No. 11-617

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In The Supreme Court of the United States

ROBERT PROBERT; LORETTA PROBERT; GENE GRISSOM; SANDRA GRISSOM; DONNA GRIMES; KENNETH MCDANIELS; JOHN GRIMES; LEONA MCDANIELS; ERIC CLONINGER; DEBRA CLONINGER,

Petitioners,

v.

FAMILY CENTERED SERVICES OF ALASKA, INC.; JOHN W. REGITANO; KATHY CANNONE; SUSAN DALE; LONNIE HOVDE; DEBORAH L. COXON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH L. COVELL
LAW OFFICES OF
KENNETH L. COVELL
712 8th Avenue
Fairbanks, AK 99701
(907) 452-4377

ERWIN CHEMERINSKY
(*Counsel of Record*)
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
401 E. Peltason
Irvine, CA 92697
(949) 824-7722
EChemerinsky@law.uci.edu

Attorneys for Petitioners Robert Probert, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Federal Fair Labor Standards Act requires that employers pay employees a minimum wage and overtime pay. 29 U.S.C. §§206(a)(1), 207(a)(1). The statute provides that this applies to "an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution." §203(r)(2)(A).

Plaintiffs are individuals who provide home care for "severely emotionally disturbed" children. The plaintiffs do this for Family Centered Services of Alaska and sued it to have it comply with the minimum wage and overtime provisions of the Fair Labor Standards Act. The District Court granted summary judgment for the plaintiffs, but the Ninth Circuit reversed and concluded that plaintiffs were not providing "care" and were not "institutions" as required by the Act. Thus the questions presented are:

Whether the Fair Labor Standards Act applies to plaintiffs' homes which provide care for severely emotionally disturbed children, including a) whether institutions must provide "treatment" in order for it to be "care" within the meaning of the Act, and b) whether homes that provide care to severely emotionally disturbed children are "institutions" as required by the Act.

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OPINIONS BELOW

The decision of the United States District Court for the District of Alaska granting summary judgment for the plaintiffs is found at Appendix (App.) p. 20. The District Court's Order Re Motion for Reconsideration is at App. 12.

The Ninth Circuit's decision reversing the District Court is at App. 1. The Ninth Circuit denied rehearing and rehearing *en banc* on August 18, 2011, and this order is found at App. 35.

JURISDICTION

The United States District Court for the District of Alaska had jurisdiction pursuant to 28 U.S.C. §1331. This Court has jurisdiction pursuant to review the final judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act, 29 U.S.C. §§206(a)(1), 207(a)(1). Specifically, §203(r)(2)(A):

> [I]n connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such

> institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit).

STATEMENT OF THE CASE

Plaintiffs are married couples who worked as use parents" in Family Centered Services of ska's (FCSA) Homes. FCSA is a non-profit corpo-ion. Each home houses up to five children. All children are "severely emotionally disturbed" as ined by the Alaska law that qualifies the homes for dicaid funding, 7 Alaska Admin. Code §43.471, and h of the children has at least one diagnosed men-disorder under Axis-I of the current Diagnostic l Statistical Manual of Mental Disorders. The dren participate in group therapy conducted by icians in the homes and receive other services side the homes. Plaintiffs are not licensed medical social service professionals, but the children cer-ily benefit from the plaintiff's care as house ents. App. 2-3, 7. House parents provide treat-it, such as by administering psychotropic medica-is to the children. App. 27. The house parents k as much as 98 hours a week and are on duty en days a week, 24 hours a day, for weeks on end.

Because of this, Plaintiff Loretta Probert was paid an effective wage of $3.13 an hour.[1]

FCSA advertises that it provides quality residential care to emotionally disturbed children. ER 204. All or nearly all the children that are in therapeutic family homes are on psychotropic medication. In its "Therapeutic Family Home Policy and Procedures Manual," FCSA acknowledges it provides services to the children who are experiencing mental health issues.

> FCSA's Therapeutic Family Homes provide quality residential care to male and female youth ages 6-18 that are experiencing mental health and behavioral issues and are at imminent risk of psychiatric placement outside their community.

Order re: Second Motion for Partial Summary Judgment at Docket 53 (App. 32).

Plaintiffs sued FCSA for overtime pay under the FLSA. After denying Plaintiffs' first motion for partial summary judgment, the district court granted a similar motion for partial summary judgment in their favor, concluding that FCSA through its homes, was operating "an institution primarily engaged in the

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[1] Loretta Probert worked as a "part-time" houseparent. She was paid $397.26 ($22.07 x 18 hours) per week. This divided by 127 hours (40 hours straight time plus 58 hours x 1.5 to arrive at a straight time rate) puts Loretta at an hourly rate of $3.13. App. 3, n.1. ER 453, 466-469.

e of the . . . mentally ill . . . who reside on the mises of such institution," 29 U.S.C. §203(r)(2)(A), l was therefore an enterprise subject to the FLSA's rtime provisions, 29 U.S.C. §207(a)(1). App. 34. The district court looked to a federal Medicaid ulation that defined "institution" as "an establishnt that furnishes (in single or multiple facilities) l, shelter, and some treatment or services to four nore persons unrelated to the proprietor," 42 CFR 5.1010. The court also relied on FCSA's own web-, which described the Homes as "provid[ing] qualiresidential care to male and female youth ages 3 that are experiencing mental health and behavl issues." Doc. 63, App. 30-32.

The United States Court of Appeals for the Ninth cuit reversed. It concluded that "the Homes are covered by that statute because they are not an titution primarily engaged in the care of the :, the aged, mentally ill or defective who reside the premises of such institution.' 29 U.S.C. 3(r)(2)(A)." App. 2. First, the Ninth Circuit said t the homes are not primarily engaged in provid- "care." The court said: "[W]e understand 'care' in context to include something more like treatnt. What the Homes primarily provided, as their ne suggests, was a home or a residence." App. 6.

The Ninth Circuit then said that the plaintiffs e not "institutions" as used in the FLSA. The court ared: "Second, the Homes do not appear to us to institutions' as that term is used in this statute." . 7. The court relied on the Oxford English

Dictionary's definition of "institution" and its reading of the legislative history to support this interpretation. App. 7-9. Because it concluded that plaintiffs neither were providing "care" nor an "institution," the court held that the FLSA does not apply and that its minimum wage overtime provisions were inapplicable.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISIONS AND THE PRIOR RULINGS OF THIS COURT CONCERNING HOW THE FAIR LABOR STANDARDS ACT SHOULD BE INTERPRETED.

Throughout the country, in literally every state, there are facilities like those involved in this litigation and this question as to the application of the Fair Labor Standards Act truly has national importance. The Ninth Circuit found that the homes involved in this case were not covered by the FLSA because they were not providing "care" and they were not "institutions."

This Court has declared that the FLSA is to be liberally construed to apply to the furthest reaches consistent with Congressional direction. *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959).

The Ninth Circuit flouted this by substituting the
·d "treatment" for "care" in 29 U.S.C. §203(r) and
The court said that plaintiffs were not covered by
Act because they were not medical or service pro-
ɪionals and thus not primarily focused on pro-
.ng the type of "care that service professionals
vide." App. 7.

There is nothing in the FLSA or its legislative
;ory that suggests such a limit. By any under-
ıding of the word "care," and certainly by an ex-
.sive reading of that term, the plaintiffs' homes are
viding domiciliary care for severely emotionally
.urbed children. In fact, even the defendants' own
ɪsite describes the homes as providing "care." It
;es: "Each Home is supervised by live-in parents
› are responsible for the overall *care* of up to five
dren." FCSA website http://www.familycentered
vices.com/Programs.htm#TFH (last viewed Nov. 13,
1) (emphasis added).

A definition of "care" is found in the Department
ıabor Field Operation Handbook (FOH) §12g15(b):
are therein is defined as domiciliary, meaning to
: after the residents and provide routine custodial
:." This is exactly what plaintiffs were providing.

This Court has commanded that "we cannot,
er the guise of interpretation ... rewrite con-
ɜsional acts." *Confederated Bands of Ute Indians*
Jnited States 330 U.S. 169, 179 (1947). But in
ɜfining "care" to mean "treatment," this is exactly
ıt the Ninth Circuit did.

Similarly, the Ninth Circuit interpreted "institution" in a manner at odds with this Court's requirement that the FLSA be expansively interpreted and with this Court's repeated command that judges give great deference to interpretation of statutes by federal agencies.

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), this Court emphasized the need for such deference, specifically to the Department of Labor's Field Operations Handbook. The Court explained: "The Field Operations Handbook provides administrative guidance and is entitled to great weight. The well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 139-140.[2]

The Department of Labor Field Operations Handbook, §12g02, defines "institutions" in a way that clearly includes plaintiff's homes:

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[2] Moreover. *Skidmore* is codified at 29 CFR 779.8:

> On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134) ... As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions as constructed by the courts and evidenced by its legislative history. 29 CFR §779.8.

Institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises defined.

Such an institution (other than a hospital) is an institution primarily engaged in (i.e., more that [sic] 50% of the income is attributable to) providing *domiciliary care* to individuals who reside on the premises and who, if suffering from physical or *mental infirmity or sickness of any kind*, will require only general treatment or observation of a less critical nature than that provided by a hospital. *Such institutions are not limited to nursing homes*, whether licensed or not licensed, *but include those institutions* generally known as nursing homes, rest homes, convalescent homes, homes for the elderly and infirm, *and the like*. (emphasis added)

also Field Operations Handbook §25i and §12g12. ;g12 App. 38, Institutions for Care of the Emo-ally Disturbed).[3]

The Ninth Circuit opinion said that the Department of r website says the Field Operations Handbook is not used device for establishing interpretive policy. App. 10. Quite :ontrary, the Department of Labor website declares: "The Operations Handbook (FOH) is an operations manual that des Wage and Hour Division (WHD) investigators and staff interpretations of statutory provisions, procedures for con-ng investigations, and general administrative guidance. 'OH was developed by the WHD under the general authority lminister laws that the agency is charged with enforc-The FOH reflects policies established through changes in ation, regulations, court decisions and the decisions and

(Continued on following page)

Numerous provisions in federal and state statutes and regulations by context demonstrate that "institutions" or "child care institutions" include group homes providing domiciliary care. *See, e.g.*, 42 U.S.C. §671(a)(10), AS 47.07.020(b)(3), 7 AAC 100.002(c)(5)(A), 45 CFR §1356.71(g), 45 CFR §1356.60(c)(2)(vii), 45 CFR §1356.30(f), 45 CFR §1356.21(m)(2) (referring to childcare "institutions" in a way that includes homes.") Similarly, federal Medicaid regulations that define "institution" as "an establishment that furnishes (in single or multiple facilities) food, shelter, and some treatment or services to four or more persons unrelated to the proprietor," 42 CFR §435.1010.

Alaska law, too, treats these homes as "institutions." FCSA has licenses for these homes and these licenses indicate that they are subject to all rules, administrative code, and regulations (ER 383). Under Alaska law, a Certificate of Need is required prior to the licensing of any residential facility if the facility costs more than $1 million to construct. AS 47.80.140.

The Ninth Circuit bases its narrow definition of "institution" on the Oxford English Dictionary and the legislative history of the FLSA. App. 8-9. As for the former, it is notable that the court used the 1933 edition (reprinted in 1961) for its definition and its conclusion that group homes are not institutions.

opinions of WHD administrator." www.dol.gov/whd/FOH/ (last viewed 11-08-2011).

p. 8. But group homes did not come into existence
:il the late 1960s and '70s. The first known use of
;roup home was in 1967. *See* http://mw4.mw.com/
tionary/grouphome (last visited 7/14/2011). It is
·dly surprising that group home is not found under
definition of institution in the edition of a dic-
ıary from a foreign county that was written before
advent of group homes. Nor should a definition in
Oxford English Dictionary matter when the De-
·tment of Labor's Field Operations Handbook and
er federal regulations clearly treat homes as "in-
·utions" in situations like this.

As for the legislative history, the Ninth Circuit
ed because it ignored the fact that Congress ex-
ssly decided to include institutions for the emo-
ıally disturbed in the FLSA, Pub. L. No. 89-601,
Stat. 830 (1966), and on four subsequent occasions
·ressly rejected an effort to create a house parent
eption to the Act. *See* H.R. 2531, 104th Cong., 2d
s. (1995); S. 1554, 104th Cong., 2d Sess. (1996);
ι. 4778, 105th Cong., 2d Sess. (1998); S. 371, 110th
ıg., 1st Sess. (2007).

Thus, the Ninth Circuit's narrow definition of
re" and "institutions" directly conflicts with many
ır decisions of this Court commanding that the
3A be construed "liberally to apply to the furthest
ches consistent with congressional direction."
y and Susan Alamo Foundation v. Secretary of
ıor, 471 U.S. 290, 296 (1985); *Mitchell v. Lublin,*
Jaughy & Associates, 358 U.S. 207, 211 (1959).

The Ninth Circuit decision also conflicts with this Court's prior rulings defining "institution." In *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524 (1985), this Court found that the institution in question was an institution for the treatment of mental diseases and an intermediate care facility, and that an "intermediate care facility" was not mutually exclusive from the term of "institution for the treatment of mental diseases." The Court there used the Department of Health and Human Service's regulation, 42 CFR §435.1009 E, to decide that the primary purpose of the institution was to treat the mentally ill. The Court further said in language exactly on point to this case:

> "We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum v. Bacon*, 857 U.S. 132, 141 (1982). Moreover, the agency's construction need not be the only reasonable one in order to gain judicial approval. It follows that the secretary was authorized to determine that. . . . ICFs . . . are primarily engaged in the care of the mentally ill. . . . *Heckler* at 531, 532.

This Court should grant certiorari to resolve the conflict between the Ninth Circuit's decision and this Court's command that the FLSA be expansively interpreted and its repeated requirement that courts defer to federal agencies in their interpretation of statutes. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A SPLIT AMONG THE CIRCUITS AS TO THE MEANING OF THE FAIR LABOR STANDARDS ACT.

Not surprisingly, the Ninth Circuit's narrow .nition of "care" and "institutions" within the ;A directly conflicts with decisions of several other :uits.

For example, the Fourth Circuit, in *Dole v. Odd 'ows Home Endowment Bd.*, 912 F.2d 689 (4th Cir. 0), specifically found that homes like those in this ; are "institutions" providing "care" within the ıning of the FLSA. The case involved Odd Fellows ne ("the Home") in Elkins, West Virginia, a home ch cares for "Odd Fellows members in good stand- who are unable to earn a livelihood due to infir- ies, age, or physical affliction, and are without ıns of support. The Home also provides care for rm or helpless wives or widows of such members, helpless children of members." *Id.* at 691. The ıe, exactly as in this case, was whether the Fed- . Labor Standards Act applied to the home. In .ing to exactly the opposite conclusion of the Ninth :uit in this case, the Fourth Circuit explained ; "residents are checked regularly, medicines are ıensed, and a physician visits the home at least ; a week to see residents in need of a doctor's :. . . . The home is an institution primarily en- ed in the care of its sick or aged residents." *Id.* at

694. There is no doubt that this case would have come out differently if it had been litigated in the Fourth Circuit under the *Dole* decision.

Similarly, the Ninth Circuit's decision directly conflicts with the Tenth Circuit's ruling in *Briggs v. Sagers*, 424 F.2d 130, 131 (10th Cir. 1970), which held that the FLSA applies to the "American Forks Training School, a Utah-owned institution for the custody and treatment of mentally deficient children." The School was like the homes in this case in that it was residential and housed children with mental and emotional disabilities.

In a more recent decision, the Tenth Circuit, found that the provisions of the FLSA applied to the provision of care in homes. *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004). The court explained that "[i]n evaluating where each living unit lies on the continuum, we conclude that the key inquiries are who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services." *Bios* at 1219. Under the criteria articulated in this case, plaintiffs' homes are institutions covered by the FLSA.

Contrary to the Ninth Circuit's conclusion, many other courts have found that group homes are "institutions" within the meaning of the FLSA. *See, e.g.*, *Lott v. Rigby*, 746 F. Supp. 1084 (N.D. Ga. 1990) (*see* esp. n.6: state funded "Group Residence" is clearly a type of institution and not a private home); *Thomas v. Cohen*, 453 F.3d 657 (6th Cir. 2006); *Burke v. Oxford*

use of Oregon, Chapter V, 103 P.3d 1184 (Oregon
)4); *Sunrise Group Homes v. Ferguson*, 777 P.2d 553
ash. App. 1989); *Marshall v. Sunshine & Leisure,*
., 496 F. Supp. 354, 357-58 (M.D. Fla. 1980);
vrin v. Catholic Guardian Society, 417 F. Supp. 2d
) (S.D.N.Y. 2006) (ACT homes covered by FLSA, at
.); *Bailey v. Youth Villages*, 2009 WL 104564 (W.D.
ın. 2009). *But see Jacobs v. New York Foundling
spital*, 577 F.3d 93 (2d Cir. 2009) (finding no FLSA
erage because the Foundling home only took care
regular" children and not the sick or mentally ill.)
chings v. Fla. United Methodist Children's Home,
., 393 F. Supp. 2d 1282 (M.D. Fla. 2005) (empha-
ng that the institution should be primarily en-
ed in the treatment of the mentally ill).

All of these cases illustrate that the issues
sented in this case concerning the meaning of
3(r)(2)(A) of the Fair Labor Standards Act fre-
ntly arise and that the Ninth Circuit's approach is
narrower than that followed in all Circuit Courts
l all District Courts but the *Kitchings* court.

This case would have been decided differently in
se other Circuits. This Court should grant review
resolve the conflict between the Ninth Circuit's
ision and those of other courts across the country
this question of national importance.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH L. COVELL
LAW OFFICES OF
KENNETH L. COVELL
712 8th Avenue
Fairbanks, AK 99701
(907) 452-4377

ERWIN CHEMERINSKY
(Counsel of Record)
UNIVERSITY OF CALIFORNIA,
IRVINE
SCHOOL OF LAW
401 E. Peltason
Irvine, CA 92697
(949) 824-7722
EChemerinsky@law.uci.edu

Attorneys for Petitioners Robert Probert, et al.