

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

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MAR 07 1995

Supreme Court U.S.

**OF THE**

**UNITED STATES**

CAPTION: HOLLY FARMS CORPORATION, ET AL.,  
Petitioners v. NATIONAL LABOR RELATIONS  
BOARD, ET AL.

CASE NO: 95-210

PLACE: Washington, D.C.

DATE: Wednesday, February 21, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HOLLY FARMS CORPORATION, :

4 ET AL., :

5 Petitioners :

6 v. : No. 95-210

7 NATIONAL LABOR RELATIONS :

8 BOARD, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, February 21, 1996

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:16 a.m.

15 APPEARANCES:

16 CHARLES P. ROBERTS, III, ESQ., Greensboro, North Carolina;  
17 on behalf of the Petitioners.

18 RICHARD H. SEAMON, ESQ., Assistant to the Solicitor  
19 General, Department of Justice, Washington, D.C.; on  
20 behalf of the Respondents.

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

2. (11:16 a.m.)

3. CHIEF JUSTICE REHNQUIST: We'll hear argument  
4. next in Number 95-210, Holly Farms Corporation v. National  
5. Labor Relations Board.

6. Mr. Roberts.

7. ORAL ARGUMENT OF CHARLES P. ROBERTS, III

8. ON BEHALF OF THE PETITIONERS

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

11. During the 200-plus years of our country's  
12. history, agriculture has undoubtedly changed dramatically.  
13. Over the years, it has become more mechanized, more  
14. specialized, and a much larger business. Yet, as I stand  
15. here today in 1996 before this Court, the process of  
16. catching chickens remains one of the most rudimentary  
17. agricultural processes that one can visualize. Workers  
18. using nothing but their two hands manually catch chickens  
19. and place them into cages in order that these chickens can  
20. be delivered to market.

21. One would not think that it would take much  
22. analysis to conclude that these workers are agricultural  
23. laborers, yet the parties, including us, spend pages and  
24. pages of our briefs discussing whether Holly Farms is a  
25. farmer when it sends its chicken -- sends its live haul

1 crews to the farms of the independent growers.

2 We spend pages discussing whether catching  
3 chickens is -- or whether chickens can be harvested. We  
4 spend pages discussing whether the live haul crews are  
5 acting in some way in a relationship with the processing  
6 plant, perhaps proving that lawyers and sometimes judges  
7 can make issues that are quite simple seem complex.

8 Fortunately, I don't have to rely on common  
9 sense here today, because we have a statute that Congress  
10 carefully considered that specifically defines with some  
11 precision what is agriculture.

12 QUESTION: Suggesting that common sense and  
13 Congress' statutes are mutually exclusive?

14 (Laughter.)

15 MR. ROBERTS: No, Your Honor. I think in this  
16 case we see that common sense does equate with what  
17 Congress has done. I just wouldn't want to be making only  
18 a common sense argument.

19 However, what we have is a statute -- and if  
20 nothing else from my argument becomes clear today, I hope  
21 it will be clear that the chicken catchers and the  
22 forklift operators are at a minimum engaged in secondary  
23 agriculture within the meaning of section 3(f).

24 QUESTION: How about the truck driver? That  
25 doesn't sound particularly agricultural to me.

1 MR. ROBERTS: Well, I think the truck drivers  
2 are a much more difficult question. I think that the  
3 issue there turns on whether Holly is a farmer, because  
4 their activities do not take place on a farm.

5 I think logically it makes more sense to address  
6 the chicken catchers and the forklift operators first,  
7 because the issue in our opinion is much clearer on those,  
8 and if we prevail on the chicken catchers and the forklift  
9 operators then, even if we lose on the live haul drivers,  
10 that undermines the board's bargaining unit.

11 QUESTION: But can we see them -- can we solve  
12 this case by just thinking of chicken catchers without  
13 knowing the employer involved?

14 Now, suppose Holly Farms didn't ever hatch any  
15 chickens. It was only in the slaughtering and processing  
16 business. So it goes to the farms, it sends its trucks  
17 and teams to the farms, they pick up the chickens, they  
18 haul them to the slaughterhouse or the processing plant,  
19 and they don't -- they're not even in the farming business  
20 at all. They just pick up the chicks for slaughter and  
21 processing.

22 MR. ROBERTS: And if those were the facts, the  
23 chicken catchers and forklift operators would still be  
24 agricultural laborers, but the live haul drivers would not  
25 be agricultural laborers in our opinion, under the facts

1 that you have posed.

2 How do we know that? We can look at the statute  
3 itself, which is found at page 3 of the blue brief.

4 QUESTION: Well, you rely on the fact that the  
5 chicken catchers and the people who put them in cages are  
6 doing the work on the farm.

7 MR. ROBERTS: That's correct, Your Honor. We  
8 think --

9 QUESTION: And therefore under the secondary  
10 agriculture prong of that statute.

11 MR. ROBERTS: That's our position, is that at a  
12 minimum, while we contend --

13 QUESTION: And you take the position that  
14 Bayside, that Bayside case did not deal with that aspect  
15 of the statute, where the work was done on the farm.

16 MR. ROBERTS: That's absolutely correct, Your  
17 Honor. Bayside dealt with feed haul drivers, and there  
18 was no contention in that case that their work was  
19 performed on a farm, so the sole issue was whether Bayside  
20 was a farmer, which also applies to our -- we concede that  
21 that applies to our live haul drivers, but not to the  
22 chicken catchers.

23 QUESTION: Okay, and so as far as the driver is  
24 concerned, we would have to conclude that Holly Farms has  
25 regained its status as a farmer for you to prevail as to



1 them.

2 MR. ROBERTS: We believe that that's the correct  
3 analysis, Your Honor, but if we take the chicken catchers  
4 and the forklift operators and we look at the statute,  
5 which is on page 3 of the blue brief, it says agriculture  
6 includes, among other things, the raising of poultry, and  
7 any practices performed by a farmer or on a farm as an  
8 incident to or in conjunction with such farming  
9 operations, including preparation for market.

10 Now, we know that the chicken catchers and  
11 forklift operators work on a farm, because that is  
12 conceded. We also know that catching, caging, and loading  
13 live chickens constitutes preparation for market because  
14 the board really does not dispute that, and the Secretary  
15 of Labor has specifically defined those tasks as being  
16 preparation for market.

17 We also know that the activities of the chicken  
18 catchers and the forklift operators are incidental to  
19 farming because section 3(f) specifically states that  
20 preparation for market is an activity that is, per se,  
21 incidental to farming.

22 The only remaining question is, is it related,  
23 incidental to or in conjunction with such farming, and we  
24 know that the answer to that question is yes, because the  
25 chickens that are caught, caged, and loaded onto the

1 trucks are the same chickens that are raised on the farms  
2 on which the truck drivers work, so under the plain  
3 language of section 3(f), it is clear that the chicken  
4 catchers and forklift operators at a minimum meet the  
5 secondary definition of agriculture.

6 QUESTION: Mr. Roberts, one could accept that  
7 that's a perfectly reasonable reading of the statute, but  
8 isn't there some respect that we owe to the contrary  
9 interpretation of the NLRB and its ruling in this case?

10 MR. ROBERTS: We don't believe that in this case  
11 the board's opinion is entitled to any deference on the  
12 chicken catchers and forklift operators, because the issue  
13 in our view is that that's the only reasonable  
14 interpretation of section 3(f).

15 We also contend that the board's interpretation  
16 of phrases such as incidental to farming operations is  
17 contrary to this Court's prior decisions in Maneja and  
18 Farmers Reservoir, so we think that there's a principle of  
19 stare decisis that applies here, too.

20 We also take the position that their  
21 interpretation is contrary to the Secretary of Labor's, so  
22 for a variety of reasons we think that the board's  
23 interpretation in this case is contrary to the plain  
24 language of the statute and not reasonable.

25 I'm referring right now to the chicken catchers

1 and the forklift operators. I must emphasize that  
2 analytically they are separate from the live haul drivers,  
3 and that the two groups do not necessarily rise or fall  
4 together.

5 QUESTION: Yes, and would you be able to say the  
6 same thing with respect to the line haul drivers, that  
7 that is your interpretation is the only reasonable one?

8 MR. ROBERTS: We don't --

9 QUESTION: It's hard to say that, isn't it?

10 MR. ROBERTS: Our position on the live haul  
11 drivers is that the statute is not specifically ambiguous  
12 but it does require interpretation and, had the board made  
13 a choice in this case between Holly and the independent  
14 grower, that choice might have been entitled to  
15 reference -- I mean, to deference.

16 But what's happened in this case is, unlike  
17 Bayside, where the board took the position that the  
18 independent grower was the relevant farmer, the board  
19 denies in this case that the independent grower is the  
20 farmer. It takes the -- and it also denies that Holly  
21 Farms is the farmer, so what we have is the inescapable  
22 conclusion that these chickens, which are still on the  
23 farm, have no farmer, and that's the basis for our  
24 argument, is that --

25 QUESTION: But of course you -- but they want to

1 have it both ways, but so do you. If we agree with you on  
2 the chicken catchers, then that disparity which you have  
3 just described would no longer exist. You would have a  
4 relevant farmer, right?

5 MR. ROBERTS: Well, we think that their --

6 QUESTION: And therefore your argument on the  
7 line haul --

8 MR. ROBERTS: Not necessarily, because Holly,  
9 even with the chicken catchers and the forklift operators,  
10 they can be covered in one of two ways. They can be  
11 acting incidentally to the farming operations of the farm,  
12 or they can be acting incidentally to Holly's farming  
13 operations. It's our position that they're doing both.

14 QUESTION: Or they can be acting incidentally to  
15 Holly's slaughtering operations.

16 MR. ROBERTS: That is the position that the  
17 board takes, and we think that --

18 QUESTION: No, but I mean, that is a logical  
19 possibility here, isn't it?

20 MR. ROBERTS: Not -- the chicken catchers, we  
21 think that that's not a logical --

22 QUESTION: No, no, I'm just talking about the --  
23 I thought you were talking about --

24 MR. ROBERTS: The drivers?

25 QUESTION: The drivers.

1 MR. ROBERTS: We think that that is one  
2 possibility that, you know, could be argued, but the  
3 problem is --

4 QUESTION: Well, why isn't that same possibility  
5 open to the chicken catchers?

6 MR. ROBERTS: Because the statute, Your Honor,  
7 specifically defines preparation for market of  
8 agricultural commodities raised on that farm as being  
9 incidental. Congress specifically --

10 QUESTION: No question about that, but this --  
11 doesn't this go to the point of incidental to such  
12 farming?

13 MR. ROBERTS: It --

14 QUESTION: And I mean, there is at least a  
15 reasonable position, isn't there, to the effect that if  
16 the chicken catcher is hired by a slaughterer as opposed  
17 to being hired by the farmer, the one who literally owns  
18 the henhouse with the chickens in it, that that would be a  
19 reason for saying it is not incidental to such farming, it  
20 is incidental to slaughtering?

21 I mean, that's a possible position, isn't it?

22 MR. ROBERTS: We don't think that under any  
23 reasonable interpretation, because what that -- if you  
24 adopt that interpretation, then it leads to the conclusion  
25 that there is no farmer in this case, that it's not

1 incidental to anyone's farming operation --

2 QUESTION: Well, it may lead to the conclusion  
3 that at the precise mathematical moment in question the  
4 chickens are owned by somebody who is neither a farmer nor  
5 a nonfarmer. The chickens are owned by the slaughterer at  
6 that point.

7 MR. ROBERTS: But if they're --

8 QUESTION: Slaughterers can own chickens.

9 MR. ROBERTS: But the Congress is --

10 QUESTION: I mean, can't they, and --

11 MR. ROBERTS: Certainly. Certainly, and we  
12 would agree that if the slaughterers own the chickens and  
13 the slaughterer had no raising hatcheries or anything of  
14 that nature, then the live haul drivers would be -- would  
15 be -- would not be covered, but what we're dealing here is  
16 with work on a farm. Congress specifically added the "on  
17 a farm" language to cover people who were not farmers, who  
18 did tasks on the farm.

19 QUESTION: And that leaves -- that certainly  
20 leaves open the possibility, and I suppose the certainty,  
21 that if the farmer hired an independent chicken catcher,  
22 like the thresher of the wheat in the example from the  
23 1930's, that that person would be an agricultural worker  
24 so long as the work was done on the farm.

25 But when you've got the condition that refers

1 to -- is it such farm, or such farming? I forget which --  
2 such farming operations, then you have yet another  
3 possibility in play, and that is the possibility that when  
4 the person who hires and sends the chicken catcher is  
5 neither the farmer, nor an independent, but a slaughterer,  
6 and the work is being done as a preparation for the  
7 slaughterer's slaughtering, that in fact the incidental  
8 character goes to slaughtering and not to farming.

9 MR. ROBERTS: We don't think that that's a  
10 reasonable interpretation, Your Honor, that Congress -- we  
11 don't think that was Congress' intent.

12 QUESTION: Because what?

13 MR. ROBERTS: Well, because the language  
14 specifically was added to exempt somebody who was not a  
15 farmer, and if you accept --

16 QUESTION: Well, it was added to exempt the  
17 independent thresher, and people in the thresher's  
18 position, but these chicken catchers are not like the  
19 independent threshers who were referred to in the Senate  
20 back in the thirties. They are, in fact, owned by yet a  
21 third entity, that is to say, the slaughterer.

22 If the threshers, for example, in the 1930's  
23 examples had been employees of, what, the grain  
24 wholesalers or silo owners, they would have been in the  
25 same position, I suppose, as the chicken catchers who are

1 employed by the slaughterers.

2 MR. ROBERTS: Well, the interpretation that you  
3 pose is one posed in the board's brief, but it was not  
4 posed by the board in its decision, and it's directly  
5 contrary to the board's decision in Produce Magic, where  
6 the board held that an independent harvester who went from  
7 farm to farm providing services for lettuce growers was  
8 not an agricultural laborer, even though the work was  
9 performed on a farm, because he wasn't a farmer.

10 So the board has read the statute in a manner  
11 which prevents anybody other than a farmer from ever  
12 performing secondary activities.

13 QUESTION: But the point is, the statute can be  
14 read in a way that does not have that effect and still  
15 lead to the board's conclusion here.

16 MR. ROBERTS: Only by adopting a logic that is  
17 specifically contrary to what the board has held in  
18 another case, and we don't think that that would be a  
19 reasonable method for doing it.

20 QUESTION: Well, and you also have to accept the  
21 proposition that a particular activity can only be  
22 incidental to one. It has to be either incidental to the  
23 slaughtering operation or incidental to farming. I don't  
24 know why it can't be incidental to both.

25 MR. ROBERTS: That's --



1 QUESTION: All the statute requires is that it  
2 be incidental to the farming operation.

3 MR. ROBERTS: The board has effectively imposed  
4 a solely or exclusively requirement into section 3(f)  
5 which is not warranted by the act.

6 If you look at the court's decision in the sugar  
7 cane case in Hawaii, Maneja, where they specifically dealt  
8 with railroad workers who transported sugar cane from the  
9 fields to the processing mill, the court clearly viewed  
10 that activity as being incidental to farming even though  
11 the purpose and the ultimate destination of the sugar cane  
12 was the employer's processing mill where the sugar cane  
13 was going to be processed into sugar and molasses.

14 So it seems clear from that decision that the  
15 question of whether something is related to farming is not  
16 a question of whether it has any relationship to  
17 processing but how is it, and is it the kind of activity  
18 that we would view as being reasonably related to the  
19 farming operation.

20 QUESTION: And I suppose that you'd have a real  
21 problem with any farmer who has an integrated operation,  
22 not only farms but slaughters, and then if these people  
23 who catch his chickens are doing things that are  
24 incidental to both operations, they presumably would not  
25 be entitled to the exemption.

1 MR. ROBERTS: Well, that's correct, Your Honor.

2 QUESTION: Which is just like the case you  
3 describe.

4 MR. ROBERTS: Well, I think that one problem  
5 with the board's interpretation is it leads to a detailed  
6 analysis of the business relationships between the  
7 different employers, and we read section 3(f) as focusing  
8 primarily on the nature of the work, and under the  
9 board --

10 QUESTION: Suppose that you had -- suppose I go  
11 into the business of supplying water to people who are  
12 threshing and they get thirsty, and each day I drive from  
13 my town, in the middle of the city, and I put water in my  
14 truck, and I go out there and I give them cups of water  
15 while they're threshing, or whatever they're doing.

16 Now, couldn't you say that such a person, me,  
17 who goes out and gives them water, or my employees hands  
18 them cups and so forth, that that's not incidental to  
19 farming. Rather, I have a separate business. I'm a water  
20 company. I live in the city, I get my water from the city  
21 water, I go out and give them water.

22 But in your analysis, that becomes a farm  
23 worker, is that right?

24 MR. ROBERTS: No, I don't think so, Justice  
25 Breyer.

1 QUESTION: Why not?

2 MR. ROBERTS: The -- there's two --

3 QUESTION: Why isn't it incidental to the farm?

4 MR. ROBERTS: Well, there's two problems with  
5 that. It may be incidental to farming --

6 QUESTION: Yes, that's what I thought it was in  
7 the analysis --

8 MR. ROBERTS: But -- but it still, to be  
9 covered, has to either be performed on a farm --

10 QUESTION: Yes, it is.

11 MR. ROBERTS: -- or by a farmer.

12 QUESTION: What they do is, they go out there  
13 and they hand them the cups. They walk around from corn  
14 sheaf to corn sheaf and help them drink.

15 MR. ROBERTS: Well, I mean, obviously that is a  
16 question that I think the court would have to --

17 QUESTION: What I'm trying to suggest is, it  
18 makes a difference who you're working for, that if, in  
19 fact, the water person was working for the farmer, you'd  
20 say, hey, this is incidental to the farming, but if the  
21 water person is working for a city water company, it seems  
22 more incidental to that. You could call it either way,  
23 and how, in fact, the person -- who is his employer would  
24 be relevant.

25 MR. ROBERTS: Well, that same argument would

1 apply to the independent wheat thresher. He's acting as  
2 an incident to his own business operations, yet Congress  
3 clearly intended --

4 QUESTION: But he's a farmer.

5 MR. ROBERTS: No. No, the Congress specifically  
6 took the position that the independent wheat thresher was  
7 not a farmer. He was -- in fact, that same argument was  
8 advanced that he was nothing more than a huckster who went  
9 from farm to farm selling his tinware, and that -- and  
10 Congress took the position that even though he was an  
11 independent businessman, because his activities occurred  
12 on a farm and were related incidentally to or in  
13 conjunction with farming, they were covered.

14 So the argument that you pose -- I agree the  
15 water, providing the water is a more difficult question,  
16 because the question becomes whether it has any  
17 relationship whatsoever to agricultural -- you know, even  
18 though it's an activity, it may not be incident -- the  
19 issue may be that it just has no relationship, really, to  
20 the farming operations themselves.

21 In this case, there's no question that the  
22 activities of the drivers as well as the chicken catchers  
23 and forklift operators are secondary activity. The board  
24 is not contending that there's something about the  
25 activities that are not agricultural. Their argument

1 focuses on the relationship --

2 QUESTION: Mr. Roberts, can I ask you a question  
3 about the fact, does a particular crew go out and catch  
4 the chickens on one farm, deliver them, and go back to the  
5 same farm, or does it cover a lot of farms on one --

6 MR. ROBERTS: Your Honor, it covers a lot of  
7 farms, but what happens is, the live haul drivers deliver  
8 the chicken catchers and the forklift operators to the  
9 farms.

10 QUESTION: Right.

11 MR. ROBERTS: So we have the chicken catchers  
12 and the forklift operators perform their tasks. Once the  
13 truck --

14 QUESTION: Will one truck load take all the  
15 chickens they're going to get from that farm?

16 MR. ROBERTS: No. It may involve going to  
17 several different farms. At some point in time --

18 QUESTION: No, that's not quite my question.  
19 Will -- are the various farms about the same capacity?  
20 All right. Are the number of chickens that they catch  
21 more or less than they can get in one load?

22 MR. ROBERTS: I think the -- from one farm would  
23 probably be less than what they get in one load. In other  
24 words, the --

25 QUESTION: So they have to go back to the same

1 farm a second time?

2 MR. ROBERTS: No. They go to a different farm,  
3 and once you've cleaned out one farm, then, you know --

4 QUESTION: But I thought you said that one load  
5 would not clean out the farm.

6 MR. ROBERTS: They have to go to other farms,  
7 Your Honor. There's hundreds of farms --

8 QUESTION: No, I understand, but I'm trying to  
9 get -- one crew goes to farm A. It picks up some chickens  
10 there. Does it pick up all the available chickens?

11 MR. ROBERTS: It picks up all the available  
12 chickens.

13 QUESTION: In the same load?

14 MR. ROBERTS: Yes, and then it goes to farm B.

15 QUESTION: I got the impression that it went to  
16 the farm, loaded up the truck, went back to the processing  
17 plant, and then came back to the farm.

18 MR. ROBERTS: No, Your Honor.

19 QUESTION: That's not right.

20 MR. ROBERTS: It goes to farm B.

21 At some point the truck becomes full and the  
22 live haul truck driver takes the truck back to the plant,  
23 drops the trailer, and then returns --

24 QUESTION: To a farm it's already been to.

25 MR. ROBERTS: -- to a farm.

1           The chicken catchers and forklift operators  
2           don't go back with the live haul driver while he's  
3           dropping off a load unless it's the end of their -- you  
4           know, the end of their day.

5           QUESTION: It would just be a coincidence, then,  
6           that if at some point you didn't have to go back to the  
7           same farm, because what you -- what regulates when they go  
8           back is when they've got a full truck, not when they've  
9           cleaned out one farm.

10          MR. ROBERTS: Well, obviously, yes. If they  
11          reach a farm, and then the truck gets loaded, it has to go  
12          back, and then at some point either that truck or another  
13          truck -- they have more live haul drivers than they do  
14          crews, so there can be, you know, several drivers out  
15          there, and then another truck would have to come in order  
16          to complete the loading process at that particular farm.

17          But the chicken -- my point is, is the chicken  
18          catchers and the forklift dri -- I mean, the forklift  
19          operators stay on the farms until the end of their shift  
20          and then they go home.

21          QUESTION: A different truck will come and pick  
22          them up, then?

23          MR. ROBERTS: It may be the same, or it may be a  
24          different truck.

25          QUESTION: I see. I see.

1 QUESTION: Are you going to spend any time at  
2 all arguing about whether Holly Farms is a farmer?

3 MR. ROBERTS: Yes, Your Honor. In this  
4 particular case, as I said, the live haul drivers turn on  
5 whether Holly is a farmer. Now, the board concedes that  
6 Holly is a farmer in its hatcheries when it breeds and  
7 hatches the chicks. It takes the position, however, that  
8 neither the grower nor Holly is the farmer of the chickens  
9 at the time that the live haul crews arrive at the farm,  
10 and our position is, is that the board might have been  
11 able to choose the farmer over Holly, but it had to choose  
12 one of them.

13 The chickens had to have a farmer. They're  
14 still on the farm. They haven't been reduced to  
15 possession. Either Holly or the grower has to be the  
16 farmer.

17 Now, the board in its brief specifically  
18 rejects, and in the case specifically rejects the position  
19 that the grower is the farmer, and the reasons that it  
20 gives establishes that Holly resumes its status. Thus,  
21 the reasons that the board tells us in its brief why the  
22 grower is not the farmer is that Holly bred and hatched --

23 QUESTION: But you deny that, so you're another.  
24 I mean, you're doing the same thing that they do. Why is  
25 it bad for them but okay for you?



1 MR. ROBERTS: I'm sorry, Your Honor, I didn't --

2 QUESTION: Just as they are saying that he is  
3 not the farmer, you are saying that he is.

4 MR. ROBERTS: We're saying that both are. We're  
5 saying that you can be -- in this particular case, the  
6 activities of all these workers can be incidental to both  
7 Holly's farming operations and to the grower's farm --  
8 it's -- remember, the statute speaks of the farms.

9 The operation, the farming operations that take  
10 place on the farm, those operations were the grower's  
11 operations in raising the chickens. Well, when you catch  
12 chickens that have been raised on a farm, we contend that  
13 by definition, that's related to the farm's farming  
14 activities.

15 QUESTION: That's the other issue. We're  
16 talking about the --

17 MR. ROBERTS: Our position, though, is, is that  
18 in addition to that, Holly has resumed its status as a  
19 farmer because it holds title to the chicks, it actually  
20 performs the delivery, or the catching, the caging and the  
21 delivery, and as the board points out in its brief, the  
22 grower provides a service for Holly.

23 QUESTION: Well, wait a minute. If it was an  
24 independent contractor who did the catching-caging, you  
25 wouldn't say that he became a farmer, would you? You'd

1 just say, he performed activity incidentally -- incidental  
2 to farming on the farm.

3 MR. ROBERTS: Because that --

4 QUESTION: So the mere fact that Holly did the  
5 catching-caging doesn't reconvert Holly to a farmer. It  
6 just means that Holly is doing work incidental to farming.

7 MR. ROBERTS: Well, Your Honor, and the case you  
8 pose would be one where the entity had no previous farming  
9 status with regard to those chickens.

10 In this particular case --

11 QUESTION: Okay. That is exactly -- that's the  
12 only distinction that you can rely on.

13 MR. ROBERTS: That --

14 QUESTION: That Holly used to be a farmer.

15 MR. ROBERTS: Well --

16 QUESTION: Unlike the independent contractor,  
17 before Holly dropped off the little chicks, Holly was a  
18 farmer.

19 MR. ROBERTS: That's the major distinction, but  
20 we think it's an important distinction. The other --

21 QUESTION: It is, maybe it isn't.

22 MR. ROBERTS: Well --

23 QUESTION: I'd sort of leave it to the agency to  
24 figure out.

25 MR. ROBERTS: There's a second distinction, Your

1 Honor, is that Holly owns the chickens. The example you  
2 pose would be one where the chickens were not owned by the  
3 independent contractor, so they would have no relationship  
4 whatsoever to these particular chickens.

5 So we think it is a material distinction that  
6 they own the chickens, that the grower -- you see, as the  
7 board points out --

8 QUESTION: Well, why is that material? I can  
9 own a chicken, and I'm not a farmer.

10 MR. ROBERTS: Well, in this particular case --

11 QUESTION: He can even eat it and not be a  
12 farmer.

13 (Laughter.)

14 MR. ROBERTS: I would agree with that, Your  
15 Honor.

16 But the title to the chicken runs hand-in-hand  
17 with the fact that we bred and hatched these chickens. I  
18 don't think you can separate the two. The fact remains is  
19 that we do have a very close tie. We remain, if you look  
20 at --

21 QUESTION: Yes, but I can raise some chickens  
22 and then rent them out to someone else, and at that point  
23 I'm saying, the farming's over for me, but I still own the  
24 chickens, so I don't see the materiality for the  
25 classification of the fact that I have title.

1 MR. ROBERTS: Well, I think the title of it  
2 bears on the fact that it shows that the relationship that  
3 Holly has to the chickens -- by itself, I would agree with  
4 you that that would --

5 QUESTION: It shows it's a chicken owner.

6 MR. ROBERTS: But it also has to show that in  
7 conjunction with that it is engaged in the breeding and  
8 hatching of chicks. It then --

9 QUESTION: It used to be, and it's finished.

10 MR. ROBERTS: And it performs -- and another  
11 argument that I've not really had time to address is that  
12 the activities of the chicken catchers and forklift  
13 operators are actually primary agriculture, and they're  
14 actually harvesting the chickens within the regulations of  
15 the Secretary of Labor.

16 QUESTION: You're not going to spend a lot of  
17 time on that argument --

18 MR. ROBERTS: No, I'm not, because I don't have  
19 a lot of time.

20 (Laughter.)

21 MR. ROBERTS: But to answer your question --

22 QUESTION: Mr. Roberts, as I understood your  
23 answer to my question in the very beginning you're saying  
24 this business about whether Holly is the farmer is only  
25 relevant to whether you can catch the live haul driver,

1 because under any scenario, as you see this case, the  
2 chicken catchers and the forklift person have to be  
3 agricultural laborers.

4 MR. ROBERTS: Obviously, that is our position,  
5 and it's our -- I would agree it's our strongest argument,  
6 and that's why I keep emphasizing you have to separate the  
7 two. Analytically they are distinct, and if -- if the  
8 Court is inclined to show deference to the board on the  
9 live haul drivers, we would strenuously argue that such  
10 deference would not be owed on the chicken catchers  
11 because of the nature of the language and the intent of  
12 Congress.

13 I'd like to reserve a couple of minutes for  
14 rebuttal.

15 QUESTION: Very well, Mr. Roberts.

16 Mr. Seamon, we'll hear from you.

17 ORAL ARGUMENT OF RICHARD H. SEAMON

18 ON BEHALF OF THE RESPONDENTS

19 MR. SEAMON: Mr. Chief Justice, and may it  
20 please the Court:

21 The workers at issue here go from petitioner's  
22 processing plants to the farms of independent growers to  
23 pick up mature broiler chickens and take them back to the  
24 processing plant to be slaughtered and dressed.

25 Petitioner's own witness testified that this

1 work is the first step of the processing operation, and  
2 that the work is coordinated to meet the needs of the  
3 processing plant.

4 It is undisputed that chicken processing is not  
5 an agricultural activity. The question is whether the  
6 National Labor Relations Board reasonably concluded that  
7 these workers, called live haul workers, are not within  
8 the agricultural exemption of the National Labor Relations  
9 Act. We think --

10 QUESTION: But as to the chicken catchers and  
11 the people who -- the forklift operators, it is being done  
12 on a farm.

13 MR. SEAMON: That's right.

14 QUESTION: And it certainly is incidental to the  
15 farm operation. You have to get rid of the chickens. I  
16 mean, the whole farm operation is devoted to raising them  
17 for a certain period of time and then moving them on to  
18 the next stage, and it's incidental to that. It can't  
19 occur without removing them.

20 MR. SEAMON: That's correct.

21 QUESTION: It just seems to me that the position  
22 of the board is not reasonable in light of the language of  
23 the statute as to those two categories of workers.

24 MR. SEAMON: We believe that the work of the  
25 chicken catchers and forklift operators isn't incidental

1 to the primary farming operations that go on on the farms  
2 where they do their activity, and one of the difficulties  
3 of petitioner's argument is that they avoid the statutory  
4 term, such.

5 That word requires you to look at the connection  
6 between the activity to be classified and what's going on  
7 on the farm, and the farm --

8 QUESTION: Well now, what's going on on the farm  
9 is growing the chickens for a certain period of time,  
10 isn't it?

11 MR. SEAMON: That's right, and that process --

12 QUESTION: And that process requires getting rid  
13 of them after they're 49 days old, doesn't it? You have  
14 to move them on out.

15 MR. SEAMON: Absolutely.

16 QUESTION: And that's incidental to the  
17 operation they have.

18 MR. SEAMON: And --

19 QUESTION: It may also be incidental to  
20 processing, but it certainly, at a minimum, is incidental  
21 to the farming operation.

22 MR. SEAMON: But in that sense of the term,  
23 incidental, the processing operation itself is also  
24 incidental to the farm. There has to be a market for the  
25 farmers or else, you know, the growing, they're grown for

1 no purpose.

2 QUESTION: Does the statute use the term,  
3 processing?

4 MR. SEAMON: No, the statute does not. The  
5 statute raised -- basically imposes three requirements,  
6 and we think one of them, it is not met here with respect  
7 to the chicken catchers and the forklift operators.

8 First, the work has to be done by a farmer or on  
9 a farm. Second, it has to be done incidentally to or in  
10 connection with primary farming operations, and the third  
11 and, we think, the most important requirement that's not  
12 met here is that it has to be incidental to the operations  
13 that go on on that farm.

14 The operations in this case are defined by the  
15 contract between the independent growers and Holly Farms.

16 QUESTION: Why is that? I mean, you say it is  
17 incidental to the activities that go on on the farm. It  
18 is incidental when an independent contractor comes in and  
19 does it, somebody who runs the business of catching and  
20 cooping chickens. If he sends somebody in, it is  
21 incidental to the farming business.

22 But if, instead of contracting with this  
23 independent contractor the farmer contracts with the buyer  
24 and says, look, of course I'm going to have to get these  
25 things caught and cooped before you can process them. I



1 could hire an independent contractor, but what say I sell  
2 you the chickens for a little bit less, and you coop them  
3 and -- you catch them and coop them when you send your  
4 truck to take them. He says, okay, that's a good deal.

5 Why should that have anything to do with whether  
6 the catching and cooping is incidental to the farming  
7 operation, whether you choose to pay an independent  
8 contractor or deduct it from the price that you're selling  
9 the chickens for? It doesn't seem to me to have anything  
10 to do with whether it's his.

11 MR. SEAMON: The answer to that I believe was  
12 suggested by Justice Breyer. It does make a difference  
13 who you work for as to whether you fall within the  
14 agricultural exemption or not.

15 Congress intended the agricultural exemption to  
16 extend to farmers but not to processors.

17 QUESTION: In neither case are they working for  
18 farmers. In one case they're working for somebody who's  
19 in a business of providing independent contracting  
20 employees.

21 MR. SEAMON: That's right.

22 QUESTION: He's not a farmer.

23 MR. SEAMON: And the independent contractor  
24 example came up as a result of concerns on the part of  
25 some Senators with a situation that fell somewhere between

1 farming and processing, and they were concerned with a  
2 firm that carved out a niche for itself by traveling from  
3 farm to farm performing a service on the farm for the  
4 farmer with regard to his or her commodities, and those  
5 firms were described as doing nothing but threshing wheat,  
6 or some other similar service.

7 QUESTION: Well, they're not described that way  
8 in the statute. I mean, it may be one thing that led to  
9 this particular statutory exemption, but it may -- the  
10 exemption is in broader terms than the examples which  
11 might have led to it. It's the statutory language that  
12 governs and not the thought that might have been behind  
13 it.

14 MR. SEAMON: That's correct, and we -- but we  
15 believe that in terms of determining whether an activity  
16 is incidental to the primary farming operations that are  
17 going on on a farm, it's important to determine whether  
18 it's connected with some broader process.

19 In this case, the chicken-catching operations  
20 are connected with the broader process of slaughtering and  
21 dressing the chickens for market. To that extent, they're  
22 no longer incidental. You can't say that that's true in  
23 the case of an independent contractor whose work is  
24 limited to going from farm to farm and catching chickens.

25 QUESTION: Your assumption, Mr. Seamon, is, and

1 I'm sure you'll agree with this, but I'm not sure it's a  
2 correct assumption, is that you can only be incidental to  
3 one thing. You are either incidental to the farming, or  
4 you are incidental to the processing. You can't be  
5 incidental to both. I'm just --

6 MR. SEAMON: No, we don't agree with that.

7 QUESTION: I'm not sure I agree with that.

8 MR. SEAMON: That's not a necessary premise of  
9 our argument.

10 The statute really asks only one question, and  
11 that is whether the activity is incidental to the primary  
12 farming operation, and that's the only question that has  
13 to be answered.

14 We're saying the chicken catching and the  
15 forklift operations are really part of the processing  
16 operation, and we're relying on a number of --

17 QUESTION: Well, Mr. Seamon, any farmer would  
18 tell you it's incidental to the farm operation to get  
19 those chickens out of there when they've reached the right  
20 age. I mean, that has to be part and parcel of it.  
21 Anybody who's ever worked on a farm knows that. I think  
22 your argument, or the argument of the board is just a real  
23 stretch here.

24 MR. SEAMON: It's only incidental in the same  
25 sense that it's necessary for the farmer to find someone

1 to sell the farmer's -- the chickens to once they're  
2 grown, and that's -- and whatever operations the purchaser  
3 performs on those chickens are part of the process that if  
4 there were no market for the chickens they wouldn't be  
5 grown at all in the first place, so in that sense,  
6 processing is --

7 QUESTION: Yes, but the statute itself refers to  
8 preparation for market, delivery, storage, et cetera. I  
9 mean, clearly the statute contemplated this very kind of  
10 thing with regard to farming.

11 MR. SEAMON: We are not saying -- the board is  
12 not saying that chicken catching operations can never be  
13 incidental to primary farming. It's highly relevant the  
14 way in which the operations are performed and for whose  
15 benefit they're performed.

16 In the case of an independent contractor hired  
17 by a farmer, then the chicken catching is performed for  
18 the benefit of the farmer. But when they're performed by  
19 a set of employees who are dispatched from the processing  
20 plant and whose work is really scheduled to meet its  
21 needs, that work no longer is incidental to --

22 QUESTION: I don't want to belabor the point too  
23 much, but it certainly benefits the farmer to have the  
24 mature chickens moved out so the farmer can get more money  
25 by raising chicks again. It helps the farmer. It's part

1 of his operation, or hers.

2 MR. SEAMON: Yes, but again I would go back to  
3 the term "such" in the statute, because I believe that  
4 word is key here in the sense that it requires you to  
5 focus on the particular farming operations that we're  
6 talking about, and those operations are defined by  
7 contract as being limited to raising the chickens to a  
8 certain age and then making them available for processing.

9 QUESTION: Suppose that Holly contracted out in  
10 the manner in this case only half of its chickens, and the  
11 other half it raises on its own, it has its own farms, and  
12 the chicken catchers spend half their time on Holly's own  
13 farms and half their time doing what they're doing in this  
14 case. What result in this case?

15 MR. SEAMON: The answer would be the same with  
16 respect to both phases of the operation. They -- those  
17 workers would be involved in processing under the  
18 circumstances of this --

19 QUESTION: They would be processing even when  
20 they are on Holly's own farms?

21 MR. SEAMON: Yes, that's right, and again for  
22 the same reasons that exist on this case. They're sent  
23 out of the processing plant. They are employees of the  
24 processor.

25 QUESTION: No, no, my hypothetical is that they

1 spent half their time on the farms where the chickens are  
2 raised from the very beginning to 49 days, and half the  
3 day they go out and work on Holly's farms engaging in this  
4 operation, and the other half the time they spend going  
5 out to these other farms as in this case.

6 MR. SEAMON: We would say that the time spent on  
7 both farms, on both kinds of farms would not be incidental  
8 to the farming operations there, if the facts were  
9 otherwise the same as they are in this case.

10 QUESTION: And so then if 90 percent of their  
11 time was spent on Holly's own farms, and then 10 percent  
12 of their time doing this, the result would be that they  
13 would be farm workers then, or not?

14 MR. SEAMON: That they would not be farm workers  
15 there, and again, it is because of the way in which this  
16 work is organized.

17 I mean, it's no accident that the petitioner's  
18 own industry has organized the work of the chicken  
19 processing to separate it very distinctly from the work of  
20 the independent growers. All of the growing operations --

21 QUESTION: Well then, in my hypothetical, half  
22 of their time is spent where they're doing the growing  
23 themselves.

24 MR. SEAMON: Yes.

25 QUESTION: And the workers aren't engaging in

1 farm work at that time either?

2 MR. SEAMON: No, that's right. The board's  
3 position is that, again, if the facts were otherwise the  
4 same as they are in this case, except for the fact that  
5 Holly Farms owns some of these farms, their work would  
6 still be part of the processing operation.

7 Again, we're simply relying in part on  
8 petitioner's own characterization and the way in which  
9 they organize the work.

10 QUESTION: May I just make sure I understand  
11 what you're saying? Assuming Justice Kennedy's example  
12 that the farms owned by Holly Farms did not have any kind  
13 of contractual situation just as this, it's just that they  
14 happen to pick an appropriate time to go pick up their  
15 chickens, you'd say they were still not agricultural  
16 workers then?

17 MR. SEAMON: That's correct. That's correct,  
18 because their work would still be part of the processing  
19 operation under the way in which the work has been  
20 organized in this fashion.

21 QUESTION: But if it were a totally independent  
22 chicken catcher who didn't -- then what's the result?

23 MR. SEAMON: In that case the work would be  
24 secondary to farming, and again, it is --

25 QUESTION: Which means what you're saying is

1 that it can only be incidental to one thing. You  
2 acknowledge it's incidental to farming. However, it  
3 becomes not incidental to farming when it's connected with  
4 a processing operation. It seems to me the premise of  
5 your argument is you can only be incidental to one thing,  
6 and therefore you must make the choice of whether you're  
7 incidental to farming or incidental to processing, and I  
8 don't see that that follows.

9 MR. SEAMON: I'm sorry if I'm not making it  
10 clear. It is not a premise of the board's position in  
11 this case. Instead, the idea is that chicken catching can  
12 be secondary farming under certain circumstances, for  
13 example, if the work is done by an independent contractor.  
14 also, if the farmer's -- if the farmer --

15 QUESTION: The certain circumstances you're  
16 saying is the circumstance that it is not incidental to  
17 something else, namely incidental to processing.

18 MR. SEAMON: Well, in a colloquial sense it's  
19 certainly true that things can be incidental to both one  
20 operation and another operation, and that's why part of  
21 the inquiry that's important under this Court's own  
22 decisions regarding the agricultural exemption is the way  
23 in which the work is organized.

24 QUESTION: Let's assume the case in which you  
25 consider all the factors and you're on the fence, and you



1 say, in this particular case there are good reasons to say  
2 it's incidental to such farming, and there are good  
3 reasons to say that it's incidental to slaughtering. Do  
4 you have a tie-breaker?

5 MR. SEAMON: I think one of the most important  
6 determinants in that case is who are the employees  
7 employed by?

8 QUESTION: Well, but no, I was assuming that was  
9 one of the good reasons. I mean, that is a reason under  
10 the regs.

11 Why don't you say in the case -- and I'm going  
12 to assume for the sake of argument this is such a case.  
13 You could say that it's incidental to such farming, and  
14 you could say that it's incidental to slaughtering. Maybe  
15 one argument is stronger than the other, but maybe not,  
16 but there are arguments each way.

17 Why don't we simply say, the presumption of the  
18 statute is that you're an employee unless it is  
19 demonstrated that you're not, and therefore the tie-  
20 breaker is the inclusiveness of the general definition of  
21 employee, like the inclusiveness of the general definition  
22 of income.

23 MR. SEAMON: That's right. An appropriate tie-  
24 breaker in that situation may be the canon of construction  
25 that's been specifically applied with reference to the

1 agricultural exemption that exemptions are to be narrowly  
2 construed.

3 QUESTION: Well, that comes from a couple of old  
4 cases. I don't think we're repeated it recently.

5 MR. SEAMON: Nonetheless -- and we don't think  
6 that a tie-breaker needs to be applied in this case. The  
7 problem --

8 QUESTION: Mr. Seamon, are you saying that even  
9 if Holly Farms never has this contracting-out operation,  
10 so they did everything from hatching the chicks to raising  
11 them to bringing them to slaughter, even so, these  
12 employees would be typed by the board nonagricultural  
13 employees?

14 MR. SEAMON: Not necessarily. It would depend  
15 on the particular circumstances of the case.

16 For example, if the employees who did the  
17 catching and loading of the chickens were the same  
18 employees who were actually involved in the raising of the  
19 chickens --

20 QUESTION: No. They are teams, and that's what  
21 they do. They catch chickens, and they bring them to the  
22 slaughterhouse, but they are operating under the aegis of  
23 one integrated operation that does everything and farm's  
24 nothing out.

25 MR. SEAMON: Yes, then the answer to that would

1 be that they would be involved in processing rather than  
2 agriculture.

3 QUESTION: Okay, can I go back for a second --  
4 were you finished?

5 QUESTION: Yes.

6 QUESTION: The -- as I -- I'm not positive I  
7 have this chicken thing sorted out correctly, but let's  
8 start with the farm, and the farm is under contract to  
9 Holly Hill, is that right? Okay, so now we call him  
10 contracting Farmer Brown.

11 Now, if, in fact, Smith, who picks the chickens  
12 up and puts them on the truck and takes them into the  
13 processing plant, I take it if Smith was an employee of  
14 Farmer Brown, he would be covered -- exempt. I mean, he'd  
15 be an agricultural laborer.

16 MR. SEAMON: That's correct.

17 QUESTION: Okay, and I take it that if Smith  
18 were either himself an independent contractor or worked  
19 for an independent contractor like the independent  
20 thresher, he would be an exempt agricultural laborer.

21 MR. SEAMON: That's correct.

22 QUESTION: And if, in fact, he happens to work  
23 for a firm which is in the business of grabbing chickens,  
24 transporting them, and turning them into sort of delicious  
25 packaged chicken, he does not become an agricultural

1 laborer, he's not exempt.

2 MR. SEAMON: That's right, or in that --

3 QUESTION: All right. Now -- now, that is a  
4 little counterintuitive, because you'd think he's going  
5 out there and picking up the chickens out of the thing the  
6 same way each time, and you can't quite turn to the  
7 contract on that, I don't think, because you can write the  
8 contracts, or that same contract with any of the three and  
9 you'd come to different results, and therefore it must  
10 turn on something, and I take it you'd think it turns on  
11 the deference that we owe somebody.

12 And so that's my question. Who do we owe that  
13 deference to, and exactly what? Is there a DOL regulation  
14 that solves this under the FLSA, because I take it that  
15 the board is trying to copy the FLSA.

16 MR. SEAMON: That's right.

17 QUESTION: All right, and so what we should look  
18 to, I guess, is what do the FLSA administrators think  
19 about this, and I have some regulations, and they talk  
20 about transporting plant employees, they talk about  
21 delivery to market, and they seem in talking about the  
22 transporting of plant employees that they're not exempt  
23 unless they're the employees of the farmer, i.e., of  
24 Brown.

25 MR. SEAMON: That's correct.

1 QUESTION: But they aren't too clear on that,  
2 and that's what I'd like you to address yourself to.

3 And also, they talk about marketing, i.e.,  
4 transporting chickens, in this case. They don't talk  
5 about going into the coop and picking them out, or going  
6 to a place where they're running around and picking them  
7 out, so what -- to what extent -- I mean, I'm prepared to  
8 give quite a lot of weight to the experts on this over in  
9 the FA, but what has the FLSA said about this? How clear  
10 have they made it?

11 MR. SEAMON: There are a series of regulations  
12 of the Department of Labor that address this situation.  
13 The basic regulation has specifically addressed the  
14 contract arrangements for the raising of poultry, and that  
15 was first adopted in 1961, recognizing the fact that this  
16 contracting out of the raising function goes back  
17 sometime, and what it says is that the employees of a  
18 processor who perform work on a farm as an incident to in  
19 conjunction with the raising of the poultry on that farm  
20 are employed in secondary agriculture. So it --

21 QUESTION: So we've now got against you that  
22 it's secondary agriculture.

23 MR. SEAMON: Well --

24 QUESTION: So it's against you --

25 MR. SEAMON: No, I'm --

1 QUESTION: -- if they're employed by Farmer  
2 Brown.

3 MR. SEAMON: Respectfully, I disagree.

4 QUESTION: No.

5 MR. SEAMON: What the regulation says is, it  
6 makes it conditional on whether the work is done as an  
7 incident to or in conjunction with the primary farming  
8 operations on that farm, so --

9 QUESTION: Well, the chicken-picking normally  
10 would be, wouldn't it? Okay -- oh, ahead.

11 MR. SEAMON: That basic regulation requires an  
12 inquiry into, is this work incidental to primary farming  
13 operations? The regulation that addresses that point  
14 state that an activity is incidental to primary farming if  
15 it constitutes an established part of agriculture, is  
16 subordinate to the farming operations involved, and does  
17 not amount to an independent business.

18 Now, we think all three of those factors support  
19 the board's conclusion in this case. The chicken-catching  
20 and loading operations isn't an established part of  
21 agriculture because it's not ordinarily done by farmers.

22 On the contrary, the facts of this case  
23 represent the overwhelming practice of the industry to  
24 separate the functions of raising and catching so that the  
25 raising is done by the independent contractors and the

1 catching and loading and transportation is done by the  
2 employees of the processor.

3 QUESTION: I see, and if farming should develop  
4 so that farmers no longer feed their own hogs but there  
5 are hog-feeding companies, then the feeding of hogs would  
6 no longer be farming, is that right?

7 MR. SEAMON: That's quite possible, and this  
8 Court anticipated that very situation in the Farmers  
9 Reservoir Company, when it said, agriculture as an  
10 occupation includes more than the elemental processes of  
11 planting, growing, and harvesting. There are a host of  
12 incidental activities that are also necessary to the  
13 process.

14 Whether a particular type of activity is  
15 agricultural depends in large measure on the way in which  
16 that activity is organized in a particular society, and  
17 the Court goes on to describe the example of the  
18 manufacture of farming tools.

19 QUESTION: Read the last sentence again. I  
20 think that the import of that is that there are core  
21 agricultural activities, among which I would include the  
22 feeding of hogs, and then the last sentence you read goes  
23 to other things that are at the margins, which may or may  
24 not be.

25 MR. SEAMON: That's right, and --

1 QUESTION: Isn't that right?

2 MR. SEAMON: Yes, that's right.

3 QUESTION: So the question is whether catching a  
4 chicken and putting him in a coop so he can be taken to  
5 market is the equivalent of feeding hogs or not.

6 MR. SEAMON: And I think it's clearly not,  
7 because if a firm were engaged simply in the work of going  
8 from farm to farm catching chickens, it wouldn't be  
9 ordinary to call the person who owns that business a  
10 farmer.

11 QUESTION: All right, so if in fact the -- I  
12 mean, you have to draw the line somewhere, and I guess  
13 people would think that transporting the chicken, coming  
14 and just taking the chicken and bringing it to the  
15 processing factory, that's fair enough to call not  
16 agriculture, but you've gone a little bit in the direction  
17 of feeding the hogs, because he's actually picking the  
18 chicken up, and that's not quite feeding the hog, but it's  
19 a step in that direction.

20 MR. SEAMON: Well, I --

21 QUESTION: That's one problem.

22 But now go back to the regs. That is, are there  
23 other regs that help you, or have we listed them all?

24 MR. SEAMON: Well, let me say a couple of more  
25 words about the regulation that specifically addresses the



1 incidental-to requirement, because that is really the  
2 requirement on which we contend that petitioner's argument  
3 founders.

4 The chicken catching is not an established part  
5 of agriculture because of the way in which it is  
6 organized. It is carried out by and large by employees of  
7 processors. Also, it is not subordinate to primary  
8 farming because it's not carried out under the direction  
9 of the independent growers. Their contractual obligations  
10 end at the point that the chickens reach maturity and are  
11 made available for processing.

12 QUESTION: Could you just -- what I was trying  
13 to do is, I'm just trying to list on my piece of paper all  
14 the regs that I want to be certain that I read, so I want  
15 to be sure that I have them all on that list, so just be  
16 sure you mentioned them all.

17 QUESTION: Don't you have a reg on the ownership  
18 of the chicken -- I thought I read it in the brief  
19 somewhere -- that would be relevant to look to, to the  
20 person who holds title to the chicken?

21 MR. SEAMON: Yes, that's correct. One of the  
22 board's --

23 QUESTION: Is that the same reg that Justice  
24 Breyer just referred to, or is that somewhere else?

25 MR. SEAMON: It is not the same regulation as

1 the one in which I'm talking about. It is --

2 QUESTION: But it's in the brief. I thought it  
3 was in your brief.

4 MR. SEAMON: It is on page 27 of our gray brief  
5 on the merits.

6 QUESTION: Okay.

7 MR. SEAMON: And it is quoted towards the bottom  
8 of the page of our gray brief on the merits, page 27.  
9 It's 29 C.F.R. 780.143, and it's block-quoted.

10 The fact that a practice performed on a farm is  
11 not performed by or for a farmer is a strong indication  
12 that it is not performed in connection with the farming  
13 operations there conducted, and in order to decide whether  
14 the work was done for a farmer -- as Justice O'Connor was  
15 suggesting, in a sense, of course, the removal of chickens  
16 is done for the farmer, but in certain cases it's more  
17 accurate to say that it's done for the benefit of the  
18 processor. At least that's true when the crew works out  
19 of the processing plant, the testimony of petitioner's own  
20 witness calls the process --

21 QUESTION: But again, it's probably done for  
22 both. The farmer needs to get rid of the mature pullets  
23 in order to continue his business of growing more, and the  
24 processor needs to get them in order to process them, and  
25 they both benefit, and it's incidental to both.

1 MR. SEAMON: Whether the -- we would say that  
2 you have to look at some additional factors in that,  
3 however, and one of them would include the fact that there  
4 is a good reason why these chicken catching operations are  
5 employees of the processor rather than employees of the  
6 farmer. The chicken processing operation --

7 QUESTION: But under the statute, if it's on the  
8 farm, it doesn't matter who the employer is if it's on the  
9 farm and incidental to or in conjunction with such farming  
10 operation. That's all that's important. It's not who is  
11 the employer.

12 MR. SEAMON: But the incidental-to requirement  
13 requires you to look at the relationship between the  
14 activity to be classified and the primary farming  
15 operation that goes on on that farm, and in looking at the  
16 relationship between those two activities, I would submit  
17 you also have to look at the relationship between the  
18 parties.

19 Are the same employees who are actually doing  
20 the raising of the chickens also doing the catching of the  
21 chickens? In that case, there's a very close correlation  
22 between the two types of work, and it may very well be  
23 relevant, because it is the farmer's employees who are  
24 doing the catching, to say that is incidental to the  
25 farming.

1 QUESTION: Well, it's crystal clear that the  
2 language of the statute was included to bring in, for  
3 instance, the independent thresher and so forth. It was  
4 never contemplated that it had to be an employee of the  
5 farmer.

6 MR. SEAMON: And that independent contractor is  
7 described in the legislative history as limited to doing  
8 nothing but going from farm to farm threshing wheat for  
9 the farmer. In that situation, the firm is working under  
10 the direction of the farmer. Since by hypothesis it  
11 weren't involved in processing, you couldn't say that it's  
12 activities were part of --

13 QUESTION: But don't you suppose the farmer here  
14 has to tell the chicken catchers the chickens that are  
15 49 years old are in that particular area --

16 QUESTION: Days old.

17 QUESTION: -- or 49 days old --

18 (Laughter.)

19 QUESTION: -- are in that particular area, those  
20 are the ones you have to go catch, and you go in there and  
21 get those?

22 MR. SEAMON: The record doesn't make that clear.  
23 In fact, the record doesn't indicate any interaction  
24 whatsoever between the independent growers and the  
25 chicken-catching crews, and that is one of the factors

1 that we believe is relevant.

2 QUESTION: But Mr. Seamon, we assume they're not  
3 going to show up at the farm and have the farmer just  
4 stand mute. The farmer is going to say, yes, go into that  
5 chicken house, get those chickens.

6 QUESTION: Watch out for the red one.

7 QUESTION: Yes.

8 (Laughter.)

9 QUESTION: Why -- it seems to me that this  
10 brings us back to a question that Justice Scalia has posed  
11 a couple of times.

12 Going to the reg on page 27, here are good  
13 reasons to say, in the abstract, or just looking to common  
14 language usage, that the chicken catcher in this case is  
15 doing it for the farmer, and there are good reasons to say  
16 that he's doing it for the processor, but what we've got  
17 is a regulation here that says, if you want to know how to  
18 make the choice between those two possibilities, one of  
19 the things you look at is who holds title to the chicken.

20 MR. SEAMON: That's right.

21 QUESTION: And why don't you -- I mean, why --  
22 don't you have a fair argument saying, look, we've got to  
23 have tie-breakers somewhere, somebody's got to figure out  
24 what they are, and this Department of Labor regulation has  
25 said, let's look to title, and therefore defer to the

1 regulation, admitting that as a matter of language it  
2 could go either way?

3 MR. SEAMON: And certainly title is relevant,  
4 and the Court could decide to make title a tie-breaker,  
5 and the board --

6 QUESTION: And we ought to defer to it.

7 QUESTION: And you always assume that the tie  
8 has to be broken. It seems to me that your  
9 acknowledgement that independent contractor's employees  
10 when they engage in this business are engaging in  
11 agriculture. It seems to me that acknowledgement admits  
12 that you don't have to be incidental to one or the other,  
13 you can be incidental to both.

14 Surely those people, when they do that work, are  
15 doing it incidentally to the independent contractor's  
16 business of catching and cooping chickens. There's no  
17 doubt that it's incidental to his business, and there's  
18 also no doubt that it is incidental to the farmer's  
19 business. You acknowledge that. The Government  
20 acknowledges it.

21 So, you know, just taking that one example, it's  
22 clear that you can be incidental to both, so all of your  
23 pains to demonstrate that it is incidental to the  
24 processing business lead you nowhere. One can say yes, I  
25 admit it's incidental to processing, but it's also

1 incidental to farming.

2 QUESTION: Is the purpose of the statute  
3 relevant in respect to that, if it's all right -- I  
4 mean --

5 QUESTION: Yes.

6 QUESTION: That the -- nobody -- is there some  
7 authority that -- I mean, the purpose of this statute is  
8 to let employees organize, and you don't want to let them  
9 organize where they just work for farmers because the  
10 farmers didn't have the -- they were poorer. They were  
11 poorer, and that's why they didn't have to pay the labor  
12 act wages either, or the FLSA wages. They were poorer,  
13 and when somebody works for a big company, they're not  
14 under any assumption they're poorer.

15 I mean, that would be a -- does that come into  
16 play anywhere in this -- I mean, is there some authority  
17 that says we can't take into account the purpose of the  
18 statute?

19 MR. SEAMON: May I answer?

20 QUESTION: Yes.

21 MR. SEAMON: The purpose of the statute is  
22 highly relevant. This is a management-labor relations  
23 statute that Congress intended to limit to the employees  
24 of farmers and not processors.

25 QUESTION: Thank you, Mr. Seamon.

1 Mr. Roberts, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF CHARLES P. ROBERTS, III  
3 ON BEHALF OF THE PETITIONERS

4 MR. ROBERTS: Just a couple of quick responses  
5 on some of these regs which have been referred to. He's  
6 ignored several that I think have to be interpreted in  
7 conjunction with the ones that he cited.

8 In particular, section 780.150(k) -- excuse me,  
9 151(k), the Secretary of Labor defines the poultry,  
10 hauling, grading, cooping and loading poultry are  
11 operations that are incidental or that constitute  
12 preparation for market.

13 Also, 780.126, which is cited by this Court in  
14 Bayside, specifically says that the activities of a  
15 processor when performed on the farm, it envisions this  
16 very situation we have here, where the processor has title  
17 and is dealing with an independent grower, because this is  
18 a very common arrangement. It says that the processor's  
19 employees can be engaged in secondary agriculture to the  
20 extent that they are working on a farm.

21 So if that statute, if that regulation has any  
22 meaning, then the board's position that it's incidental, I  
23 mean, the processing argument could be made there, too.  
24 it's always incidental to processing in some way if it's a  
25 processor, yet this regulation clearly envisions that a



1 processor's employees who work on a farm can be engaged in  
2 secondary agriculture. Plus the case --

3 QUESTION: What was the number of that again?

4 MR. ROBERTS: Excuse me? It's 780.126, plus the  
5 case that's cited in there by the Secretary of Labor is  
6 Johnston v. Cotton Producers, which is a Fifth Circuit  
7 case, but it's cited with approval, and in that case, it  
8 dealt with a retail store, which -- the reg speaks of  
9 retail stores and processors in the same language.

10 At one time retail stores would hold title to  
11 the chickens and then basically perform services for the  
12 farmer, and they say in that case that, specifically that  
13 chicken, a guy who caught chickens and loaded them on the  
14 trucks was engaged in secondary agriculture to the extent  
15 that his activities occurred on the farm, so the board's  
16 position boils down to the fact that it simply -- that  
17 it's going to Holly's processing operation, which is  
18 inconsistent with this regulation, it's inconsistent with  
19 Johnston, it's inconsistent with Maneja, in which the  
20 destination of the sugar cane was the processing plant,  
21 but that didn't deter the Court from saying that the  
22 activities were incidental to farming.

23 So the board has just gone way beyond  
24 interpret -- you know, reasonable interpretation of a  
25 statute in saying that it can only be incidental to

1 processing in light of all these prior decisions and  
2 interpretations.

3 QUESTION: Mr. Roberts, why do they debeak  
4 chickens? I didn't know they did that. Why do they do  
5 that?

6 MR. ROBERTS: I think it's to actually -- they  
7 don't take the whole beaks off. They actually trim them  
8 back, and I think the purpose is -- and I don't know this  
9 for certain, but I think the purpose is to prevent them  
10 from harming themselves or each other in some way, that --  
11 you know, with the beaks pecking each other, or attacking  
12 each other, or something of that nature.

13 I don't have anything further.

14 CHIEF JUSTICE REHNQUIST: On that note, the case  
15 is submitted.

16 (Laughter.)

17 (Whereupon, at 12:15 p.m., the case in the  
18 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

HOLLY FARMS CORPORATION, ET AL., Petitioners v. NATIONAL LABOR RELATIONS BOARD, ET AL.

CASE NO:      95-210

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)