 the Act which covered nursing homes. At the same time,
25 as has been pointed out, Congress only exempted casual

1 babysitters. Now We would submit that if Congress was
2 concerned about cost, in creating this babysitter and
3 companionship exemption, the primary intended
4 beneficiaries of that would have been working families
5 where both people worked and therefore who require a
6 full-time baby sitter --

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 MR. BECKER: -- and a full-time baby is not
9 covered.

10 Thank you very much.

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

13 REBUTTAL ARGUMENT OF H. BARTOW FARR,

14 ON BEHALF OF PETITIONERS

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

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

23 I think that's incorrect for several
24 reasons. First of all, the basis for it is essentially
25 this apparent distinction between the define and delimit

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

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

20 And it seems to me, in -- excuse me -- in
21 fact, that that argument points up one of the
22 difficulties here. It seems to me that the arguments
23 here are a way of simply trying to push the Department
24 aside so that the courts can ultimately do the final job
25 of exposition on this exemption. Not only contrary to

1 the basic principle of Chevron, which is where that
2 where is ambiguity in the statute, or room for
3 interpretation, the agencies are given the opportunity
4 to do that within reasonable bounds; it is also contrary
5 to the statute.

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

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

14 Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
16 The case is submitted.

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

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