No. 17-15322-JJ

United States Court of Appeals
For the Eleventh Circuit

BLAND FARMS PRODUCTION & PACKING, LLC and DELBERT BLAND,

Appellants,

v.

ALEXANDER ACOSTA, Secretary of Labor, United States Department of Labor,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA, STATESBORO
(Case No.: 6:14-cv-00053-JRH)

BRIEF AMICUS CURIAE OF GEORGIA FRUIT & VEGETABLE GROWERS ASSOCIATION, FLORIDA FRUIT & VEGETABLE ASSOCIATION, GEORGIA AGRIBUSINESS COUNCIL GEORGIA FARM BUREAU, AND NATIONAL WATERMELON ASSOCIATION

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IDENTITY AND INTEREST OF AMICUS CURIAE

The mission of the GFVGA is (1) to provide a viable and united voice to represent the fruit and vegetable industry in Georgia; (2) to encourage efficient production, packing, handling, storing, and processing of fruit and vegetables; (3) to develop marketing and promotional programs to increase public awareness of the health benefits of eating fruits and vegetables and to encourage consumption of more Georgia products; and (4) to support applied research that benefits the industry. Because this case may have profound impact on the economic viability of Georgia farmers, particularly smaller ones where fruits and vegetables are graded and packed, whom GFVGA represents, the Association seeks leave to submit this brief in support of the farmers.

The Florida Fruit & Vegetable Association (FFVA) is the state's leading full-service specialty crop organization, serving Florida's grower-shipper community since 1943. FFVA represents a broad range of crops, including vegetables, citrus, tropical fruit, berries, sod, sugar cane, tree crops and more. Its mission is to enhance the business and competitive environment for producing and marketing fruits, vegetables and other crops.

The Georgia Agribusiness Council's (GAC) mission is to advance the business of agriculture through economic development, environmental stewardship, and education to enhance the quality of life for all Georgians. GAC carries out its mission by representing the agribusiness industry in the legislative arena; providing economic services to members; promoting agribusiness development; building coalitions within the agricultural community; educating the public about agribusiness issues; and promoting agricultural education through elementary, secondary, college, and adult programs.

The Georgia Farm Bureau (GFB) is Georgia's largest voluntary agricultural organization, with almost 300,000-member families. It is an independent, non-governmental membership organization primarily composed of farm families in rural communities and of people who want Georgia to be agriculturally successful, progressive and prosperous. GFB maintains a strong grassroots network with 159 county Farm Bureau organizations. Its primary, continuing goal is to present a united voice in the legislative arena, promote farm markets, and provide leadership to Georgia's agricultural community.

The National Watermelon Association (NWA) is a voluntary, membership trade association dedicated to making a positive difference in the business and lives of its Watermelon family – those involved in the growing, grading, handling, transporting, distributing, and selling of watermelons. The National Association has members in over 30 states, Canada and Central America and is comprised of regional chapters in Alabama, Florida, Georgia, Illinois-Indiana, Maryland-Delaware, North Carolina, South Carolina, Texas, and the Western United States.

STATEMENT OF AUTHORSHIP AND FUNDING

GFVGA paid for J. Larry Stine and Elizabeth K. Dorminey of Wimberly, Lawson, Steckel, Schneider & Stine, PC to prepare this brief on behalf of amici.

SUMMARY OF ARGUMENT

This court should reverse the District Court's decision finding that the agricultural exemption to the Fair Labor Standards Act (FLSA), 29 U.S.C. §213(b), did not cover Bland Farms' packing operation because it included marketable onions that Bland purchased in the field from other farmers. GFVGA, FFVA, GAC, GFB, and NWA fully endorse all of Bland Farms' arguments as set forth in its brief and appreciate the opportunity to share their perspective as advocates for farmers.

Congress did not intend for the agriculture exemption to be construed so restrictively that it adversely affects small farmers who can neither afford to conduct their own packing operations nor sell their crops to larger producers due to the latter's fear of losing their exemption. Bland Farms' understanding of the agriculture exemption, as explained in the 1985 letter from Regional Administrator Alfred Perry, was reasonable and consistent with the statute and Congress' intent. This Court should reverse the decision below.

ARGUMENT AND AUTHORITY

That the presence in a farmer's packing shed of vegetables grown on land outside the farmer's own domain could trigger a million and a half dollars of overtime liability is shocking, and contrary to Congress' intent in creating a broad exemption in the FLSA from overtime for farming "in all its branches." Like the salary test in the recently invalidated 29 C.F.R. Part 541 regulations, the "risk of loss" litmus test for the agriculture exemption is an impermissible interpretation of an unambiguous statute, and not entitled to *Chevron* deference.

A. The Secretary's Position Injures Small Farms.

The District Court's decision puts small farmers in a bind. They cannot afford to conduct their own packing operations in competition with large producers, who can invest in modern mechanized processes and pay for large numbers of seasonal workers; and the large producers are reluctant to purchase their output for fear of destroying their own agriculture exemption. Small farms thus find themselves at harvest season with crops they can neither process nor sell: their options are either to rent their land, for less money than crops would bring; or simply to give up farming altogether.

Indeed, it was the purchases of produce that Bland Farms made, not to fulfill their own needs, but to help other, smaller farmers who were having trouble getting their crops to market, that largely contributed to this lawsuit. The District Court's opinion makes plain that Bland Farms, which grew from nothing into a very large operation, was helping its neighbors when it agreed to purchase, and process onions grown in their fields, with Bland Farm's active participation if not directly at its behest. The District Court found that Bland Farms bought onions from other growers mainly to help them out:

> Although Bland Farms did not need more onions that year, it purchased Mr. Collins's onions because Mr. Collins, a longtime friend, was "in a bind." In 2013, Bland Farms purchased onions from Ashley Day because, like Mr. Collins, Mr. Day was in a bind that year. Bland Farms also purchased onions from R.T. Stanley because Mr. Stanley did not have labor available to harvest a field of onions and Bland Farms did, so it seized the opportunity to buy more onions.

(*Alexander Acosta, Secretary of Labor v. Bland Farms Production & Packing, LLC and Delbert Bland,* --- F. Supp. 3d --- 2017 WL 3259650 (S.D.Ga. 2017), Decision at *3 (footnote omitted).) As the old saying goes, no good deed goes unpunished: because it helped out its neighbors when they could not sell their crops, Bland Farms became liable for almost a million and a half dollars in unpaid overtime. This hurt Bland Farms, but also hurts its smaller neighbors in the farming community: it cuts the small farms off from opportunities to bring their crops to market by making their produce "radioactive" by triggering liability for overtime pay.

Bland Farms acquired onions primarily in the field and did not simply charge other farmers for grading and packing services and return the onions to the growers to sell. When it purchased other farms' produce, it was primarily as an accommodation to them. Its packing, as well as farming, operations should be cloaked by the agricultural exemptions.

The District Court's decision should be reversed, and the agriculture exemption interpreted as Congress intended, to help farmers both large and small succeed in what has forever been the perilous business of growing our food.

B. The FLSA's Exemptions for Agriculture are Intentionally Broad.

In the plainest terms, Congress enacted the agriculture exemption in 29 U.S.C. §213(b)(12) to give farmers a break. The seasonal demands of planting and harvesting cause tremendous variations in labor demand and requiring farmers to pay overtime during peak seasons would be ruinously expensive. 29 U.S.C. §203(f) (hereinafter referred to as §3(f)) of the FLSA thus provides:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

29 U.S.C. §203(f). This definition "includes farming in both a primary and a secondary sense." *Bayside Enterprises v. NLRB,* 429 U.S. 298, 300,

97 S.Ct. 576, 579 (1977). "Primary farming" includes the occupations listed first in §3(f): "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities ... [and] the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. §203(f). "Secondary farming" has a broader meaning, encompassing, as stated in the second part of §3(f): "any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." *Ibid.;* see *Bayside,* 429 U.S., at 300, n. 7, 97 S.Ct., at 579, n. 7; *Farmers Reservoir & Irrigation Co. v. McComb,* 337 U.S. 755, 763, 69 S.Ct. 1274, 1278, (1949) (secondary farming embraces "any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations"). The disjunctives – "or" – are important and expand the exemption rather than restricting it.

In *Farmers Reservoir*, the Supreme Court noted that Congress specifically added the words "or on a farm" to FLSA §3(f) to address some Senators' objections that the exemption otherwise would not cover "the

threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, *but by separate companies organized for and devoted solely to that particular job*." See *id.*, at 767, 69 S.Ct., at 1280–1281 (citing 81 Cong. Rec. 7653 (1937)) (emphasis added). The second clause, italicized above, lends meaning to its predecessor: the exemption was intended to extend to cover businesses that provide services to farmers "on a farm." The statutory language plainly defines the exemption in terms of actors (farmers) or locations (farms) and makes no reference to the origin of the agricultural products.

C. The Statute Must Be Interpreted To Give Meaning To All Its Words.

It is axiomatic that a statute should be interpreted to give meaning to every word. *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 & n. 11, 108 S.Ct. 2182 (1988) (collecting cases). Bland Farm's packing operations were both performed by a farmer and "on the farm," and thus fall squarely within the scope of the agricultural exemption as Congress defined it in the statute. The distinction that Congress wished to draw was between activities carried out on a farm, by the farmer; and independent businesses that were not associated with any farm that

provided services to farmers. DOL's interpretative bulletin (hereinafter "IB"), consistent with the statute, provides that, generally, "a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business." 29 C.F.R. §780.144. Whether a "practice is ordinarily performed by farmers incidentally to their farming operations" has a "direct bearing on whether a practice is an 'established' part of agriculture." *Id.* §780.146.

A District Court decision from Iowa is instructive, since it appears to be a rare reported case directly addressing the scope of both agricultural exemptions and examines the implementing regulations. The defendants in *Jimenez v. Duran*, 287 F. Supp. 2d 979 (N.D. Iowa 2003), operated a business vaccinating poultry and providing other services for poultry producers; they did not own the chickens that they vaccinated, but rather contracted with the poultry owners to provide on-site vaccination services. The plaintiffs, their employees, filed suit seeking overtime; the Durans contended that the employees were exempt. On cross-motions for summary judgment, the District Court held

that the employees were engaged in primary agriculture, and thus were exempt from the FLSA's overtime requirement, or, alternatively, they were engaged in secondary agriculture, and thus also exempt.

The Court began its analysis with a discussion of the "primary" and "secondary" definitions of agriculture, noting the latter's broad description of "any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations."[1] *Duran*, 287 F.Supp. 2d at 985, citing, *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 39, 398, 116 S.Ct. 1396; 29 U.S.C. §203(f)). Then the Court considered whether the employees in question were engaged in activity "performed by a farmer," and whether they "were employed 'on a farm' performing activities 'as an incident to' or 'conjoined with' a primary agriculture activity." *Id.* Citing 517 U.S. at 400–04. The Court found that the vaccination activities satisfied the requirements of the pertinent regulations, which explicitly included poultry, because they certainly

[1] *See* 29 C.F.R. §780.144 ("Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business.")

related directly to the care of animals. *Duran*, 287 F. Supp. 2d at 986-87. The Court found that "[t]he fact that the Jimenezs were not employed by the farmer who owned the poultry, but by a contractor who contracted with the owner of the poultry to provide these kinds of 'care,' does not change this conclusion" that they were engaged in primary agriculture when they performed vaccinations and other services on the farm pursuant to the Duran's contract with the owners of the poultry. *Duran* 287 F. Supp.2d at 987, citing *Holly Farms,* 517 U.S. at 400, 116 S.Ct. 1396; 29 C.F.R. §780.105(b)("If an employee is employed in any of these ['primary' agriculture] activities, he is engaged in agriculture regardless of whether he is employed by a farmer or on a farm.").

The Court went on to examine the criteria for the "secondary agriculture" exemption, which it found was an alternative ground to exempt the workers' activities from overtime, which the *Holly Farms* Court had not examined. Because the Duran's activities (unlike Bland Farms') were not performed "by a farmer," the Court looked to location: whether they were performed "on a farm," and concluded, as an alternative ground for granting summary judgment to the employer, that the "secondary agriculture" exemption should apply. The Court also

rejected the plaintiffs' argument that the absence of any contractual relationship on their part with the producers precluded the agriculture exemption: "Instead, the court finds that the Jimenezs' argument reads the "on the farm" language out of the statute. Again, the "on the farm" language was added to §3(f), 'to address some Senators' objections that the exemption otherwise would not cover 'the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job.'" *Duran*, 287 F. Supp. 2d at 991.

Like the *Duran* plaintiffs, the District Court in the instant case erred by reading "on the farm" clear out of the statute. Congress plainly intended the exemption to apply to a very broad range of primary activities conducted by a farmer on a farm; and an extensive list of secondary activities, explicitly including packing produce, that occur "on the farm," even when the farmer is not personally performing all the work. If meaning is to be given to all the words in the statute, as it must, there is no justification for denying the overtime exemption simply because a minor percentage of the produce packed and processed by the farmer, on the farm, originated elsewhere.

D. The "Risk of Loss" Test is an Impermissible Interpretation.

There is no mooring in the FLSA's statutory language for the restrictive interpretive limitation introduced in 29 C.F.R. §780.158(c). 29 C.F.R. §780.158(c) states that "it must be emphasized with respect to all practices performed on products for which exemption is claimed that they must be performed only on the products produced or raised by the particular farmer or on the particular farm." (citations omitted). The statute is unambiguous and contains no such limitation, but rather states broadly that the overtime exemption applies to "any practices ... performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. §213(f).

This Court should reject the "risk of loss" litmus test that appears to have been the decisive issue for the District Court. There is nothing about risk of loss in the statute or Congressional Record. Courts and the U.S. Department of Labor – not Congress -- introduced this notion, and it is an impermissible interpretation of the statutory language and should not be accorded deference.

The Secretary, and the District Court, made much of the fact that Bland Farms did not bear the totality of the "risk of loss" in reaching their conclusion that the exemption should not apply. ("The contract growers carried the risk of loss and paid all costs involved in growing the onions. And although Bland Farms would sometimes advance the contract growers cash and help with harvesting, it always deducted the amounts advanced and the costs of its services from what it paid the contract growers." *Bland Farms*, 2017 WL 3259650, at *6.) But Congress never intended the risk of loss to be the litmus test for determining whether an activity was exempt because it was performed by a farmer, or on a farm.

Nor is there support for this limitation in the cases cited in the regulation. In *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 75 S.Ct. 719, (1955), the Supreme Court held that employees engaged in transporting sugar cane from fields of the grower-miller to the mill of the grower-miller, and transporting employees to and from the fields, fell within the definition of agriculture in §3(f), and therefore within the exemption of 29 U.S.C. §213(a)(6). Both the majority and the minority opinions concluded that the employer was a farmer engaged in farming its own land, and the activities took place within the confines of its

plantation. No independent growers were at issue in that case, but the critical point was not where the sugar cane came from, or who owned it; but where, and by whom, the activities were performed. The Court held that the *Maneja* employees' work fell within the secondary meaning of §3(f): "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations."

The notion that risk of loss should be a critical aspect of the agriculture exemption only appeared in 1967, in *Wirtz v. Osceola Farms Co.*, 372 F.2d 584, 586 (5th Cir. 1967) ("Title to the cane of the independent growers passes to Osceola at the mill, and risk of loss or destruction prior to delivery at the mill is on the grower.") In *Osceola*, the District Court had held that all aspects of the cane operation were covered by the agriculture exemption, and the Secretary appealed. The Fifth Circuit sliced and diced the workforce, holding that truck drivers transporting employer's farm laborers to and from fields of independent growers and transporting meals from points outside the employer's property to such laborers while working on farms of independent growers came under agriculture exemption; but that drivers of tractors and semitrailer tractor trucks hauling cane in raw or natural state from fields

of independent growers to the mill, and flagmen who stopped traffic at public roads for safe passage of vehicles hauling cane from fields to mill, and personnel who worked in repair shop on employer's equipment used in fields of independent growers did not. But there was a critical difference in *Osceola*: unlike Bland Farms, "Osceola is not the 'farmer' referred to in §3(f). It has not been a farmer at all since April 1964; before then it was a sugar miller and farmer engaged also in non-farm activity in transporting the crop of another farmer." *Osceola*, 372 F.2d at 588. In other words, the decisive factor for the *Osceola* court was not the origin of the cane, but rather the fact that the employer had ceased to be a farmer as well as miller and had become a miller only.

In other words, Osceola lost the exemption when it ceased its own farming operations to engage solely in milling. It ceased to be a "farmer" and became instead a provider of agricultural services. The risk of loss argument is merely incidental dicta.

The critical, *statutory* question is whether the activities are "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." And in this case, the answer is "yes." Bland Farms is a farmer, and its onion packing operations were

performed on the farm or in conjunction with such farming operations. There is simply no statutory basis for distinguishing between produce as to which some other farmer bears the risk of loss during the growing season where the entire field is purchased by Bland from farm-grown produce that runs through a *bona fide* farmer's packing shed. By the time Bland is packing the produce, it owns the produce. The risk-of-loss distinction is an impermissible interpretation at odds with the statute and the Court should not grant it deference.

The Supreme Court read the agriculture exemption broadly in *Holly Farms*, where it held that chicken-catchers were included within the scope of the exemption:

> [T]he statute does *not* require that work be performed "incident to or in conjunction with" one's *employer's* farming operations, but only incident to or in conjunction with "such" farming operations—the antecedent for which term is plainly the first clause of §3(f), to wit, "farming in all its branches," including "the raising of ... poultry." If the *sine qua non* of status as an agricultural laborer is employment *by the farmer or the independent grower,* the "or on a farm" clause is redundant, because chicken catching crews that are agents or employees of the farmers themselves fall within the "by a farmer" clause. Ordinarily, "terms connected by a disjunctive [are] given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979). The "or on a farm" clause has independent significance only if the work encompassed by that clause is performed by someone *other*

> *than* a farmer or the farmer's own agents or employees. *Chevron* deference is not owed to a Board construction of the statute that effectively redacts one of the statute's operative clauses.

There is nothing inherently ambiguous in the statutory language exempting from overtime activities "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." In *Rodriguez v. Pure Beauty Farms, Inc.*, 503 F. App'x 772, 775–78 (11th Cir. 2013) (unpublished, copy attached), this Court applied the exemption because the farmer, a commercial nursery, retained ownership of the plants even as they were consigned to Home Depot stores for sale, emphasizing ownership of the plants as the decisive consideration:

> The Farms' employees receive the plants when they are delivered by the independent transport contractors and then continue to care for the plants until they are sold. Under the particular facts of this case, the mere fact that the Farms used independent contractors to transport its plants did not end its status as a farmer and render non-exempt [the employees'] work caring for the plants before a purchaser buys them at the Home Depot stores.

Pure Beauty Farms, 503 Fed. App'x at 777-778. Similarly, Bland Farms remains a farmer when it purchases a field and later processes the crop and is entitled to the exemption all the more because the processing operations undeniably occur "on the farm."

E. The Secretary's Interpretation Is Inconsistent with the Statute and not Entitled to Deference.

The Secretary's restrictive interpretation of the agriculture exemption in this case should be rejected because it is not consistent with the broad and inclusive statute Congress enacted. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778 (1984), the Supreme Court explained that "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* at 843. In such a case, a reviewing court must give deference to an agency's answer or interpretation of a statute if the agency's regulation is reasonable. *Id.* at 843–44. Although deference is given to agency interpretations of ambiguous statutes, "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9, 104 S.Ct. 2778.

The Supreme Court considered the limits of *Chevron* deference in *United States* v. *Mead Corporation,* 533 U.S. 218, 121 S.Ct. 2164 (2004). The Court held that administrative implementation of a particular statutory provision qualifies for deference when it appears that Congress

delegated authority to the agency generally to make rules carrying the force of law, "and that *the agency interpretation claiming deference was promulgated in the exercise of that authority*." *Mead*, 533 U.S. at 226–27. *Mead* explains that *Chevron* deference is tied to the delegation of legislative authority, and in particular to the indication of "congressional intent." *Id.* at 227.

Congress may give an implementing agency the authority to fill gaps, but that does not extend to creating new rules that are inconsistent with the underlying statute. A recent and particularly pertinent example arose in *Nevada v. United States Dep't of Labor*, -- F. Supp. 2d --, No. 4:16-CV-731, 2017 WL 3837230, at *8–9 (E.D. Tex. Aug. 31, 2017), appeal filed (Nov. 2, 2017), where the court invalidated the Department of Labor's radical revision of the exemption for executive, administrative, and professional (EAP) employees in 29 C.F.R. Part 541. The Court determined that the new "salary test" created by the regulation, which more than doubled the existing salary threshold, so overwhelmed the "duties test" that Congress had established in the statute that was not a permissible construction of the statute.

Examining whether deference was owed under *Chevron*, the *Nevada* Court found that DOL's Final Rule was not "based on a permissible construction" of 29 U.S.C. §213(a)(1) because it effectively eliminated consideration of whether an employee performs "bona fide executive, administrative, or professional capacity" duties. Because Congress defined the EAP exemption with regard to duties, not salary, Congress plainly intended for employees who perform "*bona fide* executive, administrative, or professional capacity" duties to be exempt from overtime pay. However, in the Final Rule, DOL ignored Congress's intent and redefined the EAP exemption principally as a function of earnings. "If Congress was ambiguous about what specifically constituted an employee subject to the EAP exemption, Congress was clear that the determination should involve at least a consideration of an employee's duties.... Nothing in Section 213(a)(1) allows the Department to make salary rather than an employee's duties determinative of whether a "bona fide executive, administrative, or professional capacity" employee should be exempt from overtime pay." *Nevada*, 2017 WL 3837230, at *9 (citations omitted.) Courts are "not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem

inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 753 (5th Cir. 2011) (quoting *Tex. Power & Light Co. v. FCC*, 784 F.2d 1265, 1269 (5th Cir. 1986)). The Department has exceeded its authority and gone too far with the Final Rule." *Nevada*, 2017 WL 3837230, at *9.

In *Nevada*, the Court found that the Secretary had erred in expanding the salary test, to the exclusion of the duties test that Congress enacted with the EAP exemption. Here, the Secretary erred in focusing on risk-of-loss as to produce grown on other farms to the exclusion of the statute's exemption for activities performed by a farmer, on a farm. The risk-of-loss litmus test is an impermissible interpretation that is contrary to the plain language of the statute, just as the salary test was an impermissible interpretation of the EAP exemption's duties test. This Court should hold that Bland Farms' packing activities, performed by a farmer on the farm, fall squarely within the scope of the FLSA's agriculture exemptions even when some produce sourced from other farms is also processed.

F. DOL Should Not Thwart Innovation in Agriculture.

Bland Farms' scale gives it a competitive advantage that its smaller neighbors do not enjoy: it can afford the investment in mechanical sorting equipment. The FLSA was not meant to be interpreted in a manner that discourages modernization. Indeed, in *Farmers Reservoir* the court rejected the plaintiff's suggestion that modernization of the defendants' farming operations should bring them outside FLSA's definition of agriculture. As the Supreme Court explained:

> Agriculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process.... Economic progress ... is characterized by a progressive division of labor and separation of function.... Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farms in other situations. The question is whether the activity in the *particular case* is carried on as part of the agricultural function or is separately organized as an independent productive activity.

Farmers Reservoir & Irrigation Co., 337 U.S. at 760–61. Here, Bland Farms' packing operation was plainly "carried on as part of the agricultural function," not "separately organized as an independent productive activity." As such, it falls squarely within the plain language of the statutory exemption.

G. Inflation Has Made Overtime Much More Expensive.

When the FLSA was adopted in 1938, the minimum wage was $0.25; at time-and-a-half, the rate was $0.375. Today, the Federal minimum wage is $7.25, and the overtime rate $10.875. In relative terms there has been no change, but the change is profound in absolute terms: a minimum wage overtime hour in 2018 costs almost 30 times what the same hour cost when the law was new.

Agriculture has undergone even more profound changes. Rising labor costs make mechanization imperative and make large-scale operations more cost-effective. This is nowhere more apparent than in the packing operations, which no longer consist of four poles and a tin roof but have evolved into elaborate operations crammed with chutes, bins, and conveyors that transform raw produce into packages ready for grocery store shelves.

A rule that renders the produce of small farms effectively radioactive, since it dramatically increases labor costs by requiring overtime, perversely discourages farmers from farming: unless they are big enough to afford their own, expensive processing operation, they will have a hard time getting their crops to market because their produce

"poisons" a large farm's packing operation. Onions are onions, but when certain onions are half again more costly to pack, they will be shunned. This produces a result that is diametrically opposed to what Congress intended when it exempted "farming in all its branches" from the FLSA's overtime requirements.

CONCLUSION

For the foregoing reasons, the undersigned *amici* respectfully request that the District Court's decision be reversed, and judgment entered in favor of Bland Farms.

Respectfully submitted this 30th day of January 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B);

This brief contains 5,263 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii);

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6); and this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Century Schoolbook font, with double-spaced text and 1-inch margins on all sides.

/s/ J. Larry Stine
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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, electronically filed the foregoing **Brief Amicus Curiae of Georgia Fruit & Vegetable Growers Association, Florida Fruit & Vegetable Association, Georgia Agribusiness Council Georgia Farm Bureau, And National Watermelon Association** with the Clerk of the Court using CM/ECF system which will send notification of such filing to the following:

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This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007. See
also Eleventh Circuit Rules 36-2, 36-3. (Find
CTA11 Rule 36-2 and Find CTA11 Rule 36-3)
United States Court of Appeals,
Eleventh Circuit.

Eutolio A. RODRIGUEZ, Francisco Javier Toledo Hernandez, Plaintiffs–Appellants,
v.
PURE BEAUTY FARMS, INC., Deborah L. Jordan, Enrique A. Yanes, Defendants–Appellees.

No. 12–13953
|
Non–Argument Calendar.
|
Jan. 9, 2013.

Synopsis

Background: Commercial nursery farming operation's former employees, who had cared for and merchandised plants for sale at retailer's stores, brought action against employer seeking unpaid overtime wages under the Fair Labor Standards Act (FLSA). The United States District Court for the Southern District of Florida, No. 1:11–cv–20250–JAL, granted summary judgment for employer, and employees appealed.

Holdings: The Court of Appeals held that:

[1] employer was farmer and so its employees were also farmers, for purposes of FLSA's secondary agricultural exemption;

[2] employees' work caring for plants displayed in stores was incident to or in conjunction with nursery farming operations, and so qualified for secondary agricultural exemption;

[3] use of independent contractors to transport plants to retailer did not prevent employees' care for plants from qualifying for secondary agricultural exemption;a and

[4] employees' job to make plants more aesthetically pleasing while located in stores did not mean employees were engaged in separate business enterprise of selling plants, rather than in work qualifying for secondary agricultural exemption.

Affirmed.

West Headnotes (4)

[1] Labor and Employment
Nurseries, greenhouses, and flower gardens

Commercial nursery farming operation was "farmer," and so nursery operation's employees were also farmers, for purposes of Fair Labor Standards Act's (FLSA's) secondary agricultural exemption; term farmer included employer who grew agricultural products but whose purpose was to obtain products useful in non-farming enterprise and included example of employer engaged in raising nursery stock, and under nursery operation's agreement with retailer, plants remained property of nursery operation until they were purchased by retailer's customer and were cared for and merchandised by nursery operation's employees, and employees only handled the nursery operation's plants. Fair Labor Standards Act of 1938, §§ 3(f), 13(a)(6), 29 U.S.C.A. §§ 203(f), 213(a)(6); 29 C.F.R. §§ 780.105, 780.129, 780.130, 780.131, 780.132, 137.

3 Cases that cite this headnote

[2] Labor and Employment
Nurseries, greenhouses, and flower gardens

Work by commercial nursery farming operation's employees caring for plants that

were displayed for sale at retailer's stores was incident to or in conjunction with nursery farming operations, and so employees' work qualified for Fair Labor Standards Act's (FLSA's) secondary agricultural exemption; employees worked with only the nursery operation's plants and did work explicitly identified in regulations as agricultural, such as watering plants, pruning away dead limbs, leaves and buds, and preparing plants for market by handling, inspecting, and sorting them. Fair Labor Standards Act of 1938, § 13(a)(6), 29 U.S.C.A. § 213(a)(6); 29 C.F.R. §§ 780.129, 780.144, 780.147, 780.158(a), 780.205, 780.209.

3 Cases that cite this headnote

[3] **Labor and Employment**

Nurseries, greenhouses, and flower gardens

Commercial nursery farming operation's use of independent contractors to transport plants to retailer where they were merchandised did not prevent nursery operation's employees' care for plants from qualifying for secondary agricultural exemption under the Fair Labor Standards Act (FLSA) on theory plants were thereby delivered to market; nursery operation retained ownership of plants until they were purchased by retailer's customers, while plants were displayed for sale, and employees cared for plants in retailer's stores until they were purchased. Fair Labor Standards Act of 1938, § 13(a)(6), 29 U.S.C.A. § 213(a)(6); 29 C.F.R. §§ 780.105, 780.154.

2 Cases that cite this headnote

[4] **Labor and Employment**

Nurseries, greenhouses, and flower gardens

Commercial nursery operation employees' job to make plants aesthetically pleasing while they were located in retailer's stores for sale to retailer's customers did not mean employees were engaged in separate business enterprise of selling plants, rather than in work qualifying for secondary agricultural exemption under the Fair Labor Standards Act (FLSA); employees did not sell plants, but watered, pruned, and cared for plants until they were sold by retailer, and even if employees' duties included sale of plants, their work would be exempt since they handled only nursery operation's plants. Fair Labor Standards Act of 1938, § 13(a)(6), 29 U.S.C.A. § 213(a)(6); 29 C.F.R. § 780.158(a).

Cases that cite this headnote

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Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:11–cv–20250–JAL.

Before CARNES, BARKETT and HULL, Circuit Judges.

Opinion

PER CURIAM:

****1** Plaintiffs Eutolio A. Rodriguez and Francisco Javier Toledo Hernandez appeal the district court's grant of summary judgment, in favor of their former employer Pure Beauty Farms, Inc. and its owner Enrique A. Yanes, disposing of Plaintiffs' claims for unpaid overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a)(1). The district court ruled that Plaintiffs Rodriguez and Hernandez, as agricultural workers, were exempt from the FLSA's overtime provisions. After review, we affirm. [1]

I. BACKGROUND FACTS

Pure Beauty Farms ("the Farms"), a commercial nursery-farming operation, cultivates and grows plants on land owned ***774** by the Farms in Florida. The Farms transports its plants to Home Depot sites where employees of the Farms continue to care for the plants. The Farms' plants are kept in staging areas within the stores' lawn and garden departments. The plants remain the property of the Farms until they are scanned at Home Depot's register as part of a customer's purchase. Home Depot then pays the Farms an agreed upon price for the plant. Unsold plants are returned to the Farms. And, the Farms bears the loss if one of its plants dies on the shelf before sale or is returned by the customer.

Plaintiffs Rodriguez and Hernandez worked for the Farms as "merchandisers" or "merchants." Plaintiffs' job was to make sure that the Farms' plants, while located in Home Depot stores, remained healthy, attractive, and in a sellable condition until they were purchased. To keep the plants well-maintained at the Home Depot sites, Plaintiffs' duties included inspecting the plants for insects, ensuring they were watered and, if necessary, watering them, arranging them in the store so that they would get the right amount of sunlight or shade, and removing dead flowers, leaves, thorns, branches or rotted buds. Plaintiffs also kept the plant staging areas clean, sent unsaleable plants back to the Farms and requested more plants. Plaintiffs took care of and handled only plants belonging to the Farms.

Both Plaintiffs Rodriguez and Hernandez averaged over forty hours of work per week. For those hours in excess of forty, the Farms paid Rodriguez and Hernandez straight time, rather than overtime, wages.

II. DISCUSSION

An employee is exempt from the FLSA's overtime provisions if he is "employed in agriculture." *See* 29 U.S.C. § 213(a)(6).[2] The FLSA defines "agriculture" two ways: (1) "primary agriculture" and (2) "secondary agriculture." 29 C.F.R. § 780.105; *see also Sariol v. Fla. Crystals Corp.,* 490 F.3d 1277, 1279 (11th Cir.2007).[3] Under the FLSA, "primary agriculture" includes specific farming activities, such as cultivation or tillage of the soil. 29 U.S.C. § 203(f).

The FLSA provides a much broader definition of "secondary agriculture." *Sariol,* 490 F.3d at 1279. Under the FLSA, "secondary agriculture" consists of "any practices ... performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. § 203(f); *see also* 29 C.F.R. § 780.105 (explaining that "secondary" agriculture has a "somewhat broader" meaning than "primary" agriculture).

****2** We agree with the district court that the work Plaintiffs Rodriguez and Hernandez performed for the Farms falls within the meaning of "secondary agriculture."[4] The definition of secondary agriculture has three requirements: (1) the "practice must be performed either by a farmer or on a farm"; (2) it must "be performed either in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where ***775** the practice is performed"; and (3) it must be "performed 'as an incident to or in conjunction with' the farming operations." 29 C.F.R. § 780.129; *see also Sariol,* 490 F.3d at 1279–80.[5]

[1] As to the first requirement, to be a "farmer" within the meaning of the agricultural exemption, "the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a 'farmer' is engaged." 29 C.F.R. § 780.130. A farmer also generally "performs his farming operations on land owned, leased, or controlled by him and devoted to his own use." *Id.* 29 C.F.R. § 780.131. However, the term "farmer" is "an occupational title" and broadly includes an employer who grows his own agricultural products but whose "only purpose is to obtain [those] products useful to him in a non-farming enterprise which he conducts." *Id.* The regulation even gives the example of "*an employer engaged in raising nursery stock.*" *Id.* (emphasis added).

The Farms, a commercial nursery that grows and cultivates plants, is a "farmer" for purposes of the exemption. *See* 29 C.F.R. § 780.130 (explaining that it is the employer's status as a farmer that matters, and that the term may apply to corporations as well as individuals). Further, as employees of the Farms, Rodriguez and Hernandez were also "farmers." *See* 29 C.F.R. § 780.132 (" 'Farmer' includes the employees of a farmer."). Thus, the practices Rodriguez and Hernandez performed at the Home Depot sites were performed "by a farmer."

In addition, those practices were performed "in connection with the farmer's own farming operations." *See* 29 C.F.R. § 780.129, *id.* § 780.137 (explaining that "the requirement is not met" when employees are engaged in practices performed in connection with the farming operations of *another* farmer). It is undisputed that Rodriguez and Hernandez maintained only plants owned and grown by the Farms; therefore, their work was in connection with the Farms' own farming operations. Thus, the first two requirements of the secondary definition of agriculture are easily met.

[2] The parties' dispute focuses primarily on the third requirement—whether the practices Rodriguez and Hernandez performed for the Farms, but on Home Depot store-sites, were "incident to or in conjunction with" the Farms' farming operations. *See* 29 C.F.R. § 780.129. "Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business." 29 C.F.R. § 780.144. When, as here, the practice is performed on "agricultural or horticultural commodities," to determine whether "the practice is conducted as a separate business activity rather than as a part of agriculture," consideration is given to, among other things: (1) whether "the type of product resulting from the practice" remains in its raw or natural state or changes; (2) "the value added to the product as a result of the practice and whether a sales organization ***776** is maintained for the disposal of the product"; and (3) whether the product is "sold under the producer's own label rather than under that of the purchaser." 29 C.F.R. § 780.147. A farmer or his employees selling the farmer's own agricultural commodities is also a practice "incident to or in conjunction with the farming operations" as long as "it does not amount to a separate business." 29 C.F.R. § 780.158(a).

****3** In addition, the Department of Labor has specific regulations addressing employees of nurseries. If nursery employees are engaged in "[p]lanting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop," they are employed in agriculture. 29 C.F.R. § 780.205. "Employees of a grower of nursery stock who work in packing and storage sheds sorting the stock, grading and trimming it, racking it in bins, and packing it for shipment are employed in 'agriculture' provided they handle *only products grown by their employer* and their activities constitute an established part of their employer's agricultural activities and are subordinate to his farming operations." 29 C.F.R. § 780.209 (emphasis added). However, if the "grower of nursery stock operates, as a separate enterprise, a processing establishment or an establishment for the wholesale of retail distribution of such commodities, the employees in such separate enterprise are not engaged in agriculture." *Id.* (citations omitted). "Although the handling and the sale of nursery commodities by the grower at or near the place where they were grown may be incidental to his farming operations, the character of these operations changes when they are performed in an establishment set up as a marketing point to aid the distribution of those products." *Id.*

Section 780.209 cites as contrasting examples *Walling v. Rocklin,* 132 F.2d 3 (8th Cir.1942), and *Mitchell v. Huntsville Wholesale Nurseries,* 267 F.2d 286 (5th Cir.1959).[6] In *Walling,* the employees worked at a flower shop owned by a nearby greenhouse, and ninety percent of the flowers they sold to both the wholesale and retail trade were cultivated at the greenhouse. The Eighth Circuit concluded that the flower shop was not a separate enterprise, but instead was maintained "in connection with and incidental to" the greenhouse and that its employees were exempt under the secondary definition of agriculture. *Walling,* 132 F.2d at 6–7.

In contrast, in *Mitchell,* the employees worked at a packing and storage warehouse of a large plant wholesaler. The employees handled primarily nursery stock from *other,* out-of-state growers, not from the wholesaler's *own* nearby farm, which had its own warehouse for its nursery stock. The Fifth Circuit concluded that the work performed at the warehouse was "incidental to, or in conjunction with," the farming operations of *the other growers,* and thus that the warehouse employees were not exempt. *Mitchell,* 267 F.2d at 290–91.

Here, the Farms handles and sells only its own plants, and Rodriguez and Hernandez watered, pruned, and cared for only the Farms' plants situated at the Home Depot stores. Unlike the employees in *Mitchell,* Rodriguez and Hernandez did not work in a wholesale distribution center *for other growers'* horticultural products. *Cf. Mitchell,*

267 F.2d at 290–91; *see also* ***777** *Adkins v. Mid–American Growers, Inc.*, 167 F.3d 355, 357 (7th Cir.1999) (explaining that when an employer "buys plants and then resells them without doing significant agricultural work it is operating as a wholesaler rather than as a grower, and wholesalers of agricultural commodities are not exempt from the Act"); *Wirtz v. Jackson & Perkins Co.*, 312 F.2d 48, 51 (2d Cir.1963) (stating that "[w]ere any significant portion of the stock handled in defendant's storages purchased from ... independent sources" the agricultural exemption would not apply because it "is inapplicable to services performed by employees of mere distributors of agricultural products"). Rodriguez and Hernandez are more akin to the flower shop employees in *Walling*, who handled and sold only their employer's own nursery stock. *See Walling*, 132 F.2d at 6.

****4** In any event, the kind of work Rodriguez and Hernandez performed on the Farms' plants is explicitly identified in the regulations as "agricultural," such as watering them, pruning away dead limbs, leaves and buds and preparing them for market by handling, inspecting and sorting them. *See* 29 C.F.R. § 780.205. Nothing Rodriguez and Hernandez did to the plants changed them from their natural state, such that they could be said to be engaged in the separate enterprise of processing or manufacturing. *Cf. Mitchell v. Budd*, 350 U.S. 473, 480–82, 76 S.Ct. 527, 532, 100 L.Ed. 565 (1956) (concluding that workers at tobacco-bulking plant, where a lengthy fermentation process substantially changed the tobacco's physical properties and chemical content, were not exempt as agricultural workers). Indeed, by ensuring that the Farms' plants continued to receive adequate water and light and were pruned and insect-free while in the staging areas, Rodriguez and Hernandez's work was directly connected with and subordinate to the Farms' own nursery-farming operations.

[3] We are not persuaded by the Plaintiffs' argument that the FLSA's agricultural exemption does not apply to them merely because the Farms uses independent contractors to transport its plants to the Home Depot stores. The only authority Rodriguez and Hernandez cite for this proposition is 29 C.F.R. § 780.154. However, that regulation applies only when the farmer uses an independent contractor to transport his agricultural products to a wholesaler or processor and relinquishes ownership or control of the agricultural products at the receiving platform of a wholesaler or processor. [7]

In contrast, here the Farms retains ownership of the plants not only while they are transported from the farm but also while the plants are displayed for sale in the Home Depot stores. The Farms' employees receive the plants when they are delivered by the independent transport contractors and then continue to care for the plants until they are sold. Under the particular facts of this case, the mere fact that the Farms used independent contractors to transport its plants did not end its status as a farmer and render non-exempt ***778** Rodriguez and Hernandez's work caring for the plants before a purchaser buys them at the Home Depot stores.

[4] We also reject the Plaintiffs' argument that they were engaged in a separate business enterprise of selling plants because their job was to make the plants aesthetically pleasing. First, there is no evidence that Rodriguez and Hernandez sold the plants. Rather, they watered, pruned, and cared for the plants until they were sold. Second, even if Rodriguez and Hernandez's duties could be characterized as "selling" the plants, so long as they sold only the Farms' plants, their work would be exempt. *See* 29 C.F.R. § 780.158(a) (including as an agricultural practice a farmer's employees selling the farmer's own agricultural commodities); *see also Walling*, 132 F.2d at 6. The Farms did not operate a plant marketing business separate and distinct from its nursery-farming operations, and any "selling" Rodriguez and Hernandez were doing was incident to or in conjunction with the Farms' nursery-farming operations.

****5** For all these reasons, we agree with the district court that Plaintiffs Hernandez and Rodriguez's job duties for the Farms fell within the FLSA's definition of secondary agriculture and that they therefore were exempt from the FLSA's overtime provisions. Accordingly, the district court properly granted summary judgment to Defendants the Farms, Inc. and Yanes.

AFFIRMED.

All Citations

503 Fed.Appx. 772, 2013 WL 104342, 163 Lab.Cas. P 36,089, 20 Wage & Hour Cas.2d (BNA) 559

Footnotes

1 We review *de novo* the district court's grant of summary judgment, applying the same standards as the district court and viewing the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Sariol v. Fla. Crystals Corp.*, 490 F.3d 1277, 1279 (11th Cir.2007).

2 The employer bears the burden of showing that an employee is exempt from the FLSA's overtime requirements, and we construe the FLSA's exemptions narrowly. *Alvarez Perez v. Sanford–Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1156 (11th Cir.2008).

3 The FLSA includes within the term "agriculture," "the production, cultivation, growing and harvesting of any ... horticultural commodities." 29 U.S.C. § 203(f).

4 The parties do not dispute that Rodriguez and Hernandez's work falls outside the definition of "primary agriculture."

5 We apply *Chevron* deference to the U.S. Department of Labor's ("DOL") regulations implementing the FLSA when the statutory text is ambiguous or leaves terms undefined. *See Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1299 (11th Cir.2011) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). The FLSA leaves undefined the terms used to describe secondary agriculture. The parties do not argue that the DOL's regulations interpreting these terms are not entitled to *Chevron* deference.

6 *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent in the Eleventh Circuit all decisions of the former Fifth Circuit decided prior to October 1, 1981).

7 Section 780.154 provides that when agricultural products are delivered "to market" off of the farm by the farmer's employees, the work is exempt, but if the delivery is made by an independent contractor, it "is not an agricultural practice." 29 C.F.R. § 780.154 (citations omitted). The same regulation further explains: (1) that the phrase "delivery to market" "ordinarily refers to the initial journey of the farmer's products from the farm to the market"; (2) that the term "market" "normally means the distributing agency, cooperative marketing agency, wholesaler or processor"; and (3) that, under such circumstances, "[d]elivery to market ends with the delivery of the commodities at the receiving platform of such a farmer's market." *Id.* (citing as an example *Mitchell,* 350 U.S. 473, 76 S.Ct. 527).

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