No. 15-A-__

IN THE SUPREME COURT OF THE UNITED STATES

HOME CARE ASSOCIATION OF AMERICA, INTERNATIONAL FRANCHISE ASSOCIATION, AND NATIONAL ASSOCIATION FOR HOME CARE AND HOSPICE,

Applicants,

v.

DAVID WEIL, ADMINISTRATOR, WAGE AND HOUR DIVISION OF THE U.S. DEPARTMENT OF LABOR, THOMAS PEREZ, SECRETARY OF LABOR, AND THE U.S. DEPARTMENT OF LABOR,

Respondents.

APPENDIX TO EMERGENCY APPLICATION TO STAY MANDATE PENDING DISPOSITION OF CERTIORARI PETITION

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 7, 2015 Decided August 21, 2015

No. 15-5018

HOME CARE ASSOCIATION OF AMERICA, ET AL.,
APPELLEES

v.

DAVID WEIL, SUED IN HIS OFFICIAL CAPACITY,
ADMINISTRATOR, WAGE & HOUR DIVISION, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00967)

Alisa B. Klein, Attorney, U.S. Department of Justice, argued the cause for appellants. With her on the briefs were *Vincent H. Cohen, Jr.*, Acting U.S. Attorney, *Beth S. Brinkmann*, Deputy Assistant Attorney General, and *Michael S. Raab*, Attorney.

Eric T. Schneidermann, Attorney General, Office of the Attorney General for the State of New York, *Barbara Underwood*, Solicitor General, *Seth Kupferberg*, Assistant Attorney General, were on the brief for *amici curiae* States of New York, et al. in support of appellants.

Kate Andrias was on the brief for *amici curiae* Paraprofessional Healthcare Institute and 26 Consumer and Policy Organizations in support of appellants.

Arthur B. Spitzer was on the brief for *amici curiae* Women's Rights, Civil Rights, and Human Rights organizations and scholars in support of appellants.

Judith A. Scott, *Nicole G. Berner*, *Renee M. Gerni*, *Craig Becker*, *Lynn Rhinehart*, *William Lurye*, and *Claire Prestel* were on the brief for *amici curiae* American Federation of Labor and Congress of Industrial Organizations, et al. in support of appellants.

Jonathan S. Massey was on the brief for *amici curiae* Members of Congress in support of appellants.

Daniel B. Kohrman was on the brief for *amicus curiae* AARP in support of appellants.

Samuel R. Bagenstos was on the brief for *amicus curiae* the American Association of People with Disabilities in support of appellants.

Maurice Baskin argued the cause for appellees. With him on the brief was *William A. Dombi*.

Derek Schmidt, Attorney General, Office of the Attorney General for the State of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Toby Crouse*, Special Assistant Attorney General, *Mark Brnovich*, Attorney General, Office of the Attorney General for the State of Arizona, *Samuel S. Olens*, Attorney General, Office of the Attorney General for the State of Georgia, *Bill Schuette*, Attorney General, Office of the Attorney General for the State of Michigan, *Adam Paul*

Laxalt, Attorney General, Office of the Attorney General for the State of Nevada, *Wayne Stenehjem*, Attorney General, Office of the Attorney General for the State of North Dakota, *Herbert H. Slatery, III*, Attorney General, Office of the Attorney General for the State of Tennessee, *Ken Paxton*, Attorney General, Office of the Attorney General for the State of Texas, and *Brad D. Schimel*, Attorney General, Office of the Attorney General for the State of Wisconsin were on the brief for *amici curiae* States of Kansas, et al.

Stephanie Woodward was on the brief for *amici curiae* ADAPT and the National Council On Independent Living in support of appellees.

Michael Billok was on the brief for *amicus curiae* the Consumer Directed Personal Assistance Association of New York in support of appellees.

Michaelle L. Baumert and *Henry L. Wiedrich* were on the brief for *amici curiae* Members of Congress in support of appellees.

Before: GRIFFITH, SRINIVASAN and PILLARD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: The Fair Labor Standards Act's protections include the guarantees of a minimum wage and overtime pay. The statute, though, has long exempted certain categories of "domestic service" workers (workers providing services in a household) from one or both of those protections. The exemptions include one for persons who provide "companionship services" and another for persons who live in the home where they work. This case concerns

the scope of the exemptions for domestic-service workers providing either companionship services or live-in care for the elderly, ill, or disabled. In particular, are those exemptions from the Act's protections limited to persons hired directly by home care recipients and their families? Or do they also encompass employees of third-party agencies who are assigned to provide care in a home?

Until recently, the Department of Labor interpreted the statutory exemptions for companionship services and live-in workers to include employees of third-party providers. The Department instituted that interpretation at a time when the provision of professional care primarily took place outside the home in institutions such as hospitals and nursing homes. Individuals who provided services within the home, on the other hand, largely played the role of an "elder sitter," giving basic help with daily functions as an on-site attendant.

Since the time the Department initially adopted that approach, the provision of residential care has undergone a marked transformation. The growing demand for long-term home care services and the rising cost of traditional institutional care have fundamentally changed the nature of the home care industry. Individuals with significant care needs increasingly receive services in their homes rather than in institutional settings. And correspondingly, residential care increasingly is provided by professionals employed by third-party agencies rather than by workers hired directly by care recipients and their families.

In response to those developments, the Department recently adopted regulations reversing its position on whether the FLSA's companionship-services and live-in worker exemptions should reach employees of third-party agencies who are assigned to provide care in a home. The new

regulations remove those employees from the exemptions and bring them within the Act's minimum-wage and overtime protections. The regulations thus give those employees the same FLSA protections afforded to their counterparts who provide largely the same services in an institutional setting.

Appellees, three associations of home care agencies, challenged the Department's extension of the FLSA's minimum-wage and overtime provisions to employees of third-party agencies who provide companionship services and live-in care within a home. The district court invalidated the Department's new regulations, concluding that they contravene the terms of the FLSA exemptions. We disagree. The Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), confirms that the Act vests the Department with discretion to apply (or not to apply) the companionship-services and live-in exemptions to employees of third-party agencies. The Department's decision to extend the FLSA's protections to those employees is grounded in a reasonable interpretation of the statute and is neither arbitrary nor capricious. We therefore reverse the district court and remand for the grant of summary judgment to the Department.

I.

The FLSA, 29 U.S.C. §§ 201 *et seq.*, generally requires covered employers to pay a minimum wage, and also requires payment of overtime compensation at an hourly rate equaling 150% of normal pay for weekly work hours beyond forty. 29 U.S.C. §§ 206(a), 207(a)(1). The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, extended the Act's minimum-wage and overtime protections to employees in "domestic service," *i.e.*, service in a household. 29 U.S.C. §§ 206(f), 207(l). The congressional committee reports accompanying the 1974 Amendments

explained that domestic service "includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use." S. Rep. No. 93-690, at 20 (1974); H.R. Rep. No. 93-913, at 35-36 (1974).

The 1974 Amendments also exempted defined categories of domestic-service workers from certain FLSA protections. This case concerns two of those exemptions. First, 29 U.S.C.§ 213(a)(15), pertaining to companionship services, provides that the FLSA's minimum-wage and overtime requirements shall not apply with respect to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." Second, 29 U.S.C. § 213(b)(21), pertaining to live-in domestic-service workers, provides that the Act's overtime protections shall not apply with respect to "any employee who is employed in domestic service in a household and who resides in such household." The 1974 Amendments included a broad grant of rulemaking authority empowering the Secretary of Labor to "prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 1974 Amendments, Pub. L. No. 93-259, § 29(b), 88 Stat. 76.

In 1975, the Department of Labor adopted implementing regulations. Those regulations addressed the treatment of companionship-services workers and live-in domestic-service workers who are employed by third-party agencies. The regulations provided that the § 213(a)(15) exemption for companionship services and the § 213(b)(21) exemption for live-in workers included individuals "who [were] employed by an employer other than the family or household using their

services." 29 C.F.R. § 552.109(a), (c) (2014). The regulations also defined the term "companionship services" to mean "those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." 29 C.F.R. § 552.6 (2014). Additionally, "[s]uch services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services." *Id.*

Subsequently, in 1993, 1995, and 2001, the Department, citing dramatic changes in the provision of home care services, proposed regulatory amendments to remove third-party-agency employees from the scope of the companionship-services and live-in worker exemptions. *See* Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481 (Jan. 19, 2001); Application of the Fair Labor Standards Act to Domestic Service, 60 Fed. Reg. 46,797 (Sept. 8, 1995); Application of the Fair Labor Standards Act to Domestic Service, 58 Fed. Reg. 69,310 (Dec. 30, 1993). In 2001, for example, the Department explained that "workers who today provide in-home care to individuals needing assistance with activities of daily living are performing types of duties and working in situations that were not envisioned when the companionship-services regulations were promulgated." 66 Fed. Reg. at 5482. None of those proposals to alter the regulatory treatment of third-party-agency employees gained final adoption.

In 2002, the companionship-services portion of the third-party-employer regulation became the subject of a legal challenge brought by an employee of a third-party agency who sought overtime and minimum-wage protections. Ultimately, the Supreme Court rejected her challenge, upholding the regulation's inclusion of third-party-employed

workers within the Act's companionship-services exemption. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). The employee argued that the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should not apply, and that, if it did, the statutory exemption unambiguously applied only to workers employed directly by private households, thus rendering the third-party regulation invalid. The Court disagreed. It held that the "the text of the FLSA does not expressly answer the third-party-employment question"; that Congress had granted authority to the Department to resolve the issue; and that the Department's answer—*i.e.*, its regulation including employees who work for third-party agencies within the companionship-services exemption—was reasonable. *Coke*, 551 U.S. at 168, 171.

In 2013, the Department again considered reversing course on the third-party-employer issue, this time adopting a final regulation doing so. "In the 1970s," the Department observed, "many individuals with significant care needs were served in institutional settings rather than in their homes." Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,455 (Oct. 1, 2013). But "[s]ince that time, there has been a growing demand for long-term home care." *Id.* "As more individuals receive services at home rather than in nursing homes and other institutions, workers who provide home care services . . . perform increasingly skilled duties" analogous to the professional services performed in institutions. *Id.* The Department concluded that, "given the changes to the home care industry and workforce" since the original 1975 regulations, the new regulation would "better reflect Congressional intent" behind the 1974 Amendments. *Id.* at 60,454. As authority for the new regulation, the Department cited, in addition to the statutory exemptions themselves, the general grant of

rulemaking authority in § 29(b) of the 1974 Amendments. *Id.* at 60,557.

Under the new regulation, third-party employers of companionship-services and live-in employees may no longer "avail themselves" of the statutory exemptions. With respect to companionship services, the revised regulation states that "[t]hird party employers of employees engaged in companionship services . . . may not avail themselves of the minimum wage and overtime exemption provided by section [2]13(a)(15)." 29 C.F.R. § 552.109(a) (2015). With respect to live-in workers, the revised regulation states that "[t]hird party employers of employees engaged in live-in domestic service employment . . . may not avail themselves of the overtime exemption provided by section [2]13(b)(21)." *Id.* § 552.109(c). The new rules also narrow the Department's definition of "companionship services," which has the effect of limiting the scope of the Act's companionship-services exemption. Among other adjustments, the regulation now states that "[t]he term companionship services . . . includes the provision of care"—such as "meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care"—only if that care "does not exceed 20 percent of the total hours worked." *Id.* § 552.6(b) (2015).

In 2014, appellees, a group of trade associations representing third-party agencies that employ home care workers, filed a lawsuit challenging the regulations under the Administrative Procedure Act. In December 2014, shortly before the new regulations were to take effect, the district court granted partial summary judgment to appellees, declaring invalid the revised third-party-employer regulation. *Home Care Ass'n of Am. v. Weil*, No. 14-cv-967 (RJL), 2014 WL 7272406 (D.D.C. Dec. 22, 2014). The court ended its

analysis at *Chevron* step one, finding that the Department's decision to exclude a class of employees from the exemptions based on the "nature of their employer[s]" contravened the plain terms of the statute. *Id.* at *5-6. In light of the district court's vacatur of the third-party-employer regulation, appellees could make use of the companionship-services exemption, and they therefore gained standing to attack the Department's revised definition of companionship services. In a separate opinion, the district court vacated that definition, finding that its twenty-percent limitation on hours of "care" contravened both the text of the statutory exemption and congressional intent. *Home Care Ass'n of Am. v. Weil*, No. 14-cv-967 (RJL), 2015 WL 181712, at *4-5 & n.5 (D.D.C. Jan. 14, 2015). The Department now appeals.

II.

We review the new third-party-employer regulation pursuant to the two-step *Chevron* framework. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439 (2014). If "Congress has directly spoken to the precise question at issue," then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue," we analyze "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The Department contends that its revised third-party-employer regulation lies within the scope of its rulemaking authority under the general agency delegation in § 29(b) of the 1974 Amendments, as confirmed by the Supreme Court's decision in *Coke*. The Department further argues that the new regulation is a reasonable exercise of the Department's authority at *Chevron* step two and is neither arbitrary nor

capricious. We agree with the Department and uphold the regulation.

A.

Appellees contend that the new third-party-employer regulation fails at the first step of *Chevron*. In their view, the FLSA does not delegate to the Department the authority to exclude a class of employers from the Act's companionship-services and live-in worker exemptions. That argument is foreclosed by the Supreme Court's decision in *Coke*.

The Court in *Coke* confronted three distinct statutory arguments about the applicability of the companionship-services exemption to employees of third-party providers. First, respondent Coke, the employee, urged that the 1974 Amendments "clearly express[] congressional intent to exempt only companions employed directly by private households," not companions employed by third-party agencies. Brief for Respondent at 5, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 930417, at *5 (capitalization altered). Second, various amici, including the appellees here, made the opposite argument—*viz.*, that the "unambiguous language" of the companionship-services exemption *requires* applying it to employees of third-party providers. Brief for National Association for Home Care & Hospice, Inc. as Amicus Curiae in Support of Petitioners at 3, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 527341, at *3. Finally, the petitioner home care agency, supported by the United States, put forward an intermediate position. In their view, the text of the statutory exemption "does not address third-party employment," leaving the agency discretion to resolve the matter at *Chevron* step two. Brief for United States as Amicus Curiae Supporting Petitioners at 8,

17-18, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 579234, at *8, *17-18; *see* Brief for Petitioners at 10-12, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 549107, at *10-12.

The Supreme Court rejected the competing arguments that the statutory text unambiguously compels a result in either direction. The Court held that "the text of the FLSA does not expressly answer the third-party-employment question" and that there is also no "clear answer in the statute's legislative history." *Coke*, 551 U.S. at 168. Instead, the question of "whether to include workers paid by third-parties within the scope of the [exemption's] definitions" is among the "details" that the statute leaves to the "agency to work out." *Id.* at 167. In support of that conclusion, the Court referenced the Secretary of Labor's general authority "to prescribe necessary rules, regulations, and orders with regard to the amendments made by the Act." 1974 Amendments, Pub. L. No. 93-259, § 29(b), 88 Stat. at 76; *see Coke*, 551 U.S. at 165 (citing § 29(b)). Because that grant of authority "provides the Department with the power to fill . . . gaps through rules and regulations," and because the "subject matter of the regulation in question concerns a matter in respect to which the agency is expert," the treatment of third-party employers under the exemption, the Court concluded, had been "entrusted [to] the agency." *Coke*, 551 U.S. at 165.

The Court's conclusion precludes appellees' *Chevron* step-one argument. It is true that *Coke* addressed a challenge solely to the companionship-services portion of the prior regulation, while this case also encompasses a challenge to the live-in worker provision of the revised regulation. But the *Coke* Court's characterization of third-party-employer treatment as an "interstitial matter . . . entrusted [to] the

agency to work out" equally applies to the Department's authority under the FLSA's live-in worker exemption. Indeed, Congress framed the companionship-services and live-in worker exemptions with precisely parallel construction and phrasing. Section 213(a)(15) exempts from the FLSA's minimum-wage and maximum-hour requirements "*any employee employed in domestic service employment* to provide companionship services for individuals who . . . are unable to care for themselves." 29 U.S.C. § 213(a)(15) (emphasis added). And § 213(b)(21) symmetrically exempts from the Act's maximum-hour requirements "*any employee who is employed in domestic service* in a household and who resides in such household." 29 U.S.C. § 213(b)(21) (emphasis added). Both provisions invite further specification, the details of which "turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses." *Coke*, 551 U.S. at 165, 167-68.

Appellees also stress that the companionship-services exemption provides for the Secretary to "define[] and delimit[]" its terms, while the live-in worker exemption contains no similar supplement. *Compare* 29 U.S.C. § 213(a)(15), *with id.* § 213(b)(21). The Supreme Court in *Coke*, however, did not focus on the "define[] and delimit[]" language in § 213(a)(15). Rather, in holding that the Department had authority to "fill [the third-party-employment] gap[] through rules and regulations," the Court relied on § 29(b)'s general grant of authority to establish rules implementing the 1974 Amendments. *Coke*, 551 U.S. at 165. The Court invoked the precise terms of § 29(b)'s general grant of implementation authority—the authority "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act"—in the portion of its opinion holding that the third-party-employment question had been

delegated to the Secretary. *Id.* And although the Court also cited 29 U.S.C. § 213(a)(15) as a source of agency authority alongside § 29(b), the "define[] and delimit[]" language, unlike the language of § 29(b), was neither reproduced nor highlighted. *See Coke*, 551 U.S. at 165. Because § 29(b) "gives an agency broad power to enforce *all* provisions" of the 1974 Amendments—including both § 213(a)(15) and § 213(b)(21)—the Department's "authority is clear" with respect to both FLSA exemptions. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (emphasis added) (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

Appellees get no further in arguing that, even if the regulation upheld in *Coke* amounted to a valid exercise of the Department's authority to "define" the terms of the companionship-services exemption, the revised regulation does not. Appellees posit that, while the Secretary may *define* terms within the phrase "employee employed in domestic service employment to provide companionship services," the Department exceeded its authority when, instead of "defining" that phrase, it issued a rule providing that third-party employers "may not avail themselves" of the exemption. 29 C.F.R. § 552.109(a). That argument fails for the reason already given: The Department's authority does not flow solely from the "define[] and delimit[]" language of § 213(a)(15), but instead, as the *Coke* Court emphasized, comes from the general grant provided by § 29(b) to "work out" the statutory "gaps" through rules and regulations. *Coke*, 551 U.S. at 165.

Indeed, in finding it within the Department's "broad grant" of authority to decide "whether to include workers paid by third parties within the scope" of the companionship-services exemption, the Court explicitly contemplated that the

full range of potential outcomes lay within the agency's discretion. *Id.* at 167-68. "Should the FLSA cover *all* companionship workers paid by third parties?," the Court asked. *Id.* at 167. Or should it instead "cover *some* such companionship workers . . . ? Should it cover *none*?" *Id.* All of those possibilities, the Court made clear, were the Department's to assess. *Id.*

Appellees' remaining step-one arguments are unavailing. Appellees contend that the Department's new rules conflict with the legislative history of the FLSA amendments. But the *Coke* Court explicitly found that the "statute's legislative history" provides no "clear answer" to the "third-party-employment question." *Coke*, 551 U.S. at 168. And while appellees seek to attach significance to Congress's amendment of other subsections of § 213 in 1996 and 1999 without altering either § 213(a)(15) or § 213(b)(21), the *Coke* Court, having been advised about that congressional inaction, *see* Brief for the United States as Amicus Curiae at 20 n.5, *Coke*, 551 U.S. 158 (No. 06-593), apparently found it immaterial to the *Chevron* step one inquiry. Appellees similarly argue that Congress's more recent inaction in the face of proposed legislation to exclude third-party employers from the statutory exemptions shows congressional intent to allow employers to continue making use of the exemptions. But "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks omitted). And here, Congress's failure to enact legislation does nothing to upset *Coke*'s holding that "the text of the FLSA does not expressly answer the third-party-employment question." 551 U.S. at 168.

For those reasons, we reject appellees' challenge to the regulations at *Chevron* step one. The Department has the authority to "work out the details" of the companionship-services and live-in worker exemptions, and the treatment of third-party-employed workers is one such detail. *Id.* at 165-68.

B.

Because we conclude that Congress delegated authority to the Department to determine whether employees of third-party agencies should fall within the scope of the companionship-services and live-in worker exemptions, we proceed to *Chevron* step two. At that step, "'if the implementing agency's construction is reasonable,' a court must 'accept the agency's construction of the statute.'" *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 498 (D.C. Cir. 2007) (quoting *Brand X*, 545 U.S. at 980). The Department's interpretation readily satisfies that standard.

Appellees' *Chevron* step-two argument largely rehashes their step-one submission. Their primary contention is that "the total exclusion of third party employers from availing themselves of access to the companionship and live-in exemptions cannot be a permissible construction of the Act." Appellees' Br. 39-40. *Coke* belies that argument. As the Court explained, "the text of the FLSA does not expressly answer the third-party-employment question," leaving it to the Department to determine whether the FLSA should apply to "all," "some," or "none" of the home care workers paid by third parties. *Coke*, 551 U.S. at 167-68.

The Department's resolution of that question is entirely reasonable. The Department explained that bringing domestic-service workers paid by third-party employers

within the FLSA's protections would be consistent with congressional intent. The 1974 Amendments "intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service," the Department observed, 78 Fed. Reg. at 60,454, not to "roll back coverage for employees of third parties who already had FLSA protections," *id.* at 60,481. Because Congress's overriding intent was to bring more workers within the FLSA's protections, the Department determined that the companionship-services and live-in exemptions from coverage should "be defined narrowly in the regulations to achieve the law's purpose." *Id.* at 60,482. In the Department's view, a narrow construction of the statutory exemptions draws further support from "the general principle that coverage under the FLSA is broadly construed so as to give effect to its remedial purposes, and exemptions are narrowly interpreted . . . to those who clearly are within the terms and spirit of the exemption." *Id.* (citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)). The Department thus decided to interpret the exemptions as "narrow" ones that target individuals who are "not regular breadwinners or responsible for their families' support." *Id.* at 60,481 (citing H. Rep. No. 93-913, p. 36).

The Department's understanding is consistent with Congress's evident intention to "include within the coverage of the Act all employees whose *vocation* is domestic service." S. Rep. No. 93-690, at 20 (emphasis added); *see* H.R. Rep. No. 93-913, at 33-34, 36 (similar). Both the 1974 Senate and House Reports, in explaining the purpose behind the companionship exemption and another exemption covering "casual babysitting services," drew a contrast between "casual" employees and employees whose "vocation is domestic service." S. Rep. No. 93-690, at 20; H.R. Rep. No. 93-913, at 33-34, 36. And one Senator, when commenting on

the expansion of the FLSA to cover domestic-service employees, contrasted the type of assistance provided by a "neighbor" or an "elder sitter" with "the professional domestic who does this as a daily living." 119 Cong. Rec. 24,801 (July 19, 1973) (statement of Sen. Burdick). It is true that the Department points to no legislative materials concerning the live-in exemption in particular. But it was reasonable for the Department to assume that Congress intended the live-in exemption to operate in much the same way as the similarly worded companionship exemption—*i.e.*, to exclude from the FLSA's scope casual employees who are "not regular bread-winners or responsible for their families' support." 78 Fed. Reg. at 60,481 (citing S. Rep. No. 93-690, p. 20; H.R. Rep. No. 93-913, p. 36).

Based on its understanding of congressional intent, the Department reasoned that the 1974 Congress would have wanted the FLSA's protections to extend to the home care workers of today who are employed by third-party agencies. "[T]oday, few direct care workers are the 'elder sitters' envisioned by Congress when enacting the exemption," the Department observed. 78 Fed. Reg. at 60,482. Instead, home care workers employed by third parties are professional caregivers, often with training or certification, who work for agencies that profit from the employees' services. *See id.* at 60,455; National Employment Law Project, *Comments to Proposed Revisions to the Companionship Exemption Regulations, RIN 1235-AA05* 14-15 (Mar. 21, 2012), *reprinted in* J.A. at 593-94. In light of the "purpose and objectives of the [1974] amendments as a whole," 78 Fed. Reg. at 60,482, the Department decided "to prohibit third party employers from claiming [the companionship and live-in] exemptions," *id.* at 60,480. The Department thereby applied the FLSA's protections to workers for whom such employment is a "vocation." S. Rep. No. 93-690, at 20. We

find the Department's resolution to be fully reasonable and see no basis for setting it aside at *Chevron* step two.

C.

Appellees contend that, even if the new third-party regulation passes muster at *Chevron* step two, it should still be invalidated as arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). According to appellees, the Department "failed to provide an adequate justification for reversing four decades of policy interpreting the Act." Appellees' Br. 40. The Department needed to satisfy a "higher burden," appellees submit, because the new regulation departed from prior rules and policies. *Id.*

Contrary to appellees' suggestion, there is no requirement that the agency's change in policy clear any "heightened standard." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). Instead, we ask whether actions that are a departure from prior agency practice, like other agency actions, rest on a "reasoned explanation." *Id.* at 515. A "reasoned explanation," in the event of an alteration in approach, "would ordinarily demand that [the agency] display awareness that it *is* changing position," and "of course the agency must show that there are good reasons for the new policy." *Id.* But beyond that, the APA imposes no special burden when an agency elects to change course.

The Department's explanation for its updated rule meets those standards. In addition to reasoning that its original regulation misapplied congressional intent, the Department justified its shift in policy based on the "dramatic transformation of the home care industry since [the third-party-employer] regulation was first promulgated in 1975." 78 Fed. Reg. at 60,481. When Congress enacted the 1974

Amendments, the "vast majority of the private household workers were employed directly by a member of the household." Report to the Ninety-Third Congress by the Secretary of Labor: *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act* 28 (Jan. 19, 1973). By the time the Supreme Court decided *Coke* in 2007, the vast majority of home care workers were instead employed by third-party agencies. *See* Brief of the Alliance or Retired Americans, et al. as Amici Curiae in Support of Respondent at 6, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 951137, at *6.

The duties of typical home care workers also changed. In the 1970s, many individuals with significant needs received care in institutional settings rather than in their homes. *See* 78 Fed. Reg. at 60,455. Since that time, there has been an increased emphasis on the value of providing care in the home and a corresponding shift away from institutional care. As the Department recognized even by 2001, "[d]ue to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance with activities of daily living are performing types of duties and working in situations that were not envisioned when the companionship-services regulations were promulgated." 66 Fed. Reg. at 5482.

In light of the Department's reasoned explanation for its change in policy, we conclude that its departure from past practice was neither arbitrary nor capricious.

D.

Appellees see a "strong[] indicat[ion]" in the administrative record that removing third-party-employed workers from the scope of the exemptions "will make home

care less affordable and create a perverse incentive for re-institutionalization of the elderly and disabled." Appellees' Br. 44. The Department disagreed with that characterization in the final rule, concluding that care recipients would be benefitted, not harmed, by the new regulations. *See* 78 Fed. Reg. at 60,459, 60,483. The Department's conclusion has ample support in the record.

When issuing the final rule, the Department acknowledged the existence of certain comments claiming that the proposed changes would harm home care workers and recipients. "[R]aising the cost of service provided through home care agencies," those comments suggested, "would incentivize employment through informal channels rather than through such agencies." 78 Fed. Reg. at 60,481. Some commenters also argued that expanding FLSA coverage would increase institutionalization of the elderly and would accelerate workforce turnover due to reduced work hours per shift. The Department rejected those contentions based on the administrative record.

Fifteen states, the Department explained, already "provide minimum wage and overtime protections to all or most third party-employed home care workers" who would come within the FLSA's scope under the Department's rule. *Id.* at 60,482. Yet commenters raising concerns about the rule's effects "did not point to any reliable data" from those states indicating that extension of minimum-wage and overtime protection to home care workers had led either to increased institutionalization or a decline in continuity of care. *Id.* at 60,483. To the contrary, some commenters noted an absence of evidence from those states suggesting any decline in access to (or quality of) home care services owing to the extension of minimum-wage and overtime protections to home care workers. *See* Addendum to Reply Br. 14, 21.

The industry's own survey indicated that home care agencies "operating in overtime and non-overtime states already have very similar characteristics," including "a similar percentage of consumers receiving 24-hour care." 78 Fed. Reg. at 60,503.

Appellees suggest that, even if the Department's conclusions are defensible with regard to the companionship exemption, we should still invalidate its revised approach with regard to the live-in exemption because only four of those fifteen states require payment of overtime to live-in domestic-service employees. Appellees' Br. 46. The Department was aware of those differences when making its decision, however, as it included a table in the final rule detailing the nuances of each state's overtime and minimum-wage laws. 78 Fed. Reg. at 60,510-12. Whether focused on fifteen states or a subset of four states, the Department's core observation—that commenters could point to no evidence indicating that extension of protections to home care workers in the relevant states effected an increase in institutionalization or workforce turnover—remains true.

The Department instead reasonably credited comments suggesting that the new rule would improve the quality of home care services. The "rule will bring more workers under the FLSA's protections," the Department concluded, which "will create a more stable workforce by equalizing wage protections with other health care workers and reducing turnover." *Id.* at 60,483. Increased protections will also "ensur[e] that the home care industry attracts and retains qualified workers," improving the quality of home care services. *Id.* at 60,548. The Department predicted that the revised regulations would benefit consumers "because supporting and stabilizing the direct care workforce will result in better qualified employees, lower turnover, and a higher

quality of care." *Id.* at 60,459-60. Those sorts of "[p]redictive judgements about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable." *BellSouth Telecomm., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) (internal quotation marks omitted). The Department's judgments are.

III.

In addition to challenging the third-party-employer regulation, appellees also challenge 29 C.F.R. § 552.6 (2015), the regulation defining the scope of "companionship services" encompassed by the Act's companionship-services exemption. Appellees contend that the Department's revised, and more limited, definition of companionship services conflicts with the FLSA and is arbitrary and capricious. We lack Article III jurisdiction to consider appellees' challenge.

In light of our disposition with respect to the third-party-employer regulation, appellees cannot show that the revised definition of companionship services causes their member companies injury in fact. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Appellees conceded before the district court that, until the court vacated the third-party-employer regulation, their members "lacked standing to pursue injunctive relief against [the enforcement of 29 C.F.R. § 552.6], because third-party employers were not allowed to avail themselves of the exemption under any definition of companionship services, and [appellees] were therefore not directly harmed by [§ 552.6]." Mem. in Supp. of Emergency Mot. for Temporary Stay of Agency Action and Req. for Expedited Consideration, No. 14-cv-967, Dkt. No. 23-1, at 1-2 (filed Dec. 24, 2014). Appellees make no effort in their appellate briefing to revisit

that understanding. Because we now reverse the district court's vacatur of 29 C.F.R. § 552.109, appellees cannot make use of the companionship-services exemption, and their members thus suffer no direct injury as a result of the Department's narrowed definition of companionship services. We therefore lack jurisdiction to consider appellees' challenge to that definition.

* * * * *

For the foregoing reasons, we reverse the district court's judgments and remand for the entry of summary judgment in favor of the Department.

So ordered.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5018 **September Term, 2015**

1:14-cv-00967-RJL

Filed On: September 18, 2015

Home Care Association Of America, et al.,

Appellees

v.

David Weil, sued in his official capacity,
Administrator, Wage & Hour Division, et al.,

Appellants

BEFORE: Griffith, Srinivasan, and Pillard, Circuit Judges

O R D E R

Upon consideration of appellees' motion for stay of the mandate pending the filing of a petition for writ of certiorari, the opposition thereto, and the reply; and appellants' motion for expedited issuance of the mandate, the opposition thereto, and the reply, it is

ORDERED that the motions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOME CARE ASSOCIATION OF AMERICA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 14-cv-967 (RJL)**
DAVID WEIL, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION
(December 22, 2014) [Dkt. ##9, 13]

For over forty years, Congress has exempted third-party providers of home care services from having to pay either minimum or overtime wages to their employees who provide domestic companionship services to seniors and individuals with disabilities, or to pay overtime wages to live-in domestic service employees. On October 1, 2013, however, the Department of Labor issued a new regulation that takes these longstanding exemptions away from third-party employers.

Plaintiffs Home Care Association of America, the International Franchise Association, and National Association for Home Care & Hospice (together, "plaintiffs") bring this action under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, against defendants David Weil, in his official capacity as Administrator of the United States Department of Labor's Wage and Hour Division; Thomas E. Perez, in his official capacity as the Secretary of the Department of Labor; and the Department of Labor itself (together, "defendants" or "the Department"). Compl. ¶ 1 [Dkt. #1]. Plaintiffs challenge

this new Department of Labor regulation as an arbitrary and capricious exercise of authority inconsistent with Congress's language and intent. *See generally* Compl. Indeed, plaintiffs contend, *inter alia*, that if this new rule, which goes into effect on January 1, 2015, is allowed to stand, it will have a destabilizing impact on the entire home care industry and will adversely affect access to home care services for millions of the elderly and infirm. *See* Compl. ¶ 4.

Before me now are plaintiffs' motion for partial summary judgment on Counts I and II of their Complaint and defendants' motion to dismiss, or, in the alternative, for summary judgment. Pls.' Mot. for Expedited Partial Summ. J. ("Pls.' Mot.") [Dkt. #9]; Defs.' Mot. to Dismiss or in the Alternative Cross-Mot. for Summ. J. ("Defs.' Mot.") [Dkt. #13].[1] After consideration of the parties' pleadings, the arguments of counsel, the relevant law, and the entire record in this case, plaintiffs' motion for partial summary judgment is GRANTED, defendants' motion is DENIED, and the Department's revised Third Party Employer regulation scheduled to go into effect on January 1, 2015, is VACATED.

BACKGROUND

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19, first passed in 1938, obligates employers to pay covered employees minimum wage for all hours worked and overtime wages for hours worked in excess of 40 in a week, *id.* §§ 206-07.

[1] Defendants title Docket Entry 13 as "Defendants' Combined Memorandum in Support of their Motion to Dismiss or in the Alternative their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment," which is the same title found on Docket Entry 13-1. It is clear from the context, however, that Docket Entry 13 is the defendants' motion and 13-1 is their memorandum in support.

Congress amended the FLSA in 1974 in part to extend certain labor protections, including the provision of minimum and overtime wages, to domestic service employees.[2] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7, 88 Stat. 55, 62; *see* 29 U.S.C. § 201 (finding that domestic service employment affects commerce); *id.* § 206(f) (extending minimum wage protection); *id.* § 207(*l*) (extending overtime protections).

At the same time that it expanded FLSA coverage to domestic service employees, Congress included exemptions tied to certain types of domestic service work. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7(b)(3)-(4), 88 Stat. 55, 62. In particular, the statute explains that its overtime and minimum wage requirements shall not apply to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15) ("companionship services exemption"). Nor shall its overtime requirements apply to "any employee who is employed in domestic service in a household and who resides in such household." 29 U.S.C. § 213(b)(21) ("live-in domestic employee exemption"). The exemptions at issue here have remained in place since the passage of the 1974 Amendments, though FLSA exemptions have been amended since that time. *See, e.g.*, Act of Dec. 9, 1999, Pub. L. No. 106-151, § 1, 113 Stat. 1731 (defining "fire protection activities" to clarify an overtime exemption); Small

[2] Prior to the passage of these amendments, only those domestic service workers employed by a business large enough to be subject to the FLSA's enterprise coverage were included within the FLSA's protections. 39 Fed. Reg. 35,385; 78 Fed. Reg. 60,481.

Business Job Protection Act of 1996, Pub. L. No. 104-188, § 2105(a), 110 Stat. 1755, 1929 (adding an exemption under 29 U.S.C. § 213(a) for certain computer professionals); Act of Sept. 30, 1994, Pub. L. No. 103-329, § 633(d), 108 Stat. 2382, 2428 (adding an overtime and minimum wage exemption for certain criminal investigators).

Following the passage of the 1974 Amendments, the Department of Labor promulgated implementing regulations in 1975. 40 Fed. Reg. 7404. Of interest here, the regulations focus on the employees and the nature of the employees' services. 40 Fed. Reg. 7405. The "term 'domestic service employment' refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed."[3] 40 Fed. Reg. 7405. Examples include cooks, housekeepers, caretakers, chauffeurs, and "babysitters employed on other than a casual basis." *Id.*

"Companionship services" means "those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." *Id.* Services "which require and are performed by trained personnel," such as by nurses, do not qualify as "companionship services." *Id.* Finally, "live-in" workers are described as "[d]omestic service employees who reside in the household where they are employed." 40 Fed. Reg. 7406.

The regulations further specify that the exemptions cover companions and live-in domestic service workers who are "employed by an employer or agency other than the

[3] Although the phrase "of the person by whom he or she is employed" apparently conflicts with the current third-party regulation described below, the Supreme Court has held that this more general regulation does not invalidate the specific third-party regulation regarding companionship and live-in workers. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 169-70 (2007).

family or household using their services." 40 Fed. Reg. 7407. Although the final 1975 regulations acknowledge that the Department contemplated the question of whether employees of third parties should be exempt under the statute, the Secretary "concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. 7405. The final regulation elaborated, "This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Id.* These regulations remained substantially unchanged until the rulemaking at issue here.[4] *See* 29 C.F.R. §§ 552.3, 552.6, 552.102, 552.109 (current regulations).

In 2007, the Supreme Court heard a challenge to the validity of the long-standing inclusion of employees paid by third parties within the companionship services exemption. In *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), a domestic worker who had been employed by a third party to provide companionship services sued her former employer, claiming she was entitled to minimum and overtime wages under the FLSA. With the United States defending the current regulation as amicus curiae, *see* Br. for the U.S. as Amicus Curiae Supporting Pet'rs, *Coke*, 551 U.S. 158 (No. 06-593), the Court concluded that the third-party rule was valid and binding, *Coke*, 551 U.S. at 162.

In response to the Supreme Court's decision in *Coke*, several bills were introduced in Congress seeking to abolish this exemption. *See* "Direct Care Job Quality

[4] The Department previously considered changing the third-party employer regulation, *see* 66 Fed. Reg. 5481 (2001); 60 Fed. Reg. 46,797 (1995); 58 Fed. Reg. 69,310 (1993), but ultimately left the regulation in place until the rulemaking described below.

Improvement Act of 2011," H.R. 2341 and S. 1273, 112th Cong. (2011); "Direct Care Workforce Empowerment Act," H.R. 5902 and S. 3696, 111th Cong. (2010); "Fair Home Health Care Act of 2007," H.R. 3582 and S. 2061, 110th Cong. (2007). Notwithstanding efforts by legislators in the majority party in both the House and Senate in three consecutive Congresses (110th, 111th, and 112th),[5] none of their bills ever generated sufficient support to get out of committee and to the floor of either house of Congress. *See generally* Congress.gov, https://www.congress.gov/ (searchable bill histories).

Undaunted by the Supreme Court's decision in *Coke*, and the utter lack of Congressional support to withdraw this exemption, the Department of Labor amazingly decided to try to do administratively what others had failed to achieve in either the Judiciary or the Congress. The Department, in December 2011, published a Notice of Proposed Rulemaking to revise the FLSA domestic service regulations. The Proposed Rule reworked the definitions of certain terms, including "domestic service employment" and "companionship services," and limited the companionship and live-in employee exemptions to workers employed by the family or household using the services, thereby excluding third-party employers from the exemptions. 76 Fed. Reg. 81,190-98, 81,244.

After receiving over 26,000 comments, 78 Fed. Reg. 60,460, including comments from plaintiffs, *see* J.A., Tabs D-J [Dkt. ##17-4–17-10], the Department published the Final Rule on October 1, 2013, 78 Fed. Reg. 60,454 ("new rule" or "new regulation").

[5] In the 112th Congress, the majority party remained the same in the Senate, but switched in the House from Democratic to Republican control. Thus, Rep. Linda Sanchez's (D-CA-39) 2011 bill, H.R. 2341, was offered when she was in the minority party.

This new rule is scheduled to go into effect on January 1, 2015.[6] *Id.* Of relevance here, of course, is the new rule's effect on the application of the companionship services and live-in domestic service employee exemptions.[7] In a section entitled "Third Party Employment," it states that "[t]hird party employers of employees engaged in companionship services . . . may not avail themselves of the minimum wage and overtime exemption" provided by the statute, and "[t]hird party employers of employees engaged in live-in domestic service employment . . . may not avail themselves of the overtime exemption" provided by the statute. 78 Fed. Reg. 60,557.

Plaintiffs are trade associations that represent businesses employing workers currently subject to the FLSA companionship services and/or live-in domestic service exemptions. Compl. ¶¶ 9-11. As such, plaintiffs' member organizations include third-party employers who would not be able to "avail themselves" of the FLSA minimum and overtime wage exemptions for companions and live-in domestic service workers if the new rule were to go into effect.

Plaintiffs move for partial summary judgment on Counts I and II of their Complaint, which involve the new third-party regulation. Pls.' Mot.; Pls.' Mem. in Supp. of Mot. for Expedited Partial Summ. J. ("Pls.' Mem.") [Dkt. #9-1]. Defendants move to dismiss those counts, or, in the alternative, cross-move for summary judgment. Defs.'

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[6] The Department has announced that it will not bring enforcement actions against any employers regarding violations of the FLSA resulting from the new rule for the first six months it is in effect. 79 Fed. Reg. 60,974-75.

[7] Plaintiffs also challenge the new rule's revised "companionship services" definition in their Complaint, Compl. ¶¶ 34-39, but that issue is not before the Court on this Motion for Expedited Partial Summary Judgment, Pls.' Mem. at 2 n.1. The change regarding third-party employment was not effected through any revision to the definition of "companionship services," or any other definition, for that matter. 78 Fed. Reg. 60,557.

Mot.; Defs.' Combined Mem. in Supp. of Mot. to Dismiss or in the Alternative Cross-Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. ("Defs.' Mem.") [Dkt. #13-1]. I heard oral argument on the cross-motions on November 19, 2014.

LEGAL STANDARD

Under Rule 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is no fact-finding necessary here, as the parties rest this case on the administrative record. "Summary judgment is an appropriate mechanism for resolving cases involving administrative rulemaking on the record, particularly where, as here, the case turns chiefly on issues of statutory construction." *Indiv. Reference Servs. Grp., Inc. v. FTC*, 145 F. Supp. 2d 6, 22 (D.D.C. 2001) *aff'd sub nom. Trans Union LLC v. FTC*, 295 F.3d 42 (D.C. Cir. 2002); *see Troy Corp. v. Browner*, 120 F.3d 277, 281 (D.C. Cir. 1997).

ANALYSIS

I. *Chevron* Analysis

Plaintiffs first argue that the new rule conflicts with the plain language and legislative history of the FLSA. Pls.' Mem. at 11-17. The Department disagrees and counters that the new regulation is entitled to deference because it was promulgated

pursuant to the Department's rulemaking authority in this area and reflects a reasonable interpretation of the statute. Defs.' Mem. at 13-28.[8]

The Court analyzes a challenge to the validity of an agency-promulgated rule under the analytical framework laid out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The "inquiry under *Chevron* is rooted in statutory analysis and is focused on discerning the boundaries of Congress' delegation of authority to the agency." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995). First, in what is referred to as *Chevron* Step I, the Court asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the inquiry goes no further, because the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

If Congress has not spoken directly on the matter at issue, then the analysis moves to *Chevron* Step II—whether Congress has expressly or implicitly delegated authority to the agency to proceed with the force of law to implement a statutory provision or fill a statutory gap. If Congress expressly delegates "authority to the agency to elucidate a specific provision of the statute by regulation[, . . . the] regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. If Congress implicitly delegates authority to an agency, the Court defers to the

[8] Plaintiffs further argue that, should the Court find the new rule not to conflict with the statute, the Court nonetheless should set the rule aside as arbitrary and capricious because the Department of Labor did not provide an adequate justification for changing its long-established policy interpreting the FLSA. Pls.' Mem. at 17-22. The Department maintains that its use of the notice and comment rulemaking process and consideration of all of the relevant factors preclude plaintiffs from carrying their burden of proving the regulation is arbitrary and capricious. Defs.' Mem. at 29-35. For the reasons described below, I do not reach this *Chevron* Step II issue.

agency's construction of the statute so long as it is a reasonable one. *Id.* at 844; *see United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (explaining that "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law"). However, a Court may not "*presume* a delegation of power from Congress absent an express *withholding* of such power." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 659 (D.C. Cir.) *amended by* 38 F.3d 1224 (D.C. Cir. 1994). Unfortunately for the Department of Labor, I need not get to a Step II analysis in this case.

The essence of the first stage of the Court's inquiry is what questions did Congress already answer, and what questions did Congress leave up to the Department of Labor to answer? The Department has not and cannot argue that the statutory text *requires* a regulation that effectively excludes those workers employed by third parties from the exemption. The Supreme Court has rejected such a construction. *See Coke*, 551 U.S. 158. Instead, the Department rests its argument on delegated definitional authority and general implementation authority to answer what *it* considers to be open questions left by Congress. Defs.' Mem. at 15-16; Defs.' Reply in Supp. of Mot. to Dismiss or in the Alternative Cross-Mot. for Summ. J. at 1-2 ("Defs.' Reply") [Dkt. #18]. Plaintiffs, on the other hand, contend that the exemption enjoyed by third-party employers over the past forty years is *not* an open question and the Department of Labor cannot, therefore, manipulate its definitional authority in such a way as to effectively rewrite the exemption out of the law. Pls.' Mem. at 11-13. I agree with the plaintiffs.

The FLSA and its amendments undoubtedly envisioned that the Department of Labor would play some role in implementing the statutory scheme. The companionship services exemption itself directs the Secretary of Labor to "define[] and delimit[]" the statutory terms in the exemption, 29 U.S.C. § 213(a)(15), though, notably, no such express direction is stated in the live-in domestic employee exemption, 29 U.S.C. § 213(b)(21). Further, the 1974 Amendments authorize the Secretary of Labor in a general sense "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." Fair Labor Standards Amendments of 1974, Pub. L. 93-259, § 29(b), 88 Stat. 55, 76. However, an agency's general rulemaking authority does not necessarily mean that every specific rule the agency promulgates will be a valid exercise of that authority. *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). Congress surely did not delegate to the Department of Labor here the authority to issue a regulation that transforms defining statutory terms into drawing policy lines based on who cuts a check rather than what work is being performed.

As stated above, Congress merely left a number of definitional gaps in the exemptions' statutory language, including regarding what companionship services are and what domestic service employment is. The Department, appropriately, has filled those gaps through regulations, including revised definitions for "domestic service

employment" and "companionship services" in the new rule scheduled to go into effect January 1, 2015.[9]

Once those definitional gaps were filled, however, the statutory loop was closed. The language of the exemption provisions is quite clear: "*any* employee" who is employed to provide companionship services, or who resides in the household in which he or she is employed to perform domestic services, is covered by the exemption. 29 U.S.C. § 213(a)(15), (b)(21) (emphasis added). If an employee's work is encompassed within the statutory terms as defined by the regulations, the employer is not obligated to pay overtime and/or minimum wage. This, indeed, is the natural reading of the statute.[10] There is no explicit—or implicit—delegation of authority to the Department to parse groups of employees based on the nature of their employer who otherwise fall within those definitions.

That Congress intended the exemption to apply to *all* employees who provide companionship and live-in domestic services is further evidenced by analyzing the surrounding exemption text. *See Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (explaining that a court must "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose" (internal quotation marks omitted)). In particular, Congress did not hesitate in other exemptions listed

[9] The Department's effort to narrow the scope of those exempted services through its new changes to the regulatory definitions of statutory terms is not before me at this point.

[10] The Department itself recognized this statutory reality in the past. "This language is naturally read to exempt any employee who provides companionship services to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers." *See* U.S. Dep't of Labor, Wage and Hour Advisory Mem. No. 2005-1 (2005), *available at* http://www.dol.gov/whd/FieldBulletins/index.htm.

within Section 213 to make distinctions on the basis of who employs the employee. *See, e.g.*, 29 U.S.C. § 213(a)(3) (exempting "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center" in certain circumstances); *id.* § 213(b)(3) (exempting "any employee of a carrier by air"); *id.* § 213(b)(10) (exempting salesmen for motor vehicles and certain other machinery, but only if employed by a certain type of employer).

Further, in addition to exempting "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves," Section 213(a)(15) itself also exempts "any employee employed *on a casual basis* in domestic service employment to provide babysitting services." *Id.* § 213(a)(15) (emphasis added). To the extent that Congress conceptualized companions as "elder sitters" analogous to baby sitters, as argued by the Department, Defs.' Mem. at 7, it is clear that Congress recognized that one could "sit" casually or on a more established basis—and chose to include *all* those providing companionship services within the exemption. The Department explicitly has recognized, and continues to recognize in the new regulations, that "[t]he 'casual' limitation does not apply to companion services." 29 C.F.R. § 55.106; 78 Fed. Reg. 60,557.

To say the least, where Congress wanted to draw a line based on the circumstances surrounding an employee's employment rather than the type of services the employee provides, it did so. And Congress did not include a "casual basis," employer-based, or

any other modifier when exempting "any employee" providing companionship or live-in domestic services.

This, of course, makes sense. Congress was concerned with what services employees were providing, not whether money was routed through a third party on its way to the employee from the individual or family requiring assistance. Of particular concern here were the costs incurred by those in need of the types of services at issue. *See* 119 Cong. Rec. 24,797-98 (1973) (statements of Sen. Dominick and Sen. Johnston); *see also Welding v. Bios Corp.*, 353 F.3d 1214, 1217 (10th Cir. 2004) ("Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them." (internal quotation marks omitted)).

"Agencies are . . . 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Colo. River Indian Tribes*, 466 F.3d at 139 (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994)). Here, Congress has directed the Department of Labor to define statutory terms, and then include "any employee" who provides services according to those definitions within the scope of the exemptions. The focus is on the type of the services provided, not who pays the check. As such, Congress has clearly spoken on this issue, and the Department's new, conflicting rule therefore cannot survive.

II. *Long Island Care at Home Ltd. v. Coke*

The Department argues that plaintiffs' *Chevron* Step I argument is foreclosed by the Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*. Defs.' Mem. at 9-21. I could not disagree more. As the plaintiffs contend, this argument turns the actual holding in that case on its head.

The Supreme Court stated at the outset of its *Coke* opinion: "The question before us is whether, in light of the statute's text and history, . . . the Department's [current] regulation is valid and binding. We conclude that it is." *Coke*, 551 U.S. at 162 (internal citation omitted). The Supreme Court thus only considered the validity and binding nature of the previous, and still current, rule that interpreted the statutory definition of companion employees under Section 213(a)(15).

The Supreme Court did not consider the question with which I am presented by this new rule: whether the Department is authorized to craft a rule which prevents employers from "availing themselves" of the Act's statutory exemptions of their employees in a manner inconsistent with the plain language of Section 213? To the extent the Supreme Court analyzed the statutory language of the exemption (rather than how different regulations interacted with one another), the Court focused on the Department's authority to define statutory terms, which is not the method by which the Department promulgated the new third-party employer regulation here. *Id.* at 168 (explaining that it was "reasonable to infer . . . that Congress intended its broad grant of *definitional* authority to the Department to include the authority to answer these kinds of

questions" (emphasis added)). And the Supreme Court did not consider the live-in domestic employee exemption *at all*.

Finally, in blessing the current companionship services regulation, the Supreme Court was not faced with a regulation that essentially would eviscerate a Congressionally-mandated exemption via a method Congress never envisioned. By the Department's own numbers, approximately 90% of home health aides and personal care aides, which include those providing companionship services, are employed by third parties, rather than by the individual or family needing services. Defs.' Reply at 10 n.4; *see* 78 Fed. Reg. 60,519-20. Congress included the exemptions for a reason, and the Supreme Court's decision in *Coke* not only does not empower the Department to gut them, it does not grant the Department judicial cover for what can only be characterized as a wholesale arrogation of Congress's authority in this area!

III. Congressional Inaction

Although not alone dispositive, I cannot overlook the fact that Congress has revisited the FLSA many times since the 1974 Amendments, while the 1975 regulations have been in place. Indeed, Congress has amended its statutory exemptions over the years in other ways, *see, e.g.*, Act of Dec. 9, 1999, Pub. L. No. 106-151, § 1, 113 Stat. 1731; Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 2105(a), 110 Stat. 1755, 1929, but has *not* altered the exemptions at issue here. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended

by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

Following the *Coke* decision, Congress contemplated adjusting the statutory language of the companionship exemption at least three times, but never did so. *See* "Direct Care Job Quality Improvement Act of 2011," H.R. 2341 and S. 1273, 112th Cong. (2011); "Direct Care Workforce Empowerment Act," H.R. 5902 and S. 3696, 111th Cong. (2010); "Fair Home Health Care Act of 2007," H.R. 3582 and S. 2061, 110th Cong. (2007). Six bills were introduced—three in the House of Representatives, three in the Senate—over the course of three Congressional sessions, where the sponsors were in the majority party of each,[11] yet there was never sufficient support to get any of them to the floor of either house of Congress. This unequivocally represents a lack of Congressional intent to withdraw this exemption from third-party employers. The fact that the Department issued its Notice of Proposed Rulemaking *after* all six of these bills failed to move is nothing short of yet another thinly-veiled effort to do through regulation what could not be done through legislation.[12] Such conduct bespeaks an arrogance to not only disregard Congress's intent, but seize unprecedented authority to impose overtime

[11] *See* note 5, *supra.*

[12] *See, e.g., Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, No. CV 13-00966 (RJL), 2014 WL 5802283 (D.D.C. Nov. 7, 2014) (vacating a HUD rule that expanded the Fair Housing Act to include disparate impact liability); *Avenal Power Ctr., LLC v. U.S. E.P.A.*, 787 F. Supp. 2d 1, 4 (D.D.C. 2011) (holding that regulatory review process did not relieve EPA Administrator of duty to comply with statutory deadline); *Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 63 (D.D.C.) *aff'd sub nom. Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891 (D.C. Cir. 2010) (finding that FDA did not have authority under the Food, Drug, and Cosmetic Act to regulate electronic cigarettes as a drug-device combination).

and minimum wage obligations in defiance of the plain language of Section 213. It cannot stand.

CONCLUSION

For all of the foregoing reasons, plaintiffs' motion for partial summary judgment [Dkt. #9] is GRANTED and defendants' motion to dismiss, or, in the alternative, for summary judgment [Dkt. #13] is DENIED. Accordingly, the United States Department of Labor's Third Party Employer regulation, promulgated in 78 Fed. Reg. 60,557 and to be codified at 29 C.F.R. § 552.109, is hereby VACATED. An appropriate order shall accompany this Memorandum Opinion.

RICHARD J. LEON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOME CARE ASSOCIATION OF AMERICA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 14-cv-967 (RJL)**
	)	
DAVID WEIL, *et al.*,	)	
	)	
Defendants.	)	

ORDER

For the reasons set forth by the Court orally this date, it is this 31st day of December, 2014, hereby

ORDERED that Plaintiffs' Emergency Motion for Temporary Stay of Agency Action [Dkt. #23] is **GRANTED** to the extent it requests, in essence, a Temporary Restraining Order pursuant to Federal Rule of Civil Procedure 65(b); and it is further

ORDERED that the Department of Labor's regulation defining "Companionship services," promulgated in 78 Fed. Reg. 60,557 and to be codified at 29 C.F.R. § 552.6, which is due to go into effect tomorrow, January 1, 2015, is hereby **STAYED** temporarily from going into effect until January 15, 2015.

RICHARD J. LEON
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOME CARE ASSOCIATION OF AMERICA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 14-cv-967 (RJL)**
DAVID WEIL, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION
(January 14, 2015) [Dkt. #23]

On December 22, 2014, I issued an Opinion and Order vacating the Third Party Employment provision of the Department of Labor's October 2013 regulations implementing the 1974 Amendments to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19, because the rule conflicted with the statute itself. Dec. 22, 2014 Mem. Op. ("Dec. 22 Op.") [Dkt. #21]; Dec. 22, 2014 Order [Dkt. #22]. Before me now is another challenge by the same plaintiffs[1] to a different part of the same Labor Department regulations. Specifically, plaintiffs seek to vacate the Department of Labor's narrowed definition of "companionship services," Section 552.6 of the new rule, promulgated in 78 Fed. Reg. 60,557, and to be codified at 29 C.F.R. § 552.6.

On December 24, 2014, plaintiffs moved for emergency injunctive relief to keep Section 552.6 from coming into effect on January 1, 2015. Emergency Mot. for

[1] Plaintiffs here are Home Care Association of America, International Franchise Association, and National Association for Home Care & Hospice (together, "plaintiffs"), and defendants are David Weil, in his official capacity as Administrator of the United States Department of Labor's Wage and Hour Division; Thomas E. Perez, in his official capacity as the Secretary of the Department of Labor; and the Department of Labor itself (together, "defendants" or "the Department"). Compl. ¶ 1 [Dkt. #1].

Temporary Stay of Agency Action and Req. for Expedited Consideration ("Pls.' Mot.") [Dkt. #23]. I granted a Temporary Restraining Order on December 31, 2014, staying the regulation from going into effect for fourteen days. Dec. 31, 2014 Order [Dkt. #26]. On January 8, 2015, having reviewed the parties' extensive briefing, I consolidated plaintiffs' motion for a preliminary injunction with consideration of the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). Jan. 8, 2015 Order [Dkt. #30]. The following day, I heard oral arguments from the parties on the merits of plaintiffs' case, construing plaintiffs' emergency motion as a motion for summary judgment on the merits. *See Morris v. District of Columbia*, No. 14-cv-0338, 2014 WL 1648293, at *2 (D.D.C. Apr. 25, 2014). After consideration of the parties' pleadings, the arguments of counsel, the relevant law, and the entire record in this case, plaintiffs' motion is GRANTED and the Department's revised companionship services regulation currently scheduled to go into effect on January 15, 2015, is VACATED.

BACKGROUND

This matter arises out of the same statutory and regulatory background described more fully in my December 22, 2014 Opinion. *See* Dec. 22 Op. at 2-7. It concerns the second prong of a two-prong attack on an exemption from paying overtime and minimum wages: the companionship services exemption of the FLSA, codified at 29 U.S.C. § 213(a)(15). I vacated the first prong, the third-party employer exemption, two weeks ago. *See* Dec. 22 Op. The second prong, of course, is the rewritten "companionship services" definition. The companionship services exemption prevents employers, whether third-party or not, from being required to pay minimum and overtime wages to

"any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15).

The Department of Labor's implementing regulations promulgated in the aftermath of the 1974 Amendments defined companionship services as follows:

> As used in section 13(a)(15) of the Act, the term "companionship services" shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services.

40 Fed. Reg. 7405. The definition further specified that companionship services could include limited general household work, not to exceed 20 percent of total weekly work hours, but that it did *not* include services "which require and are performed by trained personnel, such as a registered or practical nurse." *Id.* This definition remained unchanged for the past 40 years.

In October 2013, however, after engaging in a full notice-and-comment rulemaking process, the Department issued a Final Rule revising its domestic service employment regulations at 29 C.F.R. Part 552. 78 Fed. Reg. 60,454 ("new rule" or "new

regulation"). The new rule, with the exception of those provisions challenged by plaintiffs, went into effect on January 1, 2015.[2] *Id.*

Together with the eradication of the exemption for third-party employers, the Department issued a new, significantly-narrowed, definition of companionship services, Section 552.6 of the regulation. "As used in section 13(a)(15) of the Act, the term companionship services means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself." 78 Fed. Reg. 60,557 (§ 552.6(a)). Although the new definition included the provision of care, the care provided had to be attendant to, and in conjunction with, the provision of fellowship and protection and it could *not* exceed 20 percent of the total hours worked per person and per workweek. *Id.* (§ 552.6(b)). "Care," as defined by the new regulation, is assistance with "activities of daily living" like dressing, feeding, and bathing, as well as assistance with "instrumental activities of daily living" that allow the client to live independently at home, like driving and meal preparation.[3] *Id.*

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[2] *See* pages 2 to 7 of my earlier opinion tracing the chronology up to and after the Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). Dec. 22 Op. at 2-7.

[3] The Department's new regulatory definition reads in full:

> § 552.6 Companionship services.
>
> (a) As used in section 13(a)(15) of the Act, the term companionship services means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. The provision of fellowship means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events. The provision of protection means to be present with the person in his or her home or to

Plaintiffs are trade associations that represent third-party home care providers that employ millions of workers and provide approximately 90 percent of the services within the scope of the Department's long-standing definition of "companionship services." Compl. ¶¶ 9-11; Dec. 22 Op. at 16. However, the majority of their services would fall outside of the confines of the new, narrower definition. Pls.' Mem. in Supp. of Emergency Mot. for Temp. Stay of Agency Action at 5 ("Pls.' Mem.") [Dkt. #23-1].

In their Complaint, filed in June 2014, plaintiffs challenged both the new companionship services definition, Compl. ¶¶ 34-39 (Counts III and IV), and the Department's third-party employment regulation addressed in my previous opinion, *id.* ¶¶ 26-33 (Counts I and II). Plaintiffs have requested that I vacate both of the challenged

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> accompany the person when outside of the home to monitor the person's safety and well-being.
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> (b) The term companionship services also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The provision of care means to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).
>
> (c) The term companionship services does not include domestic services performed primarily for the benefit of other members of the household.
>
> (d) The term companionship services does not include the performance of medically related services provided for the person. The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants; the determination is not based on the actual training or occupational title of the individual performing the services.

78 Fed. Reg. 60,557.

provisions of the Department's new rule and enjoin the Department from enforcing them. Compl. at 15 (Prayer for Relief).

Until I vacated the third-party employment regulation on December 22, 2014, however, the third-party employers that comprise plaintiffs' associations were not permitted to "avail themselves" of the companionship services exemption, so changes to its definition would have no direct impact on plaintiffs' members. This new regulatory scheme, as envisioned by the Department, would require third-party employers to pay overtime and minimum wages to those providing services to the elderly and disabled regardless of whether or not those services were encompassed within the new definition. Plaintiffs contend that because they were concerned about their standing to challenge this narrowed definition, they did not move in August for summary judgment on the companionship services challenge when they sought relief on the third-party employment regulation. Pls.' Mem. at 9. But now that third-party employers maintain their ability to utilize the statutory exemption, the regulatory definition of "companionship services" will have a huge impact on plaintiffs' member organizations—as well as other employers and the clients the home care workers serve.

Thus, two days after my December 22, 2014, Opinion and Order vacating the new third-party employment regulation, plaintiffs filed an emergency motion seeking a temporary stay of the effective date of the revised companionship services definition. Pls.' Mot. They now argue that this new, narrower, regulation defining companionship services violates the language and legislative intent of FLSA Section 13(a)(15) because it "remov[es] 'care,' for all practical purposes, from the regulatory definition." Pls.' Mem.

at 3-4. They further contend, in essence, that this new definition would have the very same impact on the industry as the third-party employment regulation I just vacated, by effectively repealing the statutory exemption. Pls.' Mem. at 3.

Notwithstanding their public pronouncement of non-enforcement of this regulation for six months, 79 Fed. Reg. 60,974-75, the defendants declined to agree to a voluntary stay of the new definition's effective date. Pls.' Mot. at 1. Thus, with the January 1, 2015, effective date looming, I heard oral argument on December 31, 2014, granted a two-week temporary restraining order, Dec. 31, 2014 Order, and set an expedited briefing schedule for a preliminary injunction, Dec. 31, 2014 Docket Entry. After reviewing the Department's opposition and the plaintiffs' reply, I decided to consolidate the preliminary injunction hearing with consideration of the merits of plaintiffs' challenge to the definition. Jan. 8, 2015 Order. The parties were provided an opportunity to supplement their briefs should they deem it necessary, *id.*, which the Department did, Defs.' Supplemental Brief [Dkt. #31], and I heard oral argument on January 9, 2015. Jan. 9, 2015 Docket Entry.

LEGAL STANDARD

On the merits, plaintiffs' motion is one for summary judgment on the administrative record. "Summary judgment is an appropriate mechanism for resolving cases involving administrative rulemaking on the record, particularly where, as here, the case turns chiefly on issues of statutory construction." *Indiv. Reference Servs. Grp., Inc. v. FTC*, 145 F. Supp. 2d 6, 22 (D.D.C. 2001) *aff'd sub nom. Trans Union LLC v. FTC*, 295 F.3d 42 (D.C. Cir. 2002); *see Troy Corp. v. Browner*, 120 F.3d 277, 281 (D.C. Cir.

1997). Under Rule 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

ANALYSIS

Plaintiffs challenge an agency regulation promulgated through notice-and-comment rulemaking, so I must apply the familiar two-step *Chevron* analytical framework. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). At the first step, "the question [is] whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If it is clear, Congressional intent must be given effect. *Id.* at 842-43. A court "employ[s] traditional tools of statutory construction," *id.* at 843 n.9, including examination of the statute's text, legislative history, structure, and purpose, *Bell Atl. Tel. Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997), to determine Congressional intent.

"[I]f the statute is silent or ambiguous with respect to the specific issue," the agency is entitled to deference. *Chevron*, 467 U.S. at 843. If Congress explicitly delegates to an agency the authority to resolve an ambiguity or fill a gap, the agency's regulations doing so "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. If an agency regulates under an implicit delegation of authority, a court must uphold the agency's interpretation unless it is unreasonable. *Id.*

The companionship services exemption applies to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). There is, to be sure, ambiguity in the meaning of the term "companionship services," and Congress has explicitly delegated authority to the Department to define the term. But that does not grant it a blank check to do so in a way that contradicts the Act itself.[4]

The statutory language of the exemption makes clear that companionship services are services provided to elderly and disabled individuals who "are unable to care for themselves." *Id.* Now the Department is attempting to issue a regulation that would write out of the exemption the very "care" the elderly and disabled need, unless it were drastically limited in the quantity provided so as to be of little practical use.

In light of the statutory language, this case is resolved at *Chevron* Step I.[5] Although Congress has not defined the outer bounds of companionship services, it has

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[4] The Department points to a phrase from my December 22, 2014, Opinion in which I recognize that Congress delegated to the Department authority to define the term "companionship services": "'[t]he Department, appropriately, has filled those [statutory] gaps through regulations, including revised definitions for . . . "companionship services."'" Defs.' Opp'n to Pls.' Req. for Preliminary Injunction at 1 ("Defs.' Opp'n") [Dkt. #27] (quoting Dec. 22 Op. at 11-12) (alterations in defendants' brief). The Department neglects, however, to mention the footnote appended to the end of the sentence from which it pulls its quote, in which I explicitly note that "[t]he Department's effort to narrow the scope of those exempted services through its new changes to the regulatory definitions of statutory terms is not before me at this point." Dec. 22 Op. at 12 n.9; *see also id.* at 7 n.7 (recognizing that "[p]laintiffs also challenge the new rule's revised 'companionship services' definition in their Complaint, Compl. ¶¶ 34-39, but that issue is not before the Court"). No one—Court or plaintiffs—disputes that it is appropriate for the Department to issue a regulation defining "companionship services," or even that it may revise that regulation. But that definitional authority remains bounded by the statute the regulation implements, and is irrelevant when it comes to issues on which Congress has spoken.

[5] Even if one were to take the Department's position that the explicit delegation of authority to define "companionship services" automatically moves the question along to the second step of *Chevron*, where the agency is entitled to deference, *see* Defs.' Opp'n at 17, the distinction is academic. It is "manifestly

spoken on the precise issue presented here, which is whether that definition must include, in a meaningful way, the provision of care. The answer is yes. There are ambiguities in the statute, but this is not one of them. The exemption clearly targets workers who provide services to those who need care. Indeed, what services could possibly be required more by those "unable to care for themselves" than *care* itself? Limiting that care to only 20 percent of a worker's total hours defies logic,[6] and Congressional intent.

The Department repeatedly titles companions "elder sitters" and likens them to babysitters. *See* Defs.' Opp'n at 19-23. The legislative history indicates that this analogy was indeed in the minds of legislators at the time of the exemption's passage. *See, e.g.*, 119 Cong. Rec. at 24,801 (Statements of Sen. Burdick and Sen. Williams). But what the Department does not seem to realize, however, is that this analogy actually supports plaintiffs' position. Babysitters—good ones, at least—do not simply sit and stare at their charges, ready to call for assistance if something should go wrong. And their duties can extend far beyond playing games or making conversation. Babysitters provide care—assistance with activities of daily living and instrumental activities of daily living—to the extent the children they are watching are unable to care for themselves. A babysitter, particularly one sitting for an infant or toddler, often is responsible for feeding, bathing, and changing the clothes and diapers of the child. Babysitters regularly prepare food for

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contrary to the statute," *Chevron*, 467 U.S. at 844, to define the "companionship services" term of this statute as including such a stringent limitation on a companion's ability to provide care.

[6] The Department, apparently, chose 20 percent as the limit because it had used that number as a limit in other FLSA regulations, 78 Fed. Reg. 60,467-68—not because of any relationship to clients' needs or the way services are provided.

their charges and drive them to places they cannot reach on their own. If the Department believes otherwise, its staff needs to spend some more time with children!

It is important to note, as I did in my previous Opinion, that Congress did *not* limit the companionship services exemption to services provided on a "casual basis," as it did for its babysitter exemption within the very same statutory provision. 29 U.S.C. § 213(a)(15); *see* Dec. 22 Op. at 13. Indeed, when discussing the companionship services exemption in particular, legislators expressed their concern with the ability of their constituents to pay for in-home care provided on a regular basis.[7] 119 Cong. Rec. 24,797-98 (1973) (statements of Sen. Dominick and Sen. Johnston).

Home care workers have been providing care to the elderly and disabled, under the umbrella of the companionship services exemption, since the enactment of the 1974 Amendments. Here, I am once again faced with a long-standing regulation left untouched by Congress for 40 years. *See* Dec. 22 Op. at 16. Congress has made numerous changes to the FLSA exemptions—including, notably, the addition of a

[7] The Department focuses on Congress's goal in expanding FLSA protections to domestic employees via the 1974 Amendments, but for the most part ignores the reality that Congress also had reasons for exempting certain categories of workers from that expansion. Defs.' Opp'n at 18-19. Defendants emphasize a statement in the Congressional committee reports to argue that "Congress sought to 'include within the coverage of the Act *all* employees whose vocation is domestic service.'" Defs.' Opp'n at 18-19 (quoting Senate Report No. 93-690, p. 20 (1974)) (emphasis added by defendants); *see also* House Report No. 93-913 (1974). They appear to believe that Congress made its decisions where to draw exemption lines by looking only at whether the workers at the time considered their work to be their vocation, rather than at what type of work was being done by each category of employee and the circumstances of their employment. That cannot be true, when one of the categories Congress exempted was *live-in* domestic workers! It strains credulity to contend that Congress believed that all workers who reside in the household in which they are employed do not consider their work to be their vocation. And although Congress did observe that "[p]eople who will be employed in the excluded [casual babysitting and companionship services] categories are not regular bread-winners or responsible for their families' support," Senate Rep. No. 93-690, p. 20 (1974); *see also* House Report No. 93-913, such an observation regarding the then-current state of the labor market indicates neither why Congress exempted companionship providers, nor that a future change in the state of the industry would warrant a change in what services an exempt companion may provide.

definition of "fire protection activities" into the statute at 29 U.S.C. § 203(y), specifically to clarify the meaning of the overtime exemption codified at 29 U.S.C. § 213(b)(20). Act of Dec. 9, 1999, Pub. L. No. 106-151, § 1, 113 Stat. 1731 ("An Act To amend the Fair Labor Standards Act of 1938 to clarify the overtime exemption for employees engaged in fire protection activities."). But Congress has not shown one iota of interest in cabining the definition of companionship services, which has been interpreted by the Department the same way for 40 years. Indeed, not a single one of the six bills introduced in Congress after the Supreme Court's decision in *Coke* addressed the definition of "companionship services." *See* Dec. 22 Op. at 5-6, 17. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

Thus, I cannot help but conclude that Congress's intent in 1974 to exempt from minimum and overtime wage requirements domestic workers providing services, including care to the elderly and disabled, is still as clear today as it was forty years ago. Here, yet again, the Department is trying to do through regulation what must be done through legislation. *See* Dec. 22 Op. at 17 and n.12. And, therefore, it too must be vacated.

CONCLUSION

Millions of American families each day struggle financially to care for their loved ones who are either too elderly or infirm to care for themselves. Congress is now, and has been, keenly aware of that struggle for many decades. Indeed, as the baby-boomer generation gets older, that struggle will be shared by an ever-increasing number of families. The exemption Congress has provided third-party employers and individual families with respect to minimum and overtime wages has been, and is, a central component of Congress's effort to insure that as many of those families as possible will be able to survive that struggle. While the Department of Labor's concern about the wages of home care providers is understandable, Congress is the appropriate forum in which to debate and weigh the competing financial interests in this very complex issue affecting so many families. Redefining a 40-year-old exemption out of existence may be satisfyingly efficient to the Department of Labor, but it strikes at the heart of the balance of power our Founding Fathers intended to rest in the hands of those who must face the electorate on a regular basis.

Thus, for all of the foregoing reasons, plaintiffs' motion for summary judgment [Dkt. #23] is GRANTED. Accordingly, the United States Department of Labor's regulation defining "companionship services," promulgated in 78 Fed. Reg. 60,557 and to be codified at 29 C.F.R. § 552.6, is hereby VACATED. An appropriate order shall accompany this Memorandum Opinion.

RICHARD J. LEON
United States District Judge

APPENDIX F

AFFIDAVIT OF BRUCE DARLING

I, Bruce Darling, hereby swear or affirm that the following statement is true, based upon personal knowledge.

1. I serve as a national organizer with ADAPT. ADAPT is a national grass-roots community that organizes disability rights activists to engage in nonviolent direct action, including civil disobedience, to ensure the civil and human rights of people with disabilities to live in freedom. I have organized with ADAPT for 29 years. As part of ADAPT, I have testified before the Senate Finance Committee on how public policy could be changed to allow seniors and people with disabilities to live in the community rather than forced into nursing facilities and other institutions.
2. Since 1990, ADAPT has worked to end the institutional bias in Medicaid. The institutional bias refers to the predisposition in Medicaid to force people with disabilities and seniors into institutional settings in order to receive personal assistance and long term services and supports. A significant aspect of that bias is the federal requirements that Medicaid must fund institutional settings to provide services and supports to people with disabilities and seniors. Medicaid does not mandate that services and supports be provided in home and community based settings, but rather, only offer this as an option, despite the 1999 Supreme Court ruling that people with disabilities have a right to receive services and supports in community settings, and despite the fact that most people prefer to live independently in their own homes in their communities.
3. ADAPT has been gravely concerned about the Department of Labor (DOL) changes to the Fair Labor Standards Act (FLSA) companionship services and live-in exemptions because the changes will reinforce the institutional bias and have significant negative impact on people with disabilities.
4. I submitted an Affidavit in this case when it was pending before the U.S. District Court. In that Affidavit, I indicated that the rules would trigger direct and irreparable harm to both consumers of personal care services and their personal care attendants. Specifically, I stated that the rules would increase institutionalization of people with disabilities and seniors, reduce attendant wages, reduce the attendant workforce available to those in need of their services, disrupt the continuity of attendant services, undermine the health and safety of people with disabilities, and undermine the body integrity of people with disabilities.
5. That prediction of harm is already coming true. Employers of attendants financed under Medicaid are capping hours that the attendants are allowed to work, leaving individuals with disabilities and seniors without necessary continuity of care and searching for alternatives to their longstanding personal attendant services. For example, just days after the issuance of the Court of Appeals decision, companies providing home attendant services in the New York Medicaid program notified their clients and employees that services of any one employee would be limited to 40 hours per week. (Exhibit A). Such action is detrimental to the health and safety

of individuals with disabilities and seniors. It also reduces the wages of attendants while increasing the difficulties already existing in finding and employing personal services attendants.

6. Medicaid has provided no assurances that personal attendant services will continue uninterrupted to those receiving the services. In many cases, Medicaid beneficiaries who receive long term services and supports have received these services for many years from the same attendant. That continuity of care will now be lost as a result of changes necessitated by the DoL rules. While New York Medicaid has taken some preliminary steps to mitigate the harm triggered by these rules, that action will not secure continued access to necessary attendant services for the majority of New York's Medicaid beneficiaries.
7. Notwithstanding the preliminary steps toward mitigation taken by New York Medicaid, the DoL rules threaten to violate the rights of people with disabilities in every state. Many states are responding to the additional costs imposed by the DoL rules by cutting hours or programs, just as ADAPT predicted in its public comment to DoL. For three examples: the Kansas Department for Aging and Disability Services is in the process of eliminating night supports for people who require 24-hour care; the Texas Department of Aging and Disability Services released a memo in the Spring of 2015 instructing agencies to cut attendants' hours to 39 ½; and Arkansas has responded to the DoL rules by enforcing a 40 hour limit on attendant hours. These foreseeable responses to the DoL rules undermine the DoL's stated purpose of increasing wages for attendants, and violate the rights of people with disabilities at the same time.
8. Based on my 29 years of experience advocating for independent living and community integration of people with disabilities, the implementation of the DoL rules will cause irreparable harm, including institutionalization and death, of thousands of people with disabilities and seniors in New York alone and many more across the country. In addition, for those individuals still in their own homes, it will be increasingly difficult, if not impossible, to find attendants to provide these services as their incomes will drop significantly as their work hours are capped in order for their employer to avoid or minimize overtime compensation costs in a system where the payment rates are not set by the employer and do not adjust on a timely basis or at all with new costs.

I hereby swear under penalties of perjury that the foregoing statement is true and accurate. Sworn to in Rochester, NY this 9th day of September, 2015.

Bruce Darling

AFFIDAVIT

I, William A. Dombi, hereby swear or affirm in the District of Columbia that the following statement is true, based upon personal knowledge:

1. I serve as Vice President for Law of the National Association for Home Care and Hospice (NAHC), one of the Plaintiffs in the pending action captioned Home Care Association of America v. Weil, No. 1:14-cv-00967 (D.D.C.). NAHC is a trade association, along with its affiliate the Private Duty Home Care Association of America, which represents the interests of over 6,000 companies that provide home care services through over 2 million dedicated employee caregivers. I am also familiar with the membership of the other Plaintiffs in this action, the Home Care Association of America and the International Franchise Association.

2. All of the Plaintiffs have many members that employ workers currently subject to the Fair Labor Standards Act (FLSA) companionship services and/or live-in domestic services exemptions. Section 552.6 of the new Rule of the Department of Labor (the "Department") that redefines "companionship services," if allowed to go into effect on January 1, 2015, will directly, permanently, irreparably, and adversely impact the business and client interests of the Plaintiffs' members. The purpose of this Affidavit is to provide sworn evidence of such harm, in support of Plaintiffs' Emergency Motion for Temporary Stay of Agency Action. Comments previously filed by the Plaintiffs that are already part of the Administrative Record are incorporated by reference herein.

3. Many of Plaintiffs' members currently provide care that has long been deemed to be an integral part of "companionship services" under the statutory exemption for such services and the Department's longstanding enforcement of that exemption in the current 29 CFR 552.6. The purpose of such caregiving is to meet the Activities of Daily Living (ADL) needs of their clientele. The core business of these members is personal care and personal care support to the elderly and persons with disabilities that is needed for these clients to stay in their own homes and outside an institutional care setting. These services would not meet the revised definition of "companionship services" set out in the revised section 552.6 as such is set out in 78 Fed. Reg. 60,454 (October 1, 2013) as the new definition limits personal care and housekeeping tasks to no more than 20 percent of the hours worked by the employee. Because personal care is integral to companionship, such caregiving services cannot as a practical matter be confined to the Department's newly restrictive 20 percent standard. Essentially, the Department's changed definition makes the "companionship services" exemption under the FLSA inapplicable to the businesses of Plaintiffs' members and thousands of other public and private employers employing more than 90% of all companionship employees.

4. The harm that the change in the definition of "companionship services" will have on the interests of Plaintiffs' members takes many forms. If the challenged rule takes effect on January 1, 2015, then home care companies will be required for the first time to make significant changes in their operations, client service, employment practices, compensation management, client relations, payer relations, referral

source relations, and the manner in which the business operate within the systems of support for persons in need of home care. None of the costs associated with these drastic changes will be recoverable from any known source. 5. More specifically, home care business will suffer irreparable economic and significant noneconomic harm if the new definition of companionship services goes into effect on January 1, 2015. This harm includes, but is not limited to:

a.) lost goodwill in the businesses' relationships with clients, client referral sources, government funding organizations, managed long term services and supports (MLTSS) organizations, health care providers in the continuum of care, and workers who provide personal care services in clients' homes as home care becomes a less reliable care and employment setting with higher costs, operational restrictions, barriers to access to care, increased inflexibility in service scheduling and caregiver assignment, compromised care quality, and care gaps;

b.) compromised business relationships with other stakeholders in home care that will consider the businesses to be unreliable or inconsistent sources of care;

c.) a shift in long term care policy under such state programs as Medicaid, the State Units on Aging, Centers for Independent Living, and veteran's programs that will no longer view home care as a viable and comprehensive care option for their constituents thereby leading to a shift towards institutional or congregate living care settings rather than an individuals' private home;

d.) business closures and lost revenues; and

e.) dramatic changes in business systems, structures, operations, human resource management, and focus triggered by the new definition of "companionship services" that cannot be easily or efficiently reversed in the event that the rule is ultimately determined to be invalid.

6. In part the foregoing irreparable harm inflicted by the new Section 552.6 will result from harms befalling Plaintiffs' members' elderly and infirm clients, which in turn will cause them to suffer declines in goodwill toward the caregiving employers who will no longer be able to fulfill the consumers needs at affordable costs. In this regard, the new definition of companionship services" will:

a.) reduce care options for individuals in need of personal care and personal care supports. For example, home care consumers will no longer be able to receive continuous services from a single caregiver as working hours will be capped to control overtime compensation costs. In

addition, short term 24 hour respite care will be less available because of the inability of home care businesses to provide affordable care;

b.) create confusion and stress for consumers of home care as multiple, part-time caregivers replace full-time caregivers;

c.) increase the risk of quality of care shortcomings as worker turnover increases due to capped working hours leading to new, inexperienced workers;

d.) care will be acquired through "underground" services wherein consumers bypass care subject to quality and state regulatory controls and purchase care from unregulated, unsupervised individual caregivers;

e.) expand the waiting time to begin services as there will be increased difficulties in recruiting and training caregivers; and

f.) increase costs for care to a point where it will be unaffordable by some in need of home care. In turn, this will increase the risk of institutionalization of those individuals.

7. Home care workers will also be adversely affected, a fact that will again result in irreparable harm to Plaintiffs' member employers who rely on their home care workers to perform valuable caregiving services. The harm expected to be suffered by these workers includes, but is not limited to:

a.) reduced wages as working hours are capped by employers to avoid overtime costs;

b.) lost employment as the workforce is shifted to a part-time workforce, displacing those who want to need to work more than 40 hours per week:

c.) lost employment as the employer terminates operations because of an inability to adjust to the new compensation requirements:

d.) lost opportunity to continue in a career as a caregiver as the level of available compensation is insufficient to meet the individual's cost of living; and

e.) the need to take on multiple, part-time home care jobs to replace the work hours lost due to working hour caps imposed solely to control overtime costs.

8. The adverse impacts referenced above are already emerging, particularly in state Medicaid programs that are grappling with changes that are needed to avoid or reduce the financial impact of the new definition of "companionship service." Medicaid does not provide for coverage of the type of service that is considered "companionship services" under the new 29 CFR 552.6 as that new definition focuses on "fellowship." Instead, Medicaid programs provide coverage of beneficiaries who need personal care support in the home. See, 42 CFR Sections 440.70 (Home Health Services); 440.167 (Personal Care Services); 440.180 (Home and Community Based Waiver Services); 440.181 (Home and Community based Services for Individuals 65 and Over); and 440.182 (State Plan Home and Community Based Services). None of these Medicaid benefits cover "fellowship services" as defined in the new 29 CFR 552.6.

9. State Medicaid programs are in the midst of changes that will significantly modify their home care programs, affecting home care clients, workers, and businesses. These programs are looking at increasing payment rates as a last resort as state funds are not readily available to cover the new cost of overtime for personal care services that is outside the new definition of "companionship services." These programs do not provide coverage of fellowship services, the function that becomes the dominant (80%) element in the new definition of "companionship services." Concern about the impact of the new rule on Medicaid programs is highlighted by the recent joint letter from the U.S. Department of Justice and the Office of Civil Rights of the U.S. Department of Health and Human Services warning state Medicaid programs that the new rule may drive states to take steps that could violate the Americans with Disabilities Act (ADA). Currently, state Medicaid programs provide payment for personal care provided to an estimated 5 million Medicaid beneficiaries across the country under one or more of the programs referenced in paragraph 8.

10. In response to concerns raised by state Medicaid programs along with other government-based home care programs, the U.S. Department of Labor issued a policy action that provides for a time-limited (6 months at least) non-enforcement policy on the new rule. However, since that policy action does not affect the risk of private enforcement of the new rule, these programs are struggling for ways to comply, specifically for ways to avoid new costs. As a result, the impacts described in paragraphs 5, 6, and 7 are taking hold as January 1, 2015 approaches.

11. At this point, it is a rare Medicaid program that has instituted any adjustments to address or accommodate the cost of overtime compensation to personal care workers whose functions fit the current

definition of "companionship services," but will not fit the new definition that takes effect on January 1, 2015. The vast majority of Medicaid home care programs have taken no action that will allow employers of personal care aides to comply with the new overtime obligations that will be triggered by the new definition of "companionship services." If that new definition goes into effect on January 1, 2015, these employers will have virtually no other choice than to limit working hours of caregiver staff, restrict admissions of new clients and patients, or close down operations as the Department of Labor's policy action of a time-limited non-enforcement of the new rule still leaves these employers vulnerable to a private enforcement action.

11. With respect to services that are purchased by clients on a private pay or commercial insurance basis, home care companies already report that clients are terminating services rather than face higher charges for care, and employees are departing their employment in favor of other types of work rather than face new limits on hours worked.

12. The pace of changes outlined above is expected to accelerate after January 1, 2015 as more employers and payers recognize that the Department of Labor's temporary non-enforcement policy on the new rule provides no certain protection from overtime compensation obligations.

I hereby swear under penalties of perjury that the foregoing statement is true and accurate. Sworn to in Washington, D.C.

December 24, 2014

William A. Dombi

William A. Dombi

Dated: December 24, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOME CARE ASSOCIATION OF AMERICA, et al Plaintiffs, v. DAVID WEIL, et al Defendants.	Case No. 1:14-cv-00967

AFFIDAVIT OF BRUCE DARLING

I, Bruce Darling, hereby swear or affirm that the following statement is true, based upon personal knowledge:

1. I serve as a national organizer with ADAPT. ADAPT is a national grass-roots community that organizes disability rights activists to engage in nonviolent direct action, including civil disobedience, to ensure the civil and human rights of people with disabilities to live in freedom. I have organized with ADAPT for 28 years. As part of ADAPT I have testified for the Senate Finance Committee on how public policy could be changed to allow seniors and people with disabilities to live in the community rather than be forced into nursing facilities and other institutions.
2. Since 1990, ADAPT has worked to end the institutional bias in Medicaid. The institutional bias refers to the predisposition in Medicaid to force people with disabilities and seniors into institutional settings in order to receive personal assistance and long term services and supports. A significant aspect of this bias is the federal requirement that Medicaid must fund institutional settings to provide services and supports to people with disabilities and seniors. Medicaid does not mandate that services and supports be provided in home and community based settings, but rather, only offers this as an option, despite the 1999 Supreme Court ruling that people with disabilities have the right to receive services and supports in community settings, and despite the fact that most people prefer to live independently in their own homes in their communities.
3. ADAPT has been gravely concerned about the Department of Labor (DOL) changes to the Fair Labor Standards Act (FLSA) companionship exemption because the

changes will reinforce the institutional bias and have a significant negative impact on people with disabilities.

4. In 2012, ADAPT organized a campaign, DOL Off MY Body, at www.DOLOffMyBody.org, opposing the companionship exemption rule changes, detailing the harm that will come to people with disabilities and attendants when these changes take effect on January 1, 2015. The significant harm that the companionship exemption changes impose includes:

    a. Increased Institutionalization

        i. Increasing the cost of home and community based services by requiring overtime and travel pay, without increasing the Medicaid rates, will result in a reduction in hours of personal assistance. This will force some people with disabilities into institutions. In its own findings, the DOL identified that some people would be forced into institutions because of the rule changes.

        ii. These changes will most seriously impact people who have the most significant disabilities and rely on Medicaid services to live in the community. These individuals are the ones most at risk of institutionalization.

        iii. Forcing people with disabilities and seniors who can live independently in the community into institutions as a result of the rule changes will be a violation of their rights under the *Olmstead* decision.

    b. Reduction in Attendant Wages

        i. The FLSA changes will reduce the take-home pay of attendants. Because Medicaid and Medicare rates are not being increased to cover the additional cost associated with the rule changes, states and home care agencies will be forced to limit the hours attendants can work to 40 hours per week because there will be no funds to pay for overtime. Many attendants currently work over 40 hours per week, often for the same individual who requires more hours of services. There is a strong bond between attendants and the people they serve. Requiring overtime without additional funding will cause attendants to lose wages as states and home care agencies will be forced to cap hours at 40 per week. Attendants will then have to find additional jobs to maintain their current income level.

ii. People with disabilities have already begun receiving notices that their attendants' hours will be capped at 40 hours per week. See Appendix A.

iii. Attendants have already begun receiving notices that their hours will be capped at 40 hours per week, or that they must agree to take a pay cut in order to maintain the hours they currently work.

c. Reduction in the Attendant Workforce

i. The FLSA changes will reduce the attendant workforce. Family and friends frequently work as attendants in consumer directed programs. These attendants would not otherwise provide attendant services. If these attendants have their hours capped, instead of taking on additional consumer directed clients to sustain their income, they will leave the field to pursue other job opportunities where they can maintain or increase their income. Consequently, the overall home care system will lose hours and workers.

ii. Other attendants, who are not family or friends, but are unable to maintain their current standard of living, will leave the field. This has already begun.

iii. Under the new rule, attendants – whether friends and family or not – may not simply be able to work for a different consumer to make up the hours they will lose. The rule requires the attendant to be paid for overtime whenever he works more than 40 hours for any joint third-party employer. In most consumer directed models, the fiscal intermediary is almost certainly a joint third-party employer, which will mean that the attendant will not be able to work for over 40 hours for the same fiscal intermediary, even if that is the only agency providing such services in the area. In addition, the State itself, as administrator of Medicaid, may also be a joint third-party employer under the rule, which will mean that attendants in those states will not be able to work over 40 hours at all.

iv. The DOL rule will cause attendants to seek other kinds of work. Many attendants currently work more than 40 hours per week, due to the shortage of attendants as well as the relationships that attendants and consumers develop over time. With attendant hours capped in response to this rule, attendants will lose up to 40% of their income at a single stroke.

v. This effect is already occurring: attendants are being deprived of their income and driven out of this workforce, while people with

disabilities, and seniors, are being deprived of services and supports that enable them to live in our homes and communities.

vi. There is already a shortage of attendants. The FLSA rule changes will only exacerbate this issue by forcing attendants out of the field to pursue work opportunities that will allow them to maintain their standard of living.

d. Disruption in the Continuity of Attendant Services

i. People with disabilities, and seniors, will be forced to hire new attendants for either of two reasons. First, because their attendants are not able to work the full amount of hours that they previously worked (such as an attendant that works 60 hours a week who is then capped at 40 hours per week). Second, because their attendants have left the field completely (such as an attendant that works 60 hours a week who is told she will be capped at 40 hours a week, and in response quits being an attendant to take a different job in order to maintain her income level).

ii. The interruption in continuity of care resulting from this rule will disrupt and change the lives of people with disabilities in innumerable ways. People with disabilities will no longer have uninterrupted, consistent service delivery from attendants who know our needs and can skillfully work with them, and who can provide ongoing accurate observation.

iii. This rule also places in jeopardy the trusting relationship between an attendant and an individual with a disability. To use one example, a consumer, Mary, used to be in a nursing facility where she was abused. Mary has since moved into the community and has received services from the same attendant, Jane, for over a decade. Mary and Jane are not simply in an employer-employee relationship, but have developed a close friendship. Mary has become part of Jane's family: Jane's daughter, Michelle, has begun offering attendant services to Mary as well. Jane, Mary, and Michelle and their families celebrate holidays together, and the Jane's grandchildren exchange gifts with Mary. This month, Jane and Michelle were both told that their hours would be capped at 40, or their wages would be cut to keep costs within the current Medicaid rate. Even if Mary could find other attendants to make up the attendants' hours, the needless loss of these relationships will affect the lives of these people in profound ways. Mary will have to hire a stranger – if she can even find one – to assist her with

activities of daily life such as feeding, using the toilet, bathing, and transferring to and from her own bed.

e. Undermine the health of people with disabilities.

   i. Unfilled shifts and lack of continuity in attendant care will result in healthcare problems for the individuals with disabilities and seniors who rely on attendant services. Without consistent attendant services, people with disabilities and seniors can and will quickly and easily develop urinary tract infections, skin breakdowns, pneumonia, and other life threatening medical conditions. Some people will die as a result of the gaps in assistance.

f. Undermine the safety of people with disabilities.

   i. People with disabilities are more likely than any other group in society to be victims of personal violence. Furthermore, elder abuse is on the rise in America. Replacing trusted, long-term workers with new workers puts individuals with disabilities and seniors at a higher risk of abuse.

   ii. Attendants often have keys to the homes and access to the most intimate documents and details of the people they serve. Replacing trusted, long-term workers with new workers also puts some individuals with disabilities at risk of theft, property damage, and identity theft.

g. Undermine the body integrity of people with disabilities

   i. The FLSA changes will force people with disabilities to bring strangers into their homes. DOL dismissed this concern, noting that in home care turnover is often high. However, there are many attendants and consumers – some of whom are friends and family – who have worked together for years or even decades. With the hours that trusted attendants may work capped, people with disabilities will be forced to bring strangers into their homes to assist them with their most personal care, including showering, toileting, and dressing.

5. The harm from the rule changes is already starting – attendant hours are being capped and individuals with disabilities and seniors are struggling to find new attendants. With just six days until the rule changes take effect, many people with disabilities and seniors are unable to find new and additional attendants to provide the services they need to live independently in the community due to the overall shortage of attendants

which has been exacerbated by this rule change necessitating capping the hours attendants may work.

6. Because Medicaid rates have not increased to cover the mandated overtime, the burden falls to the states to provide the funds to pay attendant overtime – if the state chooses to do so at all. The vast majority of states do not have plans to pay for the changes. By the time DOL issued the guidance on the rule's impact on the states, states had already finished their annual budget processes. In states that have two-year budget cycles, like Texas, the budget process will not even begin until after the effective date of the rule changes. Not only have states not had the opportunity to rewrite their Medicaid budgets in response to this rule, but in many cases states do not even know how to adjust to the rule because they have not had any reason to collect overtime or travel time data before now.

7. DOL has acknowledged the detrimental impact the rule changes will have on the Disability Community. In response to this impact the DOL announced a six month non-enforcement policy for the new rule. This non enforcement policy will not mitigate the impact of the rule changes. Individual workers can still sue to enforce the new rules. Furthermore, by contract, home care agencies are required to comply with labor laws and regulations, whether or not those regulations are being enforced.

8. Based on my 28 years of experience advocating for independent living and the community integration of people with disabilities, including my knowledge and experience with Medicaid home and community based services, I have concluded that the civil rights of people with disabilities to live in the community will be violated by the rule changes and the lives of people with disabilities and attendants will be detrimentally impacted. This conclusion is supported by the harmful effects that are already occurring, including the capping of attendant hours and the struggle to find new attendants. In six days, thousands of people with disabilities, and seniors, will be at risk of institutionalization, personal harm, and death. Furthermore, in six days, attendants will be losing parts of their income as their hours are capped.

I hereby swear under penalties of perjury that the foregoing statement is true and accurate. Sworn to in Rochester, New York.

Bruce Darling

Signed this 24th day of December, 2014.

HEALTHCARE SERVICES.

June 9, 2014

VIA FIRST CLASS MAIL

Dear Consumer or Self Directing Other:

I write on behalf of Maxim Healthcare Services, Inc. ("Maxim") regarding upcoming changes within the Consumer Directed Personal Assistance Program ("CDPAP"). Minimum wage will soon increase, while New York State Medicaid reimbursement rates have decreased. These cuts and other changes (including overtime changes to the Fair Labor Standards Act) will impact many of the consumers we collectively serve in New York. These changes will also impact Maxim, our employees, as well as numerous other healthcare providers. Maxim does not generate the kind of operational results that would allow absorption of these additional costs.

As a result, we are in a position where we must make adjustments to some of our wage and hour practices. **Effective December 28, 2014, Maxim will not allow employees in the CDPAP program to work overtime.** In the rare circumstance where overtime cannot be avoided, Maxim will pay in accordance with applicable law. However, **after 12/27/14, employees should no longer be scheduled to work more than 40 hours in a workweek.** Moreover, with the increases in minimum wage, we will need to adjust some of our rates as well Before any change goes into effect, you and any assigned caregiver will be provided advance notice of any new pay rate. Please ensure that your caregivers are advised of the changes.

This was a very difficult decision to make, but necessary for Maxim to continue to service our consumers and employ our staff in the state of New York. We truly appreciate your business and your commitment to the Maxim CDPAP. Please contact me with any questions about the Fair Labor Standards Act or NYS minimum wage changes at (888) 476-8525. You may also contact your local Maxim office.

Sincerely Yours,

Ray Donovan
State Program Director
New York State Consumer Directed Personal Assistance Program

Maxim of New York/Consumer Directed Personal Assistance Program
Email: radonova@maxhealth.com Address: 150 State Street Suite 140 Rochester, New York 14614

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOME CARE ASSOCIATION OF AMERICA, et al Plaintiffs, v. DAVID WEIL, et al Defendants.	)	Case No. 1:14-cv-00967

AFFIDAVIT OF KELLY BUCKLAND

1. My name is Kelly Buckland. I am over the age of 18 and I understand the obligations of an oath.

2. I am the Executive Director of the National Council on Independent Living (NCIL). I have served in this position since 2009.

   A. Prior to becoming the Executive Director of NCIL I served for over twenty years as the Executive Director of the Boise Center for Independent Living and the Idaho State Independent Living Council. I have worked on issues affecting the independent living of people with disabilities, including the passage of the Personal Assistance Services Act. I have testified before Congress several times on independent living issues and has been closely involved with the direct-service and systemic change aspects of the Independent Living movement.

   B. I am person with a disability and I use attendant services to live independently in the community. In 1970, I experienced a spinal cord injury. In 1974, I was forced into a nursing facility because there were no home and community based services available. Since then, I have moved out of that nursing facility, earned a Bachelor's and Master's degree, and led successful organizations for over thirty years. I would not be able to live independently and successfully in the community without attendant services.

3. NCIL is the longest-running national, cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals, including individuals with disabilities, Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), and other

organizations that advocate for the human and civil rights of people with disabilities throughout the United States.

4. During my service as the Executive Director of NCIL, the Council has represented people with disabilities who are living independently in the community, and those in nursing facilities and institutions who want to live independently in the community.

5. NCIL also represents 403 Centers for Independent Living across the nation. CILs are community-based, cross-disability, non-profit organizations that are designed and operated by people with disabilities. CILs are unique in that they operate according to a strict philosophy of consumer control, wherein people with all types of disabilities directly govern and staff the organization. CILs have been at the forefront of transitioning people with disabilities back into the community from nursing facilities and institutions. This was formalized in the Workforce Innovation and Opportunity Act of 2014 which added transition as the fifth core service that CILs provide.

6. The goal of NCIL and all CILs is to advance the civil rights and independent living of people with disabilities. We accomplish this by advocating for appropriate services and supports for people with disabilities to live in the community instead of being imprisoned in nursing facilities and institutions against their will and in violation of their civil rights.

7. NCIL has expressed grave concerns about changes to the Fair Labor Standards Act (FLSA) definition of companionship. The Department of Labor's changes to the Companionship Exemption rule in the FLSA will impose significant harm to people with disabilities when the rule goes into effect on January 1, 2015, including:

    A. People with disabilities in the community will be at risk of institutionalization. People with disabilities who use attendant services to live in the community will be at risk of institutionalization because the requirement to pay attendants overtime without additional Medicaid funding to cover those costs will result in a loss of attendant services.

    B. Attendants will lose hours and income, and will leave the attendant workforce. The requirement to pay attendants overtime without additional Medicaid funding will cause states, home care agencies, and consumer directed fiscal intermediaries to prevent attendants from working over 40 hours per week. As a result, attendants that regularly work over 40 hours per week will lose income when their hours are capped. This loss of income will cause attendants to seek other opportunities for work outside of the attendant workforce.

    C. People with disabilities will experience a disruption in their continuity of care which will lead to negative health consequences. When their trusted attendants' hours are capped, people with disabilities will be forced to hire new attendants to

cover the additional hours. Given the shortage of attendants, people with disabilities may not be able to find an attendant and will experience a gap in services. If people with disabilities are able to find new attendants, the new attendants will not be familiar with the person's body, needs, and routines. In either circumstance – a gap in services or a new, unfamiliar attendant – the person with a disability is at risk of serious negative health consequences from not receiving the appropriate supports and services.

D. People with disabilities will have a more difficult time maintaining their independence and self-sufficiency. Many people with disabilities are employed and may be privately paying for assistance. Although individuals would be able to claim the exemption, the proposed changes so significantly narrow the permissible tasks of exempt companions that virtually anyone who needs personal assistance would find that the exemption would not apply to them.

E. Traveling with an attendant will be unaffordable. People with significant disabilities currently pay an attendant for a block of time while traveling for work or vacation. The FLSA changes will require that people with significant disabilities pay significantly more for that assistance. This would have a number of negative consequences, as people with significant disabilities may no longer be able to:

   i. Travel long distances for medical and rehabilitative services (as in rural, frontier and tribal communities);

   ii. Visit an frail or dying relative, participate in a family reunion, or travel to visit out-of-town family during the holidays;

   iii. Participate in state and federal committees, commissions and task forces, to testify in person at their state legislatures, and to otherwise be present when decisions and policy about their lives are being made; and

   iv. Attain professional advancement because they could not take on responsibilities that require significant travel or participate in out-of-town training.

F. Access to services in rural, frontier, and tribal communities will be even more limited than it is now. There is a shortage of a traditional attendant workforce in these communities where consumer directed services provided by family and friends has filled the gap. The FLSA changes will cause the hours of these workers to be capped and worsen the workforce issues.

G. Veterans receiving Aid and Attendance benefits will be harmed. Aid and Attendance benefits is cash paid directly to the veteran with a service connected disability who meets a certain level of need. Veterans may use the money to supplement the household income so a spouse can provide assistance or pay other family members who do not live with the veteran to provide the assistance the veteran needs. Currently, veterans can claim the companionship exemption in meeting their needs, but because the DOL has severely limited the tasks that an exempt companion may do, the exemption becomes almost entirely irrelevant.

8. DOL did not consider the consistency between consumer directed services and Congressional intent regarding the exemption. The Congressional Committee on Education and Workforce's Subcommittee on Workforce Protections held a hearing on "*Ensuring Regulations Protect Access to Affordable and Quality Companion Care.*" At the hearing, Nancy Leppink, on behalf of DOL, noted that the reason for the original "carve out" of companionship services was because companions "were typically friends, neighbors, or fellow parishioners of the individual receiving the companionship services, performing the services in those roles and not as employees engaged in a vocation." These workers performed the services for the purpose of providing care to their specific friend or family member; not as typical employees engaged in a vocational path toward health care services. The DOL's description of the original "carve out" is consistent with consumer directed services. In a consumer directed model, the majority of attendants are not focused on career paths and professionalization, but rather are focused on providing transfers, meal preparation, and suctioning to, for example, their cousin, so the cousin does not have to go into a nursing facility.

9. NCIL envisions a world in which people with disabilities are valued equally and participate fully. Sadly, our vision of equality has not yet been fully realized. Many people with disabilities remain imprisoned in nursing facilities and our civil rights laws are undermined and devalued on an increasing basis. On January 1, 2015, the FLSA changes pertaining to companionship will only further undermine our civil rights and devalue our lives by taking away our attendant services, causing our health to deteriorate, and forcing us into nursing facilities.

On this 24th day of December, 2014, I hereby swear under penalties of perjury that the foregoing statement is true and accurate. Sworn to in Fairfax, Virginia.

Kelly Buckland

AFFIDAVIT OF KARI BRUFFETT

My name is Kari Bruffett. I am over 18 years of age, of sound mind, and I have personal knowledge of and swear to the facts stated below:

1. I am currently employed as the Secretary of the Kansas Department for Aging and Disability Services (KDADS).
2. In this capacity, I lead a cabinet-level agency that is responsible for overseeing and administering the state's Older Americans Act programs, behavioral health programs, home and community based services (HCBS) for older adults and persons with disabilities, the management and oversight of four state hospitals, survey and certification for adult care homes, and the distribution of Medicaid long-term care payments.
3. I am concerned that definitional changes to the companionship services definition have created a landscape of uncertainty and have the potential to disrupt services and supports for thousands of our most vulnerable Kansans.

Factual History of the Companionship Exemption as Applied to Kansas

4. Until December 31, 2014, "companionship services" is defined as fellowship, care and protection for a person who because of advanced age or mental or physical infirmity cannot care for his or her own needs, and these services have been exempt from the Fair Labor Standards Act for the past forty years.
5. This allowed many Kansas Home and Community Based Services (HCBS) individual consumers to self-direct their care by providing the consumer the ability to hire workers of their choice, including family members and friends, and schedule them to meet their needs without the restrictions of a traditional forty hour workweek.

6. This helped self-directing consumers recruit and maintain workers by offering flexibility. It also helped limit the number of people coming in and out of a consumer's home to provide companionship services to the consumer.
7. The current definition allows cost-effective supports like sleep-cycle support to be paid on a per night basis, rather than per hour.
8. The administrative side of self-direction is handled by a Financial Management Service (FMS) provider with funding provided by the state through Managed Care Organizations (MCOs).
9. The DOL Final Rule will have significant adverse effects on individuals in Kansas who receive in-home services, on the providers of those services, and on the state's current system for delivering the services.
10. The new rule will affect approximately 11,000 individuals, or 42 percent of the Medicaid participants in Kansas who self-direct personal attendant care and home based services in their homes. These are individual consumers with intellectual and developmental disabilities, physical disabilities and the frail elderly, all of whom can continue to live in their homes and home communities with these services. We believe a majority of these individuals will be negatively impacted by the new rule.
11. In August of 2014, I sent a letter to the US Department of Labor Secretary Thomas Perez requesting exemption for Medicaid-funded populations or a delay in implementation to allow the State to engage consumers, families, providers and stakeholders around the possible changes in services and impact to vulnerable Kansans. Other states have requested similar changes and/or delays. Definitional changes will have a

disproportionate effect on robust in-home programs that serve the frail elderly and people with disabilities.

The DOL Final Rule Definitional Changes Remove "Care" from the Exemption for Aging and Disabled Individuals leading to Adverse Consequences.

12. On January 1, 2015, the companionship services definition will be replaced with a definition that removes one critical word—"care".

13. On January 1, 2015, companionship services will be limited to fellowship and protection. Companionship services can include the provision of care, but only if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per work week.

14. Under the new definition, if more than 20 percent of the work performed in a work-week is for activities for daily living and instrumental activities for daily living, the consumer cannot claim the exemptions.

15. Additionally, the rule creates uncertainty about what is considered medically related services and therefore not available for exemption. The changes to the definition are too broad and cover duties that are not required to be performed by a nurse or medical professional under many state laws, including those of Kansas.

16. The current service plans that were developed with and approved by consumers in the context of current law do not identify services as fellowship or protection. Services are typically weighted to activities for daily living and what DOL under the new definition may consider medically related services.

17. The definitional changes could affect key services, including sleep-cycle support, which is currently covered by the exemption. Sleep-cycle support provides non-nursing physical assistance and/or supervision during the consumer's normal sleeping hours in the

consumer's place of residence. Sleep-cycle support helps 1,400 Kansans remain in their homes. To maintain current sleep-cycle services under the new rules, it is estimated to cost more than $30 million in all funds, or $21,428 per consumer.

18. The definitional and rule changes threaten to undo a decade's worth of effort by the State to maintain disabled individuals in the least restrictive environment necessary to meet their needs.

Adverse Consequences resulting in Irreparable Harm

19. The rule as written is unclear for aging and disabled individuals. Consumers are concerned about proposed changes that could go into effect sometime on or after January 1, 2015. Hundreds of letters, emails and phone calls have poured into the state over the last six months from self-advocates, parents, guardians, family members, and service providers who are uncertain and uneasy about what impact the changes will have on their everyday lives.

20. Concerns have been voiced about the lack of clarity as to how the new rule will be enforced, what factors will have the most impact, and if a parent taking care of an adult child will have to be paid overtime when providing "care," as newly defined, for their child.

21. FMS providers, unsure of the impact of the new rule and DOL's plan or process to enforce the rule, are unsure if they will be able to continue to provide services as of January 1, 2015, or if they should notify consumers that they will be responsible for overtime wages for their workers.

22. The new rule would increase the administrative burden on consumers and their families. Currently, each Kansas consumer is provided care by, on average, 1.5 workers. Proposed

changes may necessitate additional service providers to fulfill the requirements specified in consumers' plans of care. This would increase the management burden on self-directed consumers and lead to continuity-of-care concerns.

23. The new rule has the potential to create critical workforce shortages in Kansas. Providing adequate staffing already presents a challenge across the entire state. The impact of the rule will affect the ability of consumers to find qualified staff, especially in sparsely populated, rural and frontier communities.

24. The rule would negatively impact Kansas small businesses and the infrastructure that supports and provides services to aging and disabled individuals in Kansas.

25. Financial Management Service providers support consumers with payroll services, information and assistance. Because of the uncertainty, some of the providers have notified the State that they may no longer be able to provide services after January 1, 2015.

26. Implementing the rule, even in part, while the central issues remain in dispute, places States, consumers, providers, and stakeholders in unnecessary limbo.

27. The DOL Final Rule, in its entirely, if not vacated, will work strongly against Kansas efforts at maintaining individuals in the least restrictive environment necessary to meet their needs and preventing consumers from entering more restrictive institutional settings. I support the Plaintiffs' Motion to Stay the effective date of the DOL Final Rule until the issues have been fully briefed.

I declare under penalty of perjury under the laws the United States of America that the foregoing is true and correct.

Kari Bruffett
Secretary for the Kansas Department for Aging and Disability Services

STATE OF KANSAS)
)
COUNTY OF SHAWNEE)

SUBSCRIBED AND SWORN to before me, this 24th day of December, 2014.

MICHELLE E. MILLER
NOTARY PUBLIC
State of Kansas
MY APPT EXPIRES 8-10-15

Michelle E Miller
Notary Public

My appointment expires:

8-10-15

AFFIDAVIT OF AL CARDILLO

I, Al Cardillo, swear or affirm that the foregoing is true and accurate.

1. I am the Executive Vice President of the Home Care Association of New York ("HCA") based in Albany, New York. HCA is a not-for-profit trade association that represents nearly 300 home health care providers operating throughout the State of New York. HCA members are certified home health agencies, licensed home care services agencies, long term home health care programs, managed long term care plans and hospices that provide a range of nursing, therapy, home health aide, personal care and other services to thousands of individuals every day.

2. In my capacity as Executive Vice President of HCA, I am directly involved in legislative and regulatory policy developments that affect Medicaid home care services. That involvement includes, but is not limited to, regular discussions with state and federal Medicaid officials, members of the state legislature and their staff, and the state's governor and staff.

3. I am very familiar with and engaged in, along with other HCA staff, the U.S. Department of Labor rule that revises the definition of "companionship services" under 29 CFR 552.6. This changed definition is a major departure from the longstanding definition that included unrestricted personal care work by home care employees.

4. Without adequate funding and other required support to home care agencies and managed care plans, the revised definition of "companionship services" and its application in the context of New York State Medicaid home and community-based services will have a significant and adverse impact on home care agencies providing Medicaid personal care services along with the consumers of home care services, the home care company employees providing personal care services, and the Medicaid program itself.

5. The New York State Medicaid program has yet to be able to calculate or determine how to incorporate the impact of the overtime compensation obligations triggered by the changes to 552.6. Further, a postponement of or delay in the effective date of those changes will have no negative impact on any efforts of New York State Medicaid program to date to incorporate the impact of the new rule into its home care program operations.

6. Absent requisite funding and other support, implementation of 29 CFR 552.6 poses serious adverse risk to patient access and continuity of care, home care agency operations and employment opportunity and compensation of direct care/companionship workers, especially as the state Medicaid program has yet to be able calculate or incorporate the amount of funds needed to implement the compensation obligations resulting from that rule change. At this point, home care agencies will have the overtime obligations and have no indication that any remedies will be made available through Medicaid.

7. HCA and HCA provider members strongly support measures to improve agency reimbursement and related measures to support home care aide working conditions and compensation levels. We have been steadfastly advocating state and national measures for this purpose, including our continued opposition to federal reimbursement cuts which function in direct contradiction to the Department of Labor's goals with the new rule.

8. Realizable support for workers and services requires commensurate federal and state coverage of agency mandates, costs and related service delivery implications.

9. HCA has discussed with the state Medicaid agency, the New York State Department of Health (DOH), dating back to 2013 and prior, the consequences of the US Department of Labor's rule change and need to address its associated service delivery and reimbursement effects. To date, the Department continues working to determine how the state will respond to the new rule, and how best to managed implementation within the home care agency and as well as emerging home care-managed care service systems.

10. Thus far, the Department, even with such extended lead time, has not yet been able to calculate the expected cost and service delivery impacts of the rule, and thus is still not decided how it will respond, let alone how to best guide or direct providers, managed care plans and others to address the impact of the rule.

11. In the absence of funding and related reimbursement guidance, providers and managed care plans remain in a quandary as to managing the rule's impact on continuity of service arrangements for patients, workers and their own operations.

12. Implementation of the revised 552.6 changes are further complicated by the state's near total transition of Medicaid home care recipients into managed care. This model shift has created new patterns and jurisdiction for service planning, authorization and reimbursement that do not lend themselves to nimble response

to mandates, new directives or costs. Under this new paradigm, providers, which employ the workers and are responsible for direct care of the patients, have extremely limited ability to self-adjust to mitigate the effects of the rule, as managed care plans now have jurisdiction over payment rates and service authorization. Managed care plans are similarly limited by their existing obligations under state/provider contracts and reimbursement premium levels.

13. Effective January 1, 2015, patients, workers, providers, and managed care plans are being swept into still further, massive change, with the state requiring the transition of the majority of its Medicare-Medicaid dual population into fully capitated managed care plans. This transition will create still further complications for sorting out authorization, payment and delivery issues, making the implementation of the Labor Department's rule change all the more difficult.

14. There are many outstanding Medicaid administrative issues related to the new 29 CFR 552.6, including:

    a. The state has not calculated the cost impact and therefore the requisite rate adjustments necessary to support implementation.

    b. Even if calculated, the state may lack the authority under current regulation and statute to adjust home care agency reimbursement rates to reflect the added cost of the rule change, and would likely require at least statutory change.

    c. It is our understanding that no action has been taken to date to adjust managed care premiums to cover plan/provider cost of the new rule, and moreover the state is still in the process implementing its *April 2014 - March 2015* rate package for managed long term care plans, let alone calculate and implement a revision to these premiums adjusted to the new rule

    d. Providers and managed care plans are still awaiting promised rate adjustments to cover costs for other new state-level home care worker wage mandates effective March 1, 2014.

    e. Implementation of the rule may trigger provider and managed care plan need to renegotiate contracts to adjust for the cost of the new rule; further,

without price/cost estimates, or state premium adjustments, there is not a yet a basis upon which to reset the contracts.

15. The state has discussed the possibility of setting-aside some funds ($5 million for the period January 1 to June 30, 2015) for implementation; but thus far, this would only be for overtime payment of assistants providing consumer directed personal assistance programs providing services to managed care enrollees, and would still be subject to inclusion in the 2015-16 state budget which has yet to be proposed and would not be enacted for months. Meanwhile, the state Consumer Directed Personal Assistance Program (CDPAP) association has estimated the impact of the new rule at $20 million (not $5 million) for CDPAP alone.

16. Estimates are that the state's $5 million allotment for consumer directed services would cover only about only 15 percent of the total personal care cases served in the state, and does not address the other 85 percent of recipients in the home care/managed care system.

17. The state has not yet established a method for calculating the increased Medicaid costs due to changes in the overtime rate of pay. The state has reached out to HCA and LeadingAge NY, a trade association representing home care providers, managed long term care plans, nursing homes, adult day programs and other entities, for input. To date, no other definitive action has been taken.

18. A delay in the implementation of the revised 29 CFR 552.6 would have no adverse impact on the progress made to date by the state Medicaid program. Since that progress to date does not permit providers the opportunity to afford the cost of overtime, a delay of the rule would actually benefit the state along with Medicaid clients, workers, and providers of care and avoid hastily crafted responses that would pose risks to all stakeholders.

I hereby swear under penalty of perjury that the foregoing state is true and accurate. Sworn to this 7 day of January, 2015 in Albany, New York.

Al Cardillo

Al Cardillo

AFFIDAVIT OF JACQUIE DILLARD-FOSS

I, Jacquie Dillard-Foss, swear or affirm that the following is true and accurate;

1. I am the Chief Executive Officer of S.T.E.P. (Strategies to Empower People), a California based organization dedicated to providing a wide range of support services to adults with developmental disabilities. I have worked at S.T.E.P. since 1992 and have worked on behalf of people with disabilities since 1987.
2. I am also the co-chair of the Government Affairs Committee of the California Supported Living Network. The Network is a statewide organization of people and agencies committed to the belief that every Californian with a developmental disability has the right to live in a home of their own with the supports needed to live the life that they choose.
3. S.T.E.P. believes in Person Centered Planning and that our focus for each individualized program must be based on the person's unique needs. STEP has built a reputation for providing specialized support services. STEP is possibly best known for its Deaf and Deaf/Blind services. We strive to provide an environment of total communication and have made a commitment to hiring Deaf support staff and management to better meet the unique needs of our Deaf individuals. There is a cultural understanding and connection at STEP that enables services to be truly tailored to a Deaf individual's needs. We have a working relationship with Helen Keller National Center. STEP also works closely with the California School for the Deaf in Fremont and hosts tours to provide transition information to individuals and their families.
4. S.T.E.P. also serves a large number of medically fragile people with physical disabilities such as CP (Cerebral Palsy). We have worked to develop critical relationships with the local medical community to enable us to provide quality services to people with very complex medical needs.
5. STEP is also known for providing services to people with behavioral challenges. We believe that behavior is communication and take an individualized approach to service provision. We have invested in behavior and communication training for our staff and have developed our own training entitled R.E.S.P.E.C.T.

6. STEP has a very low turnover rate for people we support, and has consistently increased the number of people for whom we provide support. The people we support come from various ethnic backgrounds. STEP embraces cultural diversity and values the contributions made by everyone. STEP provides services to transitioning from state developmental centers and various institutional environments. STEP also works closely with family members and stakeholders. We are proud of the relationships we have developed over the years and feel this is an area of strength for the agency.

7. In my capacity as CEO of S.T.E.P. and as co-chair of the Government Affairs Committee of the California Supported Living Network, I am knowledgeable about the impact that the changes to the Fair Labor Standards Act (FLSA) rules governing "companionship services" will have in our ability to provide services and the role of community living support providers have in meeting the needs of individuals with developmental disabilities in California. I have been actively engaged in policy analysis of the impact of California state legislation that altered overtime compensation of some home care company employers in 2014 as well as the impact of the new 29 CFR 552.6 on the providers of community support services in the state.

8. Overall, it is very apparent that the changes to the definition of "companionship services" under 29 CFR 552.6 and the resulting obligation for the payment of overtime compensation to personal care workers will have a serious, adverse impact on S.T.E.P., the clients we serve, as well as the workers providing care. One significant reason for that adverse impact is that the state of California Medicaid program, known as MediCal, has not taken adequate steps to ensure care continuity, sufficient reimbursement to cover new overtime costs, and consumer choice for care in their own homes.

9. Further, the changes in 29 CFR 552.6 have had and will continue to have serious and likely irreparable negative consequences to the reputation and perceived value of S.T.E.P. as an organization available to support individuals with developmental disabilities. Already, the operation of S.T.E.P. has changed because of 29 CFR 552.6 resulting in a deterioration in our ability to meet our mission. That has and will result in a deterioration of S.T.E.P.'s standing in the spectrum of health care and supportive services before our client's, their families, referral sources, and providers of health care.

10. A recent survey conducted by the California Supported Living Network, confirms that the impact of 29 CFR 552.6 changes on S.T.E.P. are mirrored within other similar organizations throughout California. It is my information that a program located in San Francisco closed operations in late December 2014 because it concluded it could not operate within the constraints triggered by the section 552.6 changes.

11. The survey found:

    a. Approximately 10,000 people in California receive Supported Living Services
    b. MediCal provides the majority of funding for the personal care services needed by those persons
    c. The 2015 MediCal budget includes a 5.82% ($20,238,170) increase to Supported Living Services to offset the impact of the change in 29 CRFR 552.6. However, the estimated cost increase is 15% ($52,160,233) leaving an unfunded cost increase of $31,922,063
    d. As a result of the unfunded cost increase, 95% of Supported Living Services providers report that they have stopped accepting referrals for consumers with complex needs

requiring extended hours of care until the implications the rule change are fully known and addressed by MediCal.

e. 95% of providers report that they are reviewing overtime considerations for consumers with complex needs to determine if service discontinuation may be necessary because of unsustainable costs and inadequate reimbursement

12. Caregiving employees of Supported Living Services providers indicate that a requirement of overtime compensation for work in excess of 40 hours per week is not helping them because their employer will be forced to restrict the amount of hours worked. These workers also express that hey believe a shift to restricted working hours negatively affect the persons with disabilities they work for as multiple shift changes will lead to the person being confined to their home as workers come and go throughout a day.

13. Any delay in the application of 29 CFR 552.6 will benefit supported living clients and their personal caregivers while preventing irreparable harm to the standing of Supported Living Services providers in the spectrum of caregiving needed by persons with disabilities.

14. A delay in the application of 29 CFR 552.6 will have no negative impact on any progress that the sate Medicaid program can make towards finding ways to allow for a continuation of the services that 10,000 Californians depend on every day. The action of the state to date indicates that MediCal still has a long way to go before the critical services we provide can continue. As such, a delay will actually be of great benefit in the states efforts to determine where the best solutions lie and how to implement them.

I hereby swear under penalty of perjury that the foregoing state is true and accurate. Sworn to this 7th day of January, 2015 in [illegible] California

Jacquie Dillard-Foss

AFFIDAVIT OF BRITTNEI SALERNO

I, Brittnei Salerno, hereby swear or affirm in the state of California that the following statement is true, based upon personal knowledge:

1. I am the President and CEO of La Jolla Nurses Homecare based in La Jolla, California. La Jolla Nurses Homecare provides a variety of services to the elderly and persons with disabilities in the San Diego area. Among the services provided is personal care.

   I also serve as the Past Chair and Current member of the Board of Directors with the California Association for Health Services at Home ("CAHSAH"), a trade association that represents over 1,000 organizations that provide home care services throughout the state of California.

2. In my capacity as the owner and head of a home care company as well as my position with CAHSAH, I am very familiar with the "companionship services" exemption under the federal Fair Labor Standards Act (FLSA) along with state law requirements applicable to the wages of home care employees in California.

3. Effective January 1, 2014, the State of California requires under AB 241 that personal care services workers employed by home care companies be paid overtime compensation for any hours worked in excess of 8 hours per day and45 hours in a work week. Prior to January 1, 2014, these workers were exempt from overtime compensation requirements and the State of California followed, generally, the "companionship services" exemption standards under the FLSA as well as the Personal Attendant Exemption contained in Wage Order 15, established by the Industrial Welfare Commission.

4. In 2014, CAHSAH conducted a survey of home care companies to evaluate the impact of AB 241, which requires overtime compensation for personal care employees working more than 45 hours in a week. It is my expectation that the revised 29 CFR 552.6 definition of "companionship services" will have impacts equal to or greater than that experienced as a result of AB 241 because section 552.6 affects work weeks in excess of 40 hours.

5. The CAHSAH survey evaluated the impact on home care companies, their workers, and the clients served by the home care companies.

6. The findings of the survey with respect to consumer impact include:
   a. The average number of clients dropped 12.9% as a direct result of the new overtime requirements

b. 84.7% of home care companies experienced a reduction in the hours of services purchased by clients to due to their efforts to mitigate overtime costs or hourly rate increases
c. 76.6% of home care agency clients lost their familiar, longtime caregiver due to a decreased purchase of service hours
d. 82.0% of home care companies reported that clients discontinued home care services as a result of the changes directly associated with the implementation of AB 241
e. Of the home care companies reporting client terminations, 91.3% reported that their clients terminated services because they could not afford the increased costs due to the overtime provision
f. 78.8% of home care companies reported clients terminated services because having multiple caregivers, or too many caregivers, was not a viable solution to their care needs

7. The findings of the survey with respect to worker impact include:
   a. 74.3% of home care companies report that the overall weekly pay rates to hourly employees have been reduced as a result of the overtime requirements in AB241
   b. 72.6% of home care companies report that they have stopped offering extended hour shifts to employees as a result of AB 241
   c. 64.1% of home care companies report that some employees lost their jobs because clients ended services as a result of AB 241
   d. 65.2% of home care companies report that some employees resigned as a result of shorter work shifts due to the overtime requirements of AB 241
   e. 94.0% of home care companies report that employees express dissatisfaction or problems with shorter hourly shifts. Of those employees reporting dissatisfaction:
      - 85.1% indicate it is difficult to continue working with the reduced overall compensation related to reduced work hours.
      - 80.7% report it is more difficult to make ends meet since the overtime requirements of AB 241 were implemented.
      - 90.4%have been forced to seek work elsewhere
      - 88.6% have been forced to work more days per week with multiple jobs
      - 69.3% the quality and stability of client care has worsened because more staff are handling care now.
      - 64.9% report shorter shifts and multiple caregivers have caused some clients to become more aggressive, combative, resistant and confused.
      - 81.6% report overall they make less now after the implementation of AB241.

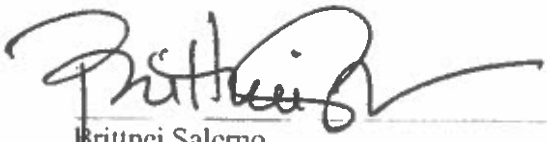
8. As a result of the problems experienced by clients and employees as set out in paragraphs 7 and 8, the survey found that the impact on home care companies includes:
   a. 68.1% report that the company has stopped provided extended hour shift care
   b. 84.6% of companies report that some of their clients terminated services and chose to hire caregivers directly

c. 72.6% of home care companies lost business when clients shifted to institutional care because of the increased care cost at home due to AB 241
d. 84.3% of companies report that referral sources directed clients to other models of care due to the overtime requirements under AB 241

9. The negative impacts on home care companies as a result of the overtime requirements under AB 241 have been irreparable in terms of relationships with clients, workers, and referral sources. Home care is no longer viewed as the same viable alternative to institutional care by clients and referral sources. Workers are increasingly disinclined to a career in home care as they view restrictions on working hours and the affect of such on overall compensation as unacceptable. In combination, home care providers standing in the spectrum of community care and health care has greatly diminished.

10. With the revised definition of "companionship services" under 29 CFR 552.6 the real, negative and irreparable impacts will be increased as home care companies are forced to operate in a marketplace where the companies' primary survival option is the shift to a part-time workforce. This shift in the industry's core business model may allow the companies to survive but only at the expense of client's opportunity to access affordable care, workers' opportunity for higher overall wages, and the industry's opportunities to be a fully available alternative to institutional care.

I hereby swear under penalty of perjury that the foregoing state is true and accurate. Sworn to this 7th day of January, 2015 in La Jolla, California.



Brittnei Salerno