No. 07-408

In the Supreme Court of the United States

CATHLEEN PARRA, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105(a)(1)(C), 110 Stat. 852, amended the definition of "disability" under Title II of the Social Security Act to bar benefits for any individual whose disability is based on drug addiction or alcoholism. 42 U.S.C. 423(d)(2)(C). Thus, if the Commissioner of Social Security finds that a claimant is disabled, and there is medical evidence of drug addiction or alcoholism, the Commissioner must determine the materiality of the claimant's drug addiction or alcoholism to the finding of disability. The question presented is:

Whether the court of appeals correctly held that the claimant bears the ultimate burden of proof to establish that drug addiction or alcoholism is not a contributing factor material to any finding of disability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 481 F.3d 742. The opinion and order of the district court (Pet. App. 27-48) and the decision of the Commissioner of Social Security (Pet. App. 16-25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2007. A petition for rehearing was denied on July 10, 2007. The petition for a writ of certiorari was filed on September 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Social Security Act (Act), 42 U.S.C. 301 *et seq.*, provides benefits to disabled individuals under a program administered by the Social Security Administration (SSA). Disability insurance benefits are paid under Title II of the Act, 42 U.S.C. 401 *et seq.*, to persons who have contributed to the program and suffer from a physical or mental disability. To receive benefits, a claimant must establish that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or * * * can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). Moreover, the claimant must show he became disabled during a period when he had made sufficiently recent contributions to the program to be eligible for disability insurance (*i.e.*, before what is often called the "date last insured"). See 42 U.S.C. 416(i).

Regulations issued by the Commissioner of Social Security (Commissioner) set forth a five-step sequential evaluation process for determining whether an individual is disabled. See 20 C.F.R. 404.1520. The Commissioner first determines whether the claimant is engaged in "substantial gainful activity." 20 C.F.R. 404.1520(a)(4)(i) and (b). If so, the claimant is not disabled; but if not, the Commissioner proceeds to step two. At step two, the Commissioner determines whether the claimant has a medically severe impairment or combination of impairments that significantly limits his physical or mental ability to do basic work activities. 20 C.F.R. 404.1520(a)(4)(ii) and (c). If not, the claimant is not disabled. If the claimant does have such a medical impairment (or combination of impairments), the Commis-

sioner proceeds to a determination, at step three, whether it satisfies a duration requirement and meets or equals the requirements of an impairment in the Listing of Impairments, found at 20 C.F.R. Pt. 404, Subpt. P, App. 1. 20 C.F.R. 404.1520(a)(4)(iii) and (d). If the impairment satisfies those criteria, the claimant is considered disabled. If not, step four assesses whether the claimant's "residual functional capacity" (*i.e.*, what basic work activities he can still do despite his limitations), 20 C.F.R. 404.1520(e), 404.1545, permits him to perform his "past relevant work," 20 C.F.R. 404.1520(a)(4)(iv) and (f). If so, he is not disabled. Finally, if the claimant is not capable of doing his past work, a decision is made under the fifth step whether, in light of his residual functional capacity, age, education, and work experience, he can adjust to performing other work existing in significant numbers in the national economy. 20 C.F.R. 404.1520(a)(4)(v) and (g). If so, the claimant is not disabled. If not, he is disabled.

The claimant bears the burden of proof at steps one through four, which focus on the claimant's personal medical condition and capacity; but the Commissioner bears the burden at step five of "providing evidence that demonstrates that other work exists in significant numbers in the national economy that [the claimant] can do." 20 C.F.R. 404.1560(c)(2); see also *Bowen* v. *Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Bustamante* v. *Massanari*, 262 F.3d 949, 953-954 (9th Cir. 2001).

A claimant who is "disabled" under the five-step inquiry, however, does not necessarily qualify for disability benefits. In the Contract with America Advancement Act of 1996 (CAAA), Pub. L. No. 104-121, § 105(a)(1)(C), 110 Stat. 852, Congress amended the definition of disability under the Act to prohibit entitlement to disability

benefits for any individual whose disability is based on drug addiction or alcoholism (DAA). Title II now states: "An individual shall not be considered to be disabled for purposes of this [title] if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. 423(d)(2)(C).

The Commissioner's disability regulations advise claimants that "[i]f we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability." 20 C.F.R. 404.1535(a). In making that determination, the "key factor" the Commissioner "will examine * * * is *whether we would still find you disabled if you stopped using drugs or alcohol*." 20 C.F.R. 404.1535(b)(1) (emphasis added). "If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability." 20 C.F.R. 404.1535(b)(2)(i).

The materiality analysis requires the Commissioner to separate out the effects of the substance use and its impact on any other impairment, physical or mental. See *Bustamante*, 262 F.3d at 955. See also Office of Disability, SSA, *Questions and Answers Concerning DAA from the 07/02/96 Teleconference—Medical Adjudicators, EM-96200* (Aug. 30, 1996) (EM-96200); Pet. App. 56-77.[1] An administrative law judge (ALJ) reviews the

[1] This document—which petitioner and the court of appeals call the "Emergency Teletype"—was issued on August 30, 1996 by the SSA's Office of Disability to assist Social Security offices, including Hearing Offices, with the implementation of the new DAA restrictions. It has not been published in the *Federal Register* or the Code of Federal

medical evidence and, if necessary, consults with a medical expert in determining what limitations, if any, would remain if the claimant stopped using drugs or alcohol. 20 C.F.R. 404.1527(f)(2)(iii). The ALJ then assesses the significance of the remaining limitations by following the five-step evaluation process a second time. See *ibid.*

2. On April 15, 1994, Joseph Parra (the claimant) applied for disability insurance benefits.[2] Pet. App. 28. He alleged disability since November 1, 1992, due to alcoholism and bursitis. *Ibid.* His date last insured was December 31, 1995. *Id.* at 23. His application was denied initially and upon reconsideration. *Id.* at 29. Following a hearing, an ALJ issued a decision in February 1998 finding that he was not entitled to benefits because his alcoholism was a material contributing factor to any disability. *Ibid.* After the Appeals Council declined to review the ALJ's decision, the claimant filed a complaint in federal district court, seeking judicial review of the Commissioner's decision. *Ibid.* On July 5, 2000, the district court remanded the case to the Commissioner for consideration of a new medical examination that had been performed on the claimant after the ALJ's decision. *Ibid.*

The claimant died on September 8, 2000, from cardiovascular collapse, hepatorenal syndrome, hepatocellular carcinoma, and liver cirrhosis. Pet. App. 3. His daugh-

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Regulations, but it reflects the programmatic policy of the Commissioner and interprets agency regulations.

[2] The claimant also sought Supplemental Security Income benefits under Title XVI of the Act, which includes similar statutory provisions about proving disability and DAA, see 42 U.S.C. 1382c(a)(3)(J), but that claim was dismissed when the claimant died without a surviving spouse. Pet. App. 30 n.4. See 20 C.F.R. 416.542(b). As a result, petitioner's current claims arise only under Title II.

ter (petitioner in this Court) was substituted in the proceeding, and she testified at the supplemental hearing held before an ALJ in October 2000. *Ibid.* The ALJ thereafter issued a decision finding that the claimant's alcoholism had been a material factor contributing to the onset of any disability before July 1, 1999. Because the claimant was last insured on December 31, 1995, he was not entitled to benefits. *Id.* at 30. Petitioner's appeal to the Appeals Council was rejected, and she again sought review in district court. *Ibid.* The parties later stipulated to a second remand. *Ibid.*

A third hearing was held before a different ALJ in January 2003. Pet. App. 3, 16. On April 4, 2003, the ALJ issued a decision finding that claimant had not been disabled due to bursitis because the medical evidence did not show a "severe physical impairment" before December 31, 1995 (the date he was last insured for benefits). *Id.* at 17-18. The ALJ further found that claimant was unable to work as of 1994, but that alcoholism was material to this finding. *Id.* at 18-21. Based on the medical report of an examining psychiatrist (Dr. Nancy McCarthy), the testimony of a medical expert (Dr. Jerome Marmorstein), and the statements of petitioner about her father's alcohol consumption, the ALJ found that claimant's inability to work in 1994 was "primarily due to heavy alcohol consumption and intoxication" and that he also had "moderately severe but curable cirrhosis of the liver" at that time. *Id.* at 18-19, 20-21.

Similarly, in his formal findings of fact, the ALJ concluded that, before July 1999, "the medical evidence establishes that alcoholism was a material contributing factor to the determination of disability." Pet. App. 24-25. The ALJ found that it was not until 1999 that the claimant showed disabling limitations that would exist

even absent his alcohol abuse. *Id.* at 23. Because that date was after his date last insured, the claimant did not qualify for disability benefits. *Id.* at 25.

The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied review on March 22, 2004. Pet. App. 31.

3. The district court affirmed the Commissioner's ruling.[3] Pet. App. 27-48. The court rejected petitioner's argument that the Commissioner had the burden of proof on the DAA materiality issue, noting that a number of courts had "concluded that the plaintiff bears the burden of proving that alcoholism or drug addiction is not a contributing factor material to the finding of disability." *Id.* at 38-39 (citing *Brueggemann* v. *Barnhart*, 348 F.3d 689, 694 (8th Cir. 2003); *Doughty* v. *Apfel*, 245 F.3d 1274, 1281 (11th Cir. 2001); *White* v. *Commissioner of Soc. Sec.*, 302 F. Supp. 2d 170, 173 (W.D.N.Y. 2004); *Frederick* v. *Barnhart*, 317 F. Supp. 2d 286, 290 (W.D.N.Y. 2004)). Next, "[a]fter careful consideration of the record as a whole," the court held that "substantial evidence" supported the decision to deny disability benefits. Pet. App. 48.

4. The court of appeals reviewed *de novo* the district court's affirmance of the Commissioner's decision, and also affirmed. Pet. App. 1-15. The court rejected petitioner's argument that the Commissioner erred in placing the burden of proof upon the claimant to establish that his alcoholism was not a contributing factor material to his disability, by showing he would have remained disabled even had he stopped drinking in 1995. *Id.* at 9. In so holding, the court observed that "each circuit to

[3] The parties consented to have the case decided by a magistrate judge. Pet. App. 27. See 28 U.S.C. 636(c).

have considered the issue has placed the burden squarely upon the claimant." *Ibid.* (citing *Doughty*, 245 F.3d at 1276; *Mittlestedt* v. *Apfel*, 204 F.3d 847, 852 (8th Cir. 2000); *Brown* v. *Apfel*, 192 F.3d 492, 498 (5th Cir. 1999)). The court explained that this approach is consistent with the general rule that the burden remains with the claimant at all times to establish his entitlement to disability insurance benefits, *ibid.* (citing *Tidwell* v. *Apfel*, 161 F.3d 599, 601 (9th Cir. 1998)), and with the fact that the claimaint is the party "best suited" to demonstrate whether he would still be disabled in the absence of alcohol addiction, *ibid.* (quoting *Brown*, 192 F.3d at 498).

The court of appeals held that petitioner failed to satisfy that burden because "[t]he record offers no evidence supporting the notion that the disabling effects of [the claimant's] cirrhosis would have remained had he stopped drinking before December 31, 1995." Pet. App. 10. The court noted that Dr. Marmorstein, the medical expert, testified that cirrhosis of the liver, which is caused by alcohol abuse, "is generally reversible and that the medical records support a finding that [the claimant's] cirrhosis was irreversible only after July 1, 1999." *Ibid.*

The court also rejected petitioner's reliance on certain internal agency guidance—EM-96200 and a then-existing provision of the Hearings, Appeals and Litigation Law (HALLEX) manual—for the proposition that a finding of materiality is precluded "unless the medical evidence affirmatively shows that a disability will resolve with abstinence." Pet. App. 12. The court concluded that such internal agency documents "do not create judicially enforceable duties," and it would "not review allegations of noncompliance with their provisions." *Ibid.*

ARGUMENT

The Ninth Circuit's holding—that in disability determinations pursuant to 42 U.S.C. 423(d)(2)(C), the burden of proof is on the claimant with respect to whether his drug addiction or alcoholism is a contributing factor material to his disability—is correct and is not in conflict with any decision of another court of appeals or this Court. Moreover, the court of appeals correctly found that substantial evidence supported the Commissioner's determination that the claimant's impairments would have resolved if he had abstained from drinking before July 1999. Further review is therefore unwarranted.

1. Although petitioner claims that this case "create[d] an unnecessary conflict among the circuits," Pet. 19, there is no disagreement about the proposition that a disability claimant bears the burden of showing a medically determinable physical or mental impairment. See *Bowen* v. *Yuckert*, 482 U.S. 137, 146 (1987); *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976) (disability claimant "bears a continuing burden of showing, by means of 'medically acceptable clinical and laboratory diagnostic techniques,' that he has a physical or mental impairment of such severity that" he is unable to engage in substantial gainful activity) (quoting 42 U.S.C. 423(d)(3)); 42 U.S.C. 423(d)(5)(A) ("An individual shall not be considered to be under a disability unless *he furnishes* such medical and other evidence of the existence thereof as the Commissioner of Social Security may require.") (emphasis added). As this Court has explained, "[i]t is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so." *Yuckert*, 482 U.S. at 147 n.5.

The 1996 amendment of the statutory definition of "disability"—which bars benefits for a claimant whose

drug addiction or alcoholism is material to any finding of disability—did not alter that settled allocation of burdens of proof. As the court of appeals remarked in this case, "each circuit to have considered the issue [of who bears the burden of proof under 42 U.S.C. 423(d)(2)(C)] has placed the burden squarely upon the claimant." Pet. App. 9. See *Brown* v. *Apfel*, 192 F.3d 492, 498 (5th Cir. 1999) (holding that claimant, as "the party best suited to demonstrate whether she would still be disabled in the absence of drug or alcohol addiction * * * bears the burden of proving that drug or alcohol addiction is not a contributing factor material to her disability"); *Mittlestedt* v. *Apfel*, 204 F.3d 847, 852 (8th Cir. 2000) (adopting Fifth Circuit's holding in *Brown* that "it is the claimant who bears the burden of proving that drug or alcohol addiction is not a contributing factor material to the disability"); *Doughty* v. *Apfel*, 245 F.3d 1274, 1280 (11th Cir. 2001) (agreeing with *Brown*; holding that "the claimant bears the burden of proving that his alcoholism or drug addiction is not a contributing factor material to his disability determination").

2. Notwithstanding the general burden of proof imposed by the statute, petitioner argues that a claimant may avoid a determination that DAA is a contributing factor material to the finding of disability simply by establishing that the evidence is in "equipoise" with regard to whether a disability would "continue in the face of abstinence" from drugs or alcohol. Pet. 14, 15 n.4. See also Pet. 5-6 ("In the event of equipoise based upon expert medical opinion, the 'tie' goes to the claimant."); Pet. 18 (twice referring to evidence "in equipoise").

Even assuming that legal proposition is correct, it has no bearing on this case because the evidence was not in equipoise. The ALJ expressly found that "the medical

evidence establishes that alcoholism was a material contributing factor to the determination of disability." Pet. App. 24-25; see also *id.* at 19 ("I conclude the claimant's primary impairment prior to July 1, 1999 was alcoholism. It was a material contributing factor to any finding of disability prior to the date last insured."). The court of appeals likewise did not conclude that the evidence was in equipoise. To the contrary, it determined that there was "substantial evidence" to show that alcohol *was* a material contributing factor, and also that there was "no evidence" showing that the disability would have persisted in 1995 if the claimant's drinking had not. Pet. App. 10, 13. The court of appeals explained: "Dr. Marmorstein testified that cirrhosis, caused by alcohol abuse, is generally reversible and the medical records support a finding that [the claimant's] cirrhosis was irreversible only after July 1, 1999." *Id.* at 10. The court also concluded that the 1994 psychological report by Dr. McCarthy constituted "substantial evidence to support a finding that [the claimant's] disabling mental limitations * * * would have resolved with abstinence." *Id.* at 11 n.3 (emphasis omitted).

Petitioner disputes the court of appeals' determination about the balance of the evidence, arguing that "[n]o evidence in this case provides a basis for the inference that [the claimant's] moderately severe cirrhosis would have resolved sufficiently to permit substantial gainful activity within any measure of a reasonable time."[4] Pet.

[4] Petitioner relies (Pet. 12) in particular on portions of Dr. Marmorstein's testimony to support her contention that no evidence proves that the claimant's cirrhosis would not have been disabling if he had stopped drinking. But to the extent that Dr. Marmorstein's testimony was ambiguous, the ALJ resolved the conflicts in his testimony by concluding that the claimant's two alcoholism-induced impairments could have

12. But this Court should decline that implicit invitation to engage in fact-bound error correction about what the evidence in this case demonstrated.

3. Petitioner claims that the court of appeals erred by failing to "give respect to the agency interpretation of the statute," and that "[n]o other circuit has declined to afford the medically informed policy interpretation of the statute and regulations respect." Pet. 19-20 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

a. The court of appeals "[a]ssum[ed] without deciding" that EM-96200 and a portion of the SSA's HALLEX manual that has since been withdrawn[5] would "apply to th[e] situation" in this case, but adhered to circuit precedent holding that it would "not review allegations of noncompliance" with such internal agency documents because they "do not create judicially enforceable duties." Pet. App. 12 (citing *Lowry* v. *Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003); *Moore* v. *Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000)). The court of appeals further stated:

> At most, these sources may represent the agency's unpromulgated interpretation of the statute's phrase "contributing factor material to the determination of

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been arrested, such that he would no longer have been disabled, had he stopped drinking before 1999, and the court of appeals concluded that the ALJ's decision was "supported by substantial evidence in the record *as a whole*." Pet. App. 11 n.3 (quoting *Tackett* v. *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999)).

[5] When the ALJ's decision was issued, a portion of the HALLEX manual instructed SSA adjudicators to "[m]ake a finding that DAA is material only when the evidence establishes that the individual would not be disabled if he/she stopped using drugs or alcohol." C.A. Pet. on Reh'g App. G-7.

> disability." Such an interpretation is "'entitled to respect'" but only to the extent that it has the "'power to persuade.'" *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140). In this case, such an interpretation is unpersuasive because it contradicts the purpose of the statute.

Pet. App. 12.

The Commissioner disagrees with the court of appeals' statements that the agency's manner of implementing Section 423(d)(2)(C) and the DAA regulations in the narrow circumstance addressed in EM-96200 (see Pet. App. 11-12 n.5) is "unpersuasive" or contrary to the statute.[6] As noted above, however, whatever the import of those statements, in this case they do not affect the

[6] Congress's purpose in enacting the CAAA was to preclude individuals "whose sole severe disabling condition is drug addiction or alcoholism" from receiving cash disability benefits, based on its perception that "many * * * use their disability checks to purchase drugs and alcohol, thereby maintaining their addictions." H.R. Rep. No. 379, 104th Cong., 1st Sess. 17 (1995). But Congress also intended to "ensure that beneficiaries with other severe disabilities who are also addicts or alcoholics are paid benefits through a representative payee and referred for treatment." *Ibid.* The Commissioner recognized that, in some cases, the DAA materiality determination would be complicated by evidence that a claimant suffered from multiple physical impairments, or both mental and physical impairments, and that it would be difficult to make a determination whether the claimant would still be considered disabled if he abstained from drug or alcohol use. In those instances, the Commissioner reasoned that benefits should be paid. Pet. App. 71-72. The internal agency documents at issue thus reflect the agency's reasonable implementation of the Commissioner's DAA regulations in the particular circumstances they identify, and are consistent with congressional intent to pay benefits to individuals "with other severe disabilities who are also addicts or alcoholics." H.R. Rep. No. 379, *supra*, at 17.

correctness of the ALJ's decision or the court of appeals' affirmance of it, and thus do not present any basis for review here. The court of appeals assumed without deciding that the internal guidance applied here, Pet. App. 12, but the record as a whole was *not* inconclusive: The ALJ found that the record establishes that alcoholism was a contributing factor material to the determination of the claimant's disability, and the court of appeals did not disturb that finding. This case therefore presents no question concerning what an ALJ should do when he finds the evidence *is* in equipoise.

b. Petitioner argues that the Tenth and Eighth Circuits have taken a different approach with respect to the applicability of EM-96200 and HALLEX. See *Salazar* v. *Barnhart*, 468 F.3d 615, 623-625 (10th Cir. 2006); *Brueggemann* v. *Barnhart*, 348 F.3d 689, 693 (8th Cir. 2003). Those cases are, however, distinguishable. In *Salazar*, the Tenth Circuit's reversal of a denial of SSI benefits rested on the court's finding that there was not substantial evidence to support the Commissioner's conclusion that the claimant would not be disabled in the absence of her DAA. See 468 F.3d at 624 (explaining that "the [ALJ's] failure to specifically mention the teletype is not fatal. What is fatal, however, is that there is not substantial evidence to support the ALJ's conclusion that Ms. Salazar would not be disabled in the absence of her DAA."). The court discussed "critical evidence" in the record showing that, even when the claimant had been sober, "her mental problems were so severe that she needed to be hospitalized," *ibid.*, and that her suicidal behavior "stem[med] from her major depression, not her DAA," *id.* at 625.

In *Brueggemann*, the Eighth Circuit acknowledged that "[t]he burden of proving that alcoholism was not a

contributing factor material to the disability determination falls on [the claimant]," but stated that "the ALJ retains the responsibility of developing a full and fair record." 348 F.3d at 693. It concluded that, because the sequential evaluation process concerning the materiality of the claimant's DAA had proved "indeterminate," the ALJ erred in failing to follow the Commissioner's DAA regulations and EM-96200. *Id.* at 695. The Eighth Circuit stated that "[i]n colloquial terms, on the issue of the materiality of alcoholism, a tie goes to [the claimant]." *Id.* at 693. Moreover, it went on to discuss evidence that the claimant's disability was independent of any alcohol abuse (including evidence that he had been hospitalized twice after being sober for several months). *Id.* at 695.

In this case—in contrast to *Salazar* and *Brueggemann*—the DAA materiality evidence was not found to be inconclusive. Rather, substantial evidence supported the Commissioner's determination that the claimant would not have been disabled in the absence of his alcoholism. Thus, petitioner has not shown that the Commissioner's result in this case violated SSA policy.

There is thus no issue that warrants review by this Court.[7]

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[7] *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339 (2007), relied upon by petitioner (Pet. 8, 11), does not suggest a different result. In *Coke*, the Court agreed with the Department of Labor's position as *amicus curiae* that a DOL advisory memorandum set forth the proper interpretation of two conflicting regulations that had been published through notice-and-comment rulemaking. As discussed in the text, because the record in this case was not found to be inconclusive, the internal guidance was not necessary to resolve any ambiguity about how the SSA's regulations apply to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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