No. 06-___

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in refusing to give deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to a thirty-year-old Department of Labor regulation—a regulation that has twice been upheld by the Tenth Circuit—on the ground that, even though it was promulgated under express grants of legislative authority and after full notice-and-comment rulemaking, the regulation was contained in a subpart headed "Interpretations."

2. Whether, in holding that a longstanding Department of Labor regulation was not persuasive and thus undeserving of any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Second Circuit erred by failing to address the governing provisions of the Fair Labor Standards Act and by declining to give any weight to the Department's interpretation of its own regulations.

RULE 29.6 STATEMENT

Petitioner Long Island Care at Home, Ltd. has no parent company, and there are no publicly held companies that hold any stock of Long Island Care at Home, Ltd.

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Petitioners Long Island Care at Home, Ltd. and Maryann Osborne respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-6a) is reported at 462 F.3d 48. The initial opinion of the court of appeals (Pet. App. 7a-32a) is reported at 376 F.3d 118. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 33a-48a) is reported at 267 F. Supp. 2d 332.

JURISDICTION

The judgment of the court of appeals on remand was entered on August 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the relevant regulations of the Department of Labor promulgated thereunder, 29 C.F.R. § 552.2 *et seq.*, are set forth at Pet. App. 65a-83a.

STATEMENT

This case involves a challenge to the validity of 29 C.F.R. § 552.109(a)—a regulation promulgated by the Department of Labor in 1975 after full notice-and-comment rulemaking—which declares that workers providing companionship services to the elderly and infirm are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act, *see* 29 U.S.C. § 213(a)(15) (providing exemption), even if they are employed by third parties rather than by the homeowner receiving care. Granting deference to the Department under the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the district court upheld the regulation. Pet. App. 33a-48a. The Second Circuit reversed, refusing to accord deference to the Department under either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7a-32a. After this Court vacated that decision, and remanded the case for consideration of further guidance provided by the Department, the Second Circuit adhered to its prior ruling and again held Section 552.109(a) to be unenforceable. Pet. App. 1a-6a.

A. The Statutory and Regulatory Framework

The issues in this case arise under certain provisions of the 1974 Amendments to the Fair Labor Standards Act (the

"Act"). *See* Pub. L. 93-259, 88 Stat. 55. Prior to the Amendments, workers were typically entitled to receive a specified minimum wage and enhanced pay for overtime only if they were employed by an "enterprise engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. §§ 206(a), 207(a). *See generally National League of Cities v. Usery*, 426 U.S. 833, 837-38 (1976); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 295 n.8 (1985). At that time, the Act defined such an enterprise as an enterprise that, among other things, had annual gross sales of at least $250,000. *See* 29 U.S.C. § 203(s)(1) (1976). The annual limit has since been doubled to $500,000. *See* 29 U.S.C. § 203(s)(1)(A)(ii).

In 1974 Congress broadened the Act to provide coverage for a particular class of workers: "Employees in domestic service." Unlike earlier provisions of the Act, the new Amendments defined the scope of coverage for domestic service workers primarily on the basis of the kind of work that they performed. Thus, Section 206(f) required payment of a minimum wage to "[a]ny employee—(1) who in any workweek is employed in domestic service in a household [if the employee's compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households, and (B) is so employed for more than 8 hours in the aggregate . . . ." 29 U.S.C. § 206(f). Similarly, Section 207(*l*) mandated enhanced overtime pay for "any employee in domestic service in one or more households [who is employed] for a workweek longer than forty hours . . . ." 29 U.S.C. § 207(*l*). *See also* H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2845 ("[i]t is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service").

Congress provided exemptions from coverage, however, for domestic service workers performing two specified jobs:

casual babysitting and companionship for the elderly and infirm. Section 213(a)(15) of the Act provides that the minimum wage and overtime provisions will not apply to "any employee employed on a casual basis in domestic service employment to provide babysitting services or 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 Act thus gave to the Department, in express terms, the authority to promulgate legislative rules to define and delimit the exemption provided by Section 213(a)(15). In addition, Congress conferred a general grant of rulemaking authority in the 1974 Amendments, stating that "the Secretary is authorized to prescribe necessary rules, regulations, and orders with respect to the amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76.

Pursuant to both of these express delegations of authority, *see* 40 Fed. Reg. 7405 (1975), the Department initiated a notice-and-comment rulemaking, which resulted in regulations subsequently published in the Code of Federal Regulations. *See* 29 C.F.R. §§ 516.34, 552.1-552.7, 552.101-552.110. The critical regulation for present purposes is Section 552.109(a), contained in a subpart headed "Interpretations," which declares that "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 40 Fed. Reg. 7407. Although the original proposed regulation had not exempted workers providing companionship services "if the third party employer is a covered enterprise," 39 Fed. Reg. 35,385 (1974)—based on the premise that the Amendments did not intend to exempt "previously covered domestic service employees" (*id.* at 35,395)—the Department altered its course upon further

consideration. Explaining the change, the Department noted that the language of the exemption in the Act did not exclude third party employers but applied "to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. 7405. The Department concluded that the final regulation was "more consistent with the statutory language and prior practices concerning similarly worded exemptions." *Id*.

At the same time that the Department promulgated Section 552.109(a), it promulgated another regulation, 29 C.F.R. § 552.3, which purported to define the term "domestic service employment." That regulation, contained in a subpart entitled "General Regulations," states that "[a]s used in section 13(a)(15) of the Act, 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." The regulation then goes on to provide an "illustrative and not exhaustive" list of the kinds of work considered to be "domestic service employment." 40 Fed. Reg. 7405. As explained in the regulation, that work includes services by employees such as "cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use." *Id*.

Section 552.109(a) has remained in force for more than 30 years. The Department has periodically proposed eliminating the exemption for employees of third party employers, *see* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5485, 5488 (2001), but, following various periods of comment, has invariably chosen not to do so. The most recent of these efforts took place five years ago when the Department, positing "an internal inconsistency" between Sections 552.109(a) and 552.3, sought to resolve it by limiting the exemption to workers employed by the person receiving care. *See* 66 Fed. Reg. 5485-86. The Department ultimately

withdrew the proposed change, however, after numerous commentators stressed the severe economic impact that would result. *See* 67 Fed. Reg. 16,668 (2002).

B. This Litigation

1. Respondent, a worker employed by petitioner Long Island Care at Home, Ltd. to provide companionship services, brought this "test case" (Pet. App. 9a) challenging the application of Section 552.109(a) to workers employed by persons or entities other than the homeowners receiving care.[1] Finding that the regulation was entitled to "strong deference" under *Chevron*, 467 U.S. at 844, *see* Pet. App. 46a, and pointing to the "explicit grant of authority to the [Department of Labor] to define and delimit Section 213(a)(15)," as well as "the fact that these regulations have been in effect for over twenty-eight years," Pet. App. 46a, the district court held that Section 552.109(a) was a legitimate exercise of the Depart-ment's authority. Pet. App. 46a.

The Second Circuit reversed. Proceeding on the basis that "[b]ecause the [Fair Labor Standards Act] is a remedial act, its exemptions are to be narrowly construed," Pet. App. 10a (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)), the court refused to accord *Chevron* defer-ence to Section 552.109(a), deeming it "an interpretive rather than a legislative regulation." Pet. App. 26a. Although the court of appeals acknowledged that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," Pet. App. 26a (quoting *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993)), it held that the regulation did not merit *Chevron* deference under the test set out in *United States v. Mead Corp.*, 533 U.S. 218,

[1] Respondent also challenged the validity of 29 C.F.R. § 552.6, which defines the term "companionship services." The Second Circuit upheld Section 552.6, *see* Pet. App. 15a-22a, and it is not at issue in this petition.

226-27 (2001), because the Department "did not intend to use the legislative power delegated in [29 U.S.C.] § 213(a)(15) when it promulgated § 552.109(a)." Pet. App. 26a.[2] It found that lack of intention to be "most apparent from its inclusion of the regulation under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations.'" Pet. App. 26a.[3] It thus concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a.

The Second Circuit then went on to reject the argument, made by the Department of Labor in an *amicus* brief, that Section 552.109(a) warranted deference as a legislative rule under *Chevron* because it had been "promulgated after notice and comment . . . ." Pet. App. 27a. Although the court recognized that "*Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference," Pet. App. 27a (citing *Mead*, 533 U.S. at 230-31), it found no need to do so for a regulation that it had already classified as an "interpretive rule." Based on that characterization of Section 552.109(a), the Second Circuit dismissed the importance of the notice-and-comment procedure by saying that "the agency undertook a notice and comment procedure for an interpretive

[2] The Court in *Mead* held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27.

[3] The Second Circuit found additional support in the Secretary's statement that "[t]he definitions required by section 213(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c); *see* Pet. App. 26a.

regulation despite the fact that the procedure was not required." Pet. App. 27a.[4]

The Second Circuit also declined to give deference to Section 552.109(a) under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Addressing "Congressional purpose," the court, without reviewing any statutory language, took the view that "persons who were employed by a third party were outside the category of 'domestic service employees' and were protected by the [Act] before the 1974 amendments," Pet. App. 29a (citations omitted), and that "[i]t is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered." Pet. App. 30a. The court of appeals also placed considerable weight on what it regarded as a "stark internal inconsistency" between Section 552.3 (the regulation defining "domestic service employment") and Section 552.109(a), Pet. App. 30a, finding that "[p]lainly, under § 552.3, employees employed by third parties do not qualify for the exemption" that Section 552.109(a) grants to them. Pet. App. 30a. Finally, the court pointed to the fact that the Department had proposed elimination of the exemption for third party employees on several occasions, deeming its position "hardly . . . a model of consistency," Pet. App. 30a, and questioning both the Department's reasoning and procedural regularity in adopting Section 552.109(a) in the first place. *See* Pet. App. 30a-31a.

2. Petitioners filed a petition for certiorari, raising, among other issues, the failure of the Second Circuit to accord *Chevron* deference to the regulation, and emphasizing the

[4] The Second Circuit recognized that the Tenth Circuit, affording *Chevron* deference, had upheld the validity of Section 552.109(a). *See* Pet. App. 25a (citing *Johnston v. Volunteers of America, Inc.*, 213 F.2d 559, 562 (2000), *cert. denied*, 532 U.S. 1072 (2001)). Saying that *Johnston* had been decided before *Mead*, the Second Circuit declined to follow it. *See* Pet. App. 25a.

substantial harm likely to be caused by its invalidation. *See* Petition for A Writ of Certiorari, No. 04-1315. Submitting a brief by invitation, the United States stated that the decision of the Second Circuit was contrary to several decisions of this Court (including *Mead* and *Auer v. Robbins*, 519 U.S. 452 (1997)) and conflicted with decisions of the Tenth Circuit (*Johnston* and *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004)). U.S. Br. at 9, 15. The United States also argued that the decision was "inconsistent with the plain terms of the FLSA, which strongly support the construction adopted by DOL in Section 552.109(a)," and, as evidenced by the *amicus* briefs filed in support of the petition, "will have a significant and disruptive impact on the provision of government-funded home care to elderly and disabled individuals." *Id*. It informed the Court that "[f]or those reasons, and because of the important and recurring nature of the questions raised in the case, it would be appropriate for this Court to grant the petition for a writ of certiorari to review the [deference question]." *Id*. However, noting that the Department of Labor had recently offered "authoritative agency guidance" making clear that it intended "Section 552.109(a) to be an exercise of its expressly delegated legislative authority," *id*. (citing Wage and Hour Advisory Memorandum No. 2005-1), the Solicitor General recommended that the Court vacate the judgment and remand the case to the Second Circuit for consideration of the Department's position. *See* U.S. Br. at 9-10.[5] The Court then granted the petition, vacated the judgment, and remanded the case "for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005)." 126 S. Ct. 1189 (2006).

On remand, the Second Circuit adhered to its original rulings. With respect to *Chevron* deference, it again concluded,

[5] The Advisory Memorandum, reprinted at Pet. App. 50a-64a, also set forth guidance regarding the proper reading of Section 552.3. *See* Pet. App. 54a-63a.

"for substantially the same reasons," that "§ 552.109(a) was not intended, at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule." Pet. App. 3a. Finding "arguments to the contrary presented in the DOL Memo" to be "not persuasive," Pet. App. 3a, it said that, even if the Department regarded Section 552.109(a) as "legally binding," Pet. App. 3a, the regulation "could have been simply intended to provide guidance to DOL employees as to how the agency planned to interpret 'domestic service employment' in the third-party employer context." Pet. App. 4a. The court of appeals also declined, once again, to give *Skidmore* deference to the regulation, relying in particular on its view about the inconsistency between Section 552.109(a) and Section 552.3. In doing so, the Second Circuit rejected the Department's explanation of why the two provisions could be read harmoniously, saying that it "need not defer to an agency's interpretation of its own regulations when those regulations, like § 552.109(a) and §552.3, are unambiguous." Pet. App. 5a (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). It thus declared Section 552.109(a) unenforceable. Pet. App. 6a.[6]

REASONS FOR GRANTING THE WRIT

The Second Circuit has twice struck down a Department of Labor regulation—promulgated more than 30 years ago after notice-and-comment rulemaking and adhered to ever since—that exempts certain third party employees from coverage under the Fair Labor Standards Act, *see* 29 U.S.C. § 213(a)(15), holding that the regulation is merely a nonbinding interpretation lacking the force of law and that it is unpersuasive. *See* Pet. App. 23a-32a (invalidating 29 C.F.R. § 552.109(a)); *id.* at 1a-6a (same). Following the initial decision, petitioners sought review in this Court on the grounds,

[6] As it had done after its initial decision, the Second Circuit stayed the mandate pending the filing of a Petition for a Writ of Certiorari in this Court. *See* Pet. App. 49a .

among others, that the Second Circuit had failed to accord the regulation proper deference under the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); that the decision was in conflict with a decision of the Tenth Circuit, *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2000); that the Second Circuit had misread the statute and other relevant regulations; and that the invalidation of Section 522.109(a) would cause extraordinary and unjustified harm. The United States informed the Court that "it would be appropriate for the Court to grant the petition for certiorari," U.S. Br. at 9, but, noting that the Department of Labor had recently issued new "authoritative agency guidance" (*id.*), urged the Court to vacate and remand so that the Second Circuit could consider that guidance. The Court followed that course. *See Long Island Care at Home, Ltd. v. Coke*, 126 S. Ct. 1189 (2006). On remand, however, the Second Circuit again declared Section 552.109(a) to be unenforceable.

The decisions below now merit full review by this Court. To begin with, the result alone—overturning a thirty-year-old regulation twice upheld by another Circuit (*see Johnston* and *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004))—is sufficient to justify this Court's attention. Not only does the Second Circuit's disregard of agency authority disrupt long-standing wage-and-hour practices, it threatens to do so at potentially enormous cost. Only last Term numerous *amici curiae* informed the Court that the increased expense resulting from invalidation of Section 552.109(a) would erode their ability to provide appropriate care for the elderly and infirm, a problem that the United States specifically noted in its brief supporting review. *See* U.S. Br. at 9. Those concerns are no less compelling today.

The Second Circuit decisions are troubling for other reasons as well. The court of appeals' principal rationale for withholding *Chevron* deference—that Section 552.109(a) was in a subpart entitled "Interpretations"—not only wrongly

assumes that an agency interpretation can never have the force of law, *see United States v. Mead Corp.*, 533 U.S. 218, 227 (2001), but is flatly inconsistent with this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), giving *Chevron* deference to a different Department of Labor regulation contained in an identically labeled subsection. Moreover, by refusing to give *Chevron* deference to a regulation that was issued after notice-and-comment rulemaking and that bears other significant indicia of deliberate lawmaking, the court of appeals has seriously diminished the proper respect due to "relatively formal" agency action. *See Mead*, 533 U.S. at 230. While this Court has not finally resolved whether resort to notice-and-comment rulemaking is sufficient in and of itself to earn *Chevron* deference—compare *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S. Ct. 2688, 2712-13 (2005) (Breyer, J., concurring) with *id.* at 2717-18 (Scalia, J., dissenting)—the federal courts of appeals, following the standard set forth in *Mead*, 530 U.S. at 226-27, have repeatedly emphasized the importance of notice-and-comment rulemaking in affording deference under *Chevron*. *See, e.g.*, *Whitaker v. Thompson*, 353 F.3d 947, 950 (D.C. Cir. 2004); *White v. Scibana*, 390 F.3d 997, 1000 (7th Cir. 2004); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179 (11th Cir. 2003).

The Second Circuit also went astray in failing to accord even the lesser deference warranted by the doctrine of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 234-35. Although the court of appeals, relying primarily on another regulation promulgated by the Department, 29 C.F.R. § 552.3, ultimately found that domestic workers employed by third parties are not "employees employed in domestic service employment," 29 U.S.C. § 213(a)(15), and thus cannot be exempted under that section, a proper reading of the Act as a whole shows that reading to be incorrect. In fact, Congress used the critical coverage term "employee[s] in domestic service" to broadly encompass

workers performing domestic jobs regardless of the workers' employer—assuring that the coverage provisions of the Act would apply to domestic service employees across the board—and the exemption for those particular domestic service employees providing "companionship services" also applies regardless of the workers' employer, just as the Department has determined. Moreover, insofar as the Second Circuit supported its contrary view with a reading of Section 552.3 that is at odds with the Department's own reading of that regulation, the court flouted the well-established principle that an agency interpretation of its own regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Thus, at each possible step, the court of appeals wrongly substituted its view for the judgment of the agency charged with implementing the governing statute. That judicial usurpation should not be allowed to stand.

I. THE SECOND CIRCUIT DECISIONS, BY INVALIDATING A REGULATION TWICE UPHELD BY THE TENTH CIRCUIT, DISRUPT LONGSTANDING PRACTICES AND THREATEN A SERIOUS DISLOCATION OF CARE

The Second Circuit, in declaring Section 552.109(a) to be nothing more than an unenforceable "interpretation," rather than a rule of law, Pet. App. 26a, has ordered a dramatic reversal in wage-and-hour practices that have been in effect, without change, for more than 30 years. Ever since promulgation of the regulation in 1975, the governing rule has been that, in keeping with the congressional intent to make companionship services affordable for the elderly and infirm, *see* Pet. App. 46a-47a, employers of workers providing those services are not required to pay the minimum wage or time-and-a-half wages for overtime. Importantly for present pur-

poses, that rule has applied regardless of whether the employee was hired directly by the person receiving care or was employed by a third party such as a family member or an independent agency. Indeed, the exemption for employees of third parties has become so firmly established that, when the Department recently proposed eliminating it, it was forced to pull back because of concerns about the potential adverse economic effects. *See* 67 Fed. Reg. 16,668 (2002). By judicial fiat, however, the Second Circuit has done precisely what the agency, only a few years before, ultimately found it inadvisable to do.

Quite apart from its overriding of the Department of Labor, the Second Circuit has also put itself into direct conflict with the Tenth Circuit, *see Johnston*, 213 F.3d at 561-62; *Welding*, 353 F.3d at 1217 n.3, creating a checkered regulatory scheme in which Section 552.109(a) is controlling in some states but not others. In *Johnston*, decided just six years ago, the Tenth Circuit expressly rejected the argument that Section 552.109(a) was merely an "interpretation which does not have the effect of law . . . ." 213 F.3d at 561. Applying *Chevron*, *see* 213 F.3d at 562, the court of appeals determined "that the secretary's interpretation is not arbitrary, capricious, or manifestly contrary to § 213(a)(15)." 213 F.3d at 562. Unlike the Second Circuit, therefore, the Tenth Circuit held that "the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." 213 F.3d at 562.

This disagreement between the Second and Tenth Circuits shows no signs of abating. In its initial decision below, the Second Circuit openly declined to follow *Johnston*, pointing out that the Tenth Circuit had decided that case before this Court's decision in *Mead*. *See* Pet. App. 25a. However, the Tenth Circuit also handed down a decision after *Mead*, *see Welding*, 353 F.3d 1214, specifically relying on *Johnston* and reiterating that "[t]he domestic service employee need not be

employed directly by the person receiving the services or by that person's family for the exemption to apply." 353 F.3d at 1217 n.3; *see also id.* ("[t]he exemption can apply even when the domestic service employee is actually employed by a service agency . . . ."). The views of the Tenth Circuit thus are solidly behind the validity of Section 552.109(a). By contrast, given an opportunity to reconsider its views upon remand from this Court, the Second Circuit firmly held to its earlier position, again declaring that Section 552.109(a) was unenforceable.

The practical consequences of the Second Circuit's decisions are potentially enormous. At the petition stage last Term, the City of New York told the Court that invalidation of Section 552.109(a) would add nearly $300 million annually to its costs of providing home care to the elderly and infirm. *See* City of New York, et al. Amici Br. at 2, 5-8. Other home care providers declared that they would simply be unable to bear the sharply increased costs resulting from the decision below. *See, e.g.*, Home Care Ass'n of New York State, Inc. Amicus Br. at 2, 9-10. Faced with this new burden, therefore, many providers may be forced to significantly reduce their employees' workweeks in order to avoid incurring ruinous time-and-a-half overtime obligations. *See* Pet. App. 85a (Declaration of Maryann Osborne).

These measures will almost certainly cause severe disruptions for clients needing care. Most seriously, the clients will face a sharp drop in the continuity and stability of their care, with more caregivers being required in order to provide clients with the same or even fewer services. Given the highly personal nature of companionship services, "clients often are very unwilling to enter into such a relationship with more than one or two such individuals." Pet. App. 100a (Declaration of Susan Choi-Hausman). Moreover, a shifting array of personal caregivers "assaults the dignity of patients, undermines the quality of care that they receive, and is there-

fore detrimental to their well being." Pet. App. 86a (Declaration of Maryann Osborne). This problem will only get worse as the number of elderly needing care continues to grow. Yet, it is precisely those people likely to be harmed by the new judicially imposed regime—"individuals who (because of age or infirmity) are unable to care for themselves" (29 U.S.C. § 213(a)(15))—that Congress specifically meant to help by exempting personal companions from the coverage provisions of the Act. *See id.*

This upheaval is as unnecessary as it is problematic. The Secretary correctly determined thirty years ago that the minimum wage and overtime provisions should not apply to caregivers employed by third parties. The Second Circuit's decisions to the contrary warrant review.

II. THE DECISIONS BELOW WRONGLY FAIL TO GIVE *CHEVRON* DEFERENCE TO A REGULATION PROMULGATED UNDER EXPRESS DELEGATIONS OF LAWMAKING AUTHORITY AND AFTER NOTICE-AND-COMMENT RULEMAKING

The reasoning used by the Second Circuit to invalidate Section 552.109(a) also raises serious concerns. While the court was wrong not to give even *Skidmore* deference to the regulation, *see* pages 23-30 *infra*, it committed its first, and most striking, error by holding that Section 552.109(a)—a regulation promulgated by the Department of Labor under express grants of lawmaking authority and after full notice-and-comment rulemaking—did not have the "force of law" required for deference under *Chevron*. *See Mead*, 533 U.S. at 226-27 (agency implementation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Gonzales v. Oregon*, 546 U.S. ___, 126 S. Ct. 904, 914-15 (2006) (same). Accord-

ing to the Second Circuit, the regulation did not merit *Chevron* deference because the Department had put the regulation "under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations,'" Pet. App. 26a, and had stated that "'the definitions required by § 213(a)(15) [of Title 29] are contained in [29 C.F.R.] §§ 552.3, 552.4, 552.5 and 552.6 [of Subpart A].'" Pet. App. 26a. It thus concluded that the Department had failed to satisfy the second part of the *Mead* standard "because, by the DOL's own account, [the regulation] was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a .

There are several notable flaws in this analysis. First of all, the Second Circuit is simply mistaken in supposing that a rule labeled an "interpretation" is not, and never can be, a rule with the force of law. On the contrary, numerous regulations with the force of law effectively "interpret" the governing statute in the sense that they supply additional legal content to statutory provisions that require further detail. *See generally Chevron*, 467 U.S. at 843 (discussing agency authority "to elucidate a specific provision of the statute by regulation"). Indeed, the Court in *Mead* acknowledged that interpretations can have the force of law, expressly declaring that *Chevron* deference is warranted when "the agency *interpretation* claiming deference was promulgated in the exercise of [delegated lawmaking] authority." *Mead*, 533 U.S. at 227 (emphasis added); *see also Gonzales*, 126 S. Ct. at 914 ("[A]n interpretation of an ambiguous statute may also receive substantial deference") (citing *Chevron*); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The proper question, then, is not whether an agency regulation "interprets" a statute, but whether the regulation does so only as a matter of agency guidance or whether it is meant to declare enforceable legal rights and responsibilities. Although the task of distinuishing between the two is not always easy, *see Lincoln v. Vigil*, 508 U.S. 182, 196 (1993), the labeling of a regulation as

an "interpretation" does not, by itself, consign it to the former category.

The Second Circuit's decision to the contrary, in fact, is directly at odds with this Court's decision in *Auer v. Robbins*, 519 U.S. 542 (1997). In *Auer*, the Court upheld a Department of Labor regulation interpreting the term "bona fide executive, administrative, or professional capacity" for purposes of implementing a different exemption under the Fair Labor Standards Act. *See* 29 U.S.C. § 213(a)(1). At that time, the regulation at issue in *Auer*, like Section 552.109(a) here, was set forth in a Subpart B headed "Interpretations" instead of in Subpart A. *See* 29 C.F.R. 541.118(a) (1996). This Court held that it was entitled to full deference under *Chevron*. *See* 519 U.S. at 455-56.

Rather than focusing almost exclusively on the label attached to the regulation, the Second Circuit should have paid more attention to affirmative evidence that the Department was exercising its lawmaking authority, in particular the fact that the agency engaged in notice-and-comment rulemaking. This Court has indicated that congressional authorization of notice-and-comment rulemaking typically satisfies the first part of the *Mead* formulation, saying that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230; *see also id*. at 229 (authorization of rulemaking is "a very good indicator of delegation meriting *Chevron* treatment"); *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 45 (2002). Given that assumption, it is reasonable also to assume that an agency regulation actually resulting from that "process of rulemaking" will satisfy the second part of the *Mead* formulation, demonstrating that the agency was indeed making law. To date, this Court has not directly addressed whether agency resort to

notice-and-comment rulemaking is itself sufficient, or at least presumptively sufficient, to establish that a regulation has the force of law, although individual Justices have expressed preliminary views on this question. *See National Cable & Telecomm. Ass'n*, 125 S. Ct. at 2712-13 (Breyer, J., concurring) (formal proceeding not always "a sufficient condition [for use of *Chevron*]"); *id*. at 2717-18 (Scalia, J., dissenting) (under *Mead* "some unspecified degree of formal process was required—or was at least the only safe harbor").[7]

For their part, however, numerous federal courts of appeals have emphasized that use of notice-and-comment rulemaking is a strong, even dispositive, indication that an agency is exercising its delegated lawmaking power. *See Whitaker*, 353 F.3d at 950; *White*, 390 F.3d at 1000; *Shotz*, 344 F.3d at 1179; *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 n.6 (1st Cir. 2005); *Koyo Seiko Co., Ltd. v. United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001); *Alaska Dept. of Health and Social Services v. Centers for Medicare and Medicaid Services*, 424 F.3d 931, 939 (9th Cir. 2005). In *Whitaker*, for example, the D.C. Circuit stated that "[b]ecause we are reviewing an agency's interpretation of the statute it is entrusted to administer, and the agency reached its interpretation after a relatively formal process with public notice and comment . . . , we review under the familiar framework established by [*Chevron*]." 353 F.3d at 950. Similarly, the Federal Circuit, reviewing an agency rule, noted that the methodology set forth in the rule "was adopted after notice-and-comment rulemaking, and thus is entitled to maximum deference." *Koyo Seiko*, 258 F.3d at 1347. And, the First Circuit rejected an argument that a Bureau of Prisons rule was entitled to nothing more than *Skidmore* deference, remarking that, because the interpretation was embodied in a regulation "which

[7] The Court has made clear that notice-and-comment rulemaking is not *necessary* for a regulation to receive *Chevron* deference. *See Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002); *Mead*, 533 U.S. at 231.

was adopted pursuant to the notice-and-comment procedure of the Administrative Procedure Act," *Perez-Olivo*, 394 F.3d at 53 n.6, it was "[t]hus . . . entitled to full deference under *Chevron*." *Id.; see* 5 U.S.C. § 553(b)(A) (notice-and-comment rulemaking not required for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

The court of appeals below dismissed the fact that the Department had promulgated the regulation after relatively formal rulemaking, saying that "the agency undertook a notice and comment procedure for an interpretive regulation despite the fact that the procedure was not required." Pet. App. 27a; *see also* Pet. App. 27a ("following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what it did; it does not alter the fact that the agency did not act pursuant to legislative authority"). But that approach gets things backwards. Rather than looking to the notice-and-comment procedure as a compelling indication that the Department had invoked its law-making authority, as other Circuits have done, the Second Circuit simply ignored it in deciding the critical issue—whether the regulation had the force of law or was merely interpretive—and then, once it finally turned to it, gave the procedure short shrift by treating it as unnecessary for what the Court had already deemed an interpretive rule. This cart-before-the-horse analysis necessarily undervalues the force of a promulgated regulation because, contrary to what the Second Circuit apparently believed, use of the notice-and-comment procedure *does* demonstrate that an agency meant to "act pursuant to legislative authority." Pet. App. 27a. It thus can be an integral part of the inquiry into whether a rule has the force of law, not just an afterthought once the essential analysis has been completed.[8]

[8] A rule promulgated following notice and comment may still be invalid, of course, if it fails the *first* part of the *Mead* test. *See, e.g.*, *Motion*

To compound its error, the court then mostly ignored other strong indications that Section 552.109(a) is a legislative rule. Thus, it gave no weight to the fact that the Department, in promulgating the 1975 regulations, expressly relied on both the delegation of authority in 29 U.S.C. § 213(a)(15) to "define and delimit" the terms of that provision and the general rulemaking authority conferred by Section 29(b) of the 1974 Amendments, granting the Department the power "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76. Yet, the explicit reliance on those grants of authority, coupled with publication of the regulation in the Code of Federal Regulations, is itself telling evidence that the Department intended Section 552.109(a) to have the force of law. *See American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).[9] And the very nature of the rule supports that view: by dictating who is required to pay, and who is entitled to receive, minimum wage and overtime pay, Section 552.109(a) directly "affects individual rights and obligations," *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979), as legislative rules do. *See id.*

Finally, the court of appeals erred by refusing to credit the Department's own representation that, in promulgating Sec-

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Picture Ass'n of America, Inc. v. FCC, 309 F.3d 796 (D.C. Cir. 2002). An agency cannot claim authority that Congress did not delegate just by engaging in notice-and-comment rulemaking. In this case, however, the Act unmistakably grants the Department the authority to promulgate legislative rules. *See* 29 U.S.C. § 213(a)(15); 1974 Amendments, § 29(b), 88 Stat. 76.

[9] This evidence is not undercut by the statement that "[t]he definitions required by Section 213(a)(15) are contained in §§ 552.3, 552.4, 552.5, and 552.6." 29 C.F.R. § 552.2(c). Even leaving aside that the Department was exercising its general Section 29(b) rulemaking authority as well as the more specific Section 213(a)(15) authority, the statement in Section 552.2(c) simply reflects that the regulations, as a whole, embody not just "definitions," but additional substantive provisions specifying how the Act, including the "definitions," is to operate.

tion 552.109(a), it had intended to, and did, exercise its lawmaking power. *See* Pet. App. 3a-4a. The December 2005 Advisory Memorandum, directly contradicting the Second Circuit, stated in plain terms that "the Department considers the third party employment regulations at 29 C.F.R. § 552.109 to be authoritative and legally binding." Pet. App. 63a. The Department pointed to specific language in the final 1975 notice to demonstrate that "at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule." Pet. App. 63a-64a. It thus reiterated that "the Department has always treated the third party employment regulations as legally binding legislative rules . . . ." Pet. App. 64a.

The Second Circuit should have paid more heed to these views. Although an agency's characterization of its own actions is not dispositive, *see, e.g.*, *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), several federal courts of appeals have held that the agency characterization carries at least some force, even when the agency is arguing that its rule was merely a matter of internal policy and thus not subject to formal rulemaking. *See, e.g.*, *American Airlines, Inc. v. Dept. of Transportation*, 202 F.3d 788, 797 (5th Cir. 2000) ("significant deference to an agency's characterization of its own action"); *Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2000) ("a factor [to] consider") (internal quotation marks omitted). The case for deference is stronger still when, as here, the agency has actually gone through the process of notice-and-comment rulemaking and seeks only to have its rule treated as law. *See generally Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517 (1994) ("Secretary was well within her discretion to interpret this language as imposing a substantive limitation . . . .") Here, the agency characterization is consistent with other historical evidence, and it accords with the agency's application of the regulation

over a long period of time. *See generally Barnhart*, 535 U.S. at 220 ("this Court will normally accord particular deference to an agency interpretation of 'longstanding' duration"). There was no good reason for the Second Circuit to disregard it.

III. THE DECISIONS BELOW, IN REFUSING TO ACCORD EVEN *SKIDMORE* DEFERENCE, CONTRAVENE THE PROVISIONS OF THE ACT AND IMPROPERLY DISREGARD THE DEPARTMENT'S INTERPRETATION OF ITS OWN REGULATIONS

Having found *Chevron* inapplicable, the Second Circuit went on to hold that the Department's interpretation did not merit any deference at all, even under *Skidmore*. *See* Pet. App. 29a-32a; 4a-6a. But this Court has observed that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . , and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . ." 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139) (internal citations omitted). Although it is not entirely clear what the limits of that deference might be, the Court in *Mead* suggested that reasonable agency views are entitled to "'at least some added persuasive force,'" 533 U.S. at 235 (quoting *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997)), or "some weight," 533 U.S. at 235 (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991)), or a "respect proportional to [their] 'power to persuade,'" 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). Thus, unless *Skidmore* deference is reduced to an empty circularity—that is, an agency interpretation warrants deference only to the extent that the court would adopt the same interpretation without giving deference—the views of an expert agency charged with administering a governing statute should at least tilt the balance with respect to unsettled

questions about the scope of proper implementation. Had the Second Circuit extended that deference here, it would have been required to uphold Section 552.109(a) as a well-grounded application of the 1974 Amendments.

The Second Circuit declined to do so, however, largely because it regarded Section 552.109(a) as inconsistent with another regulation promulgated by the Department to implement the 1974 Amendments: Section 552.3. As the court of appeals saw it, Section 552.3 had defined the term "domestic service employment" in a way that excluded domestic service performed by third party employees. *See* Pet. App. 30a; 29 C.F.R. § 552.3 (referring to "services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed"). Using this as a starting point, the Second Circuit reasoned that, because the statutory exemption for "companionship services" applied, by its terms, only to those services provided by "employee[s] employed in domestic service employment," 29 U.S.C. § 213(a)(15), the Department was barred by its own regulation from exempting workers employed by third parties. *See* Pet. App. 30a.

The most obvious shortcoming in this analysis is its lack of attention to the Act itself. Although any serious consideration of an interpretation's "persuasiveness" must look to the language of the governing statute—it is, after all, the statute that the agency is interpreting—the Second Circuit's discussion of the Act is both cursory and inaccurate. *See* Pet. App. 29a-30a; 4a-5a. Insofar as the Act is concerned, the court of appeals relies almost exclusively on the premise that domestic workers employed by third parties were already covered by the Act before 1974 and the idea that it is "implausible" to think that Congress would have intended to eliminate coverage for previously covered employees. *See* Pet. App. 29a-30a. But this off-hand treatment reflects a basic misunderstanding both of the Act's history and of the changes brought about by the 1974 Amendments.

Before the 1974 Amendments, workers in domestic service were subject to the minimum wage and overtime provisions of the Act only if they were employed by an "enterprise engaged in commerce or in the production of goods for commerce." See 29 U.S.C. §§ 206(a)(1); 207(*l*); *see generally National League of Cities*, 426 U.S. at 837-38; *Tony and Susan Alamo Foundation*, 471 U.S. at 295 n.8. As the law then stood, an employer did not fall within that definition unless it had annual gross sales of at least $250,000 (since raised to $500,000). 29 U.S.C. § 203(s)(1) (1976). Thus, contrary to the Second Circuit's understanding, domestic service workers employed by third parties were *not* routinely covered by the Act before 1974: they were covered if, but only if, they worked for an employer of a certain minimum size. And, of course, domestic service workers were not covered at all if they were employed by individual homeowners or by their families.

The 1974 Amendments significantly altered the Act with respect to domestic service workers, bringing them as a class within the scope of the minimum wage and overtime provisions. *See* 29 U.S.C. §§ 206(f); 207(*l*). Nothing in the language of the Amendments indicates that Congress meant the relevant provisions to apply only to workers employed by individual homeowners, rather than to all workers providing domestic services including those employed by third parties. Section 206(f), headed "Employees in domestic service," directs that the minimum wage be paid to "[a]ny employee—(1) who in any workweek is employed in domestic service in a household [if the employee's cash compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households; and (B) is so employed for more than 8 hours in the aggregate." That language is broad and inclusive, and the explicit mention of employees "employed . . . in one *or more* households," *see* 29 U.S.C. § 206(f) (emphasis added), naturally tends to bring within the category of

"[e]mployees in domestic service" those domestic service workers most likely to be employed by third parties such as employment agencies. That reading is reinforced by the language of the new overtime subsection, 29 U.S.C. § 207(*l*), which declares that "[n]o employer shall employ any employee in domestic service in *one or more* households," *id*. (emphasis added), without paying the required compensation. That terminology, too, strongly suggests that the provision extends to third party employers, which would commonly be the employer for domestic workers employed in more than one household.

This reading of Sections 206(f) and 207(*l*) not only fits with the text of those provisions, it eliminates inexplicable gaps in coverage that would result from an interpretation that treats "[e]mployees in domestic service" as excluding third party employees. As we have explained, the Act before 1974 did not cover domestic service workers—an open-ended category of workers that includes not just companions but cooks, chauffeurs, maids, nurses, housekeepers, and so forth —unless the worker was employed by a covered "enterprise." If the only workers regarded as "[e]mployees in domestic service" under the Amendments were workers employed by the individual homeowners receiving services, it would leave entirely outside the Act any worker employed by agencies too small to qualify as an "enterprise" and, seemingly, any worker employed by other third parties such as relatives of the homeowner. That would be a startling omission for a series of provisions that, subject to the prescribed exemptions, were meant "to include within the coverage of the Act all employees whose vocation is domestic service." H.R. Rep. No. 93-913, 1974 U.S.C.C.A.N. 2845.

If the coverage provisions of the Act apply to all domestic service workers including third party employees, it makes sense to think that the statutory exemption for domestic service workers providing "companionship services," 29 U.S.C. § 213(a)(15), applies to them as well. Again, there is nothing

in the language of the Act to show that Congress intended the availability of the exemption to turn on who employed the worker. The focus of the provision is not on the nature of the employer, but on the type of work that the employees perform: the exemption extends 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). That language ("any employee employed in domestic service employment") is once again broad and inclusive.

This straightforward reading of the exemption also fits with its self-evident purpose. As the district court below pointed out, Congress included the exemption "to allow those in need of [companionship] services to be able to find such assistance at a price they can afford." Pet. App. 46a. *See also Welding*, 353 F.3d at 1217 ("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"). This concern about affordable companionship services does not fluctuate depending upon whether the workers are employed directly by the homeowner or by a third party employer, or upon whether the workers were or were not previously covered by the Act. *See* Pet. App. 46a-47a. Indeed, the need to restrain costs in the case of third party employees has only become more acute as agencies provide an increasing amount of the needed care.[10]

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[10] The Second Circuit relied on the principle that exemptions to the Act "are to be narrowly construed." Pet. App. 10a. But that principle is largely inapposite here. While a narrow definition of "employee in domestic service" would have the effect of limiting the Section 213(a)(15) exemption for workers providing companionship, it would have the much greater threshold effect of limiting the *coverage* of Sections 206(f) and 207(*l*), which apply to the full range of domestic service workers. That

Having paid little heed to the Act, the Second Circuit rested much of its decision to invalidate the exemption for third party workers on its belief that the exemption was incompatible with the Department's regulatory definition of "domestic service employment" in Section 552.3. *See* Pet. App. 30a. The Department, however, has explained why this is not so. *See* Pet. App. 54a-63a. In its December 2005 Advisory Memorandum, the Department said that neither Section 552.3 nor Section 552.101(a)—a second regulation containing similar language—was intended to address the question of who employed the employee. *See* Pet. App. 55a-57a, 62a-63a. Rather, the purpose of those sections was only to specify what kind of work was required and where the work was to be performed: that is, domestic services in a private home (as opposed to, say, a boarding house). *See* Pet. App. 58a. The Department also carefully reviewed the origin of the "person by whom he or she is employed" language, Pet. App. 57a-59a, stressing that its use was not meant to exclude third party employees from the category of workers covered by the domestic service provisions of the Act. *See* Pet. App. 63a.

The Second Circuit, however, declined to give deference to the Department's reading of its regulations, *see* Pet. App. 5a, again committing a critical error. This Court has long recognized that an agency's interpretation of its own regulations "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson*, 508 U.S. at 45 (quoting *Bowles*, 325 U.S. at 414). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). As the Court has stated, the role of the judiciary is "not to decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512. Rather, a court must abide by any

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narrow reading, in turn, would offend the basic principle that a remedial act should be construed broadly. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999).

reasonable agency reading. *See id.*; *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001).

To justify its lack of deference, the Second Circuit invoked the principle that a court "need not defer to an agency's interpretation of its own regulations when those regulations, like § 552.109(a) and § 552.3, are unambiguous . . . ." Pet. App. 5a (citing *Christensen*, 529 U.S. at 588). But, while the principle is sound—it prevents an agency, "under the guise of interpreting a regulation, [from] creat[ing] *de facto* a new regulation" (*Christensen*, 529 U.S. at 588)—its use here is not. The problem is that the Second Circuit made no effort to read the Department's regulations as a whole. *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) ("[w]e must read the body of regulations . . . so as to give effect, if possible, to all of its provisions"). Instead, the court of appeals first read Section 552.3 in isolation and then, having ascertained its "unambiguous" meaning, decided that it prohibited the exemption granted by Section 552.109(a). As a result, the Second Circuit wound up attributing to the Department the extraordinarily improbable intention of, on the one hand, effectively declaring third party employees ineligible for the "companionship services" exemption in Section 552.3 (by excluding them from "domestic service employment") and then, on the other hand, simultaneously proclaiming in Section 552.109(a) that it was going to exempt them anyway. It is hard to imagine that the Department actually meant to do that, and any reading that leads to such an absurd outcome is itself proof that the regulations contain an ambiguity and demand a more coherent construction. The Department has provided a reasonable one and, under traditional principles of deference, that is enough. *See Stinson*, 508 U.S. at 45; *Martin*, 499 U.S. at 150-51.[11]

[11] Judicial deference does not disappear merely because the Department has explored the possibility of other interpretations over time. *See* Pet. App. 30a-31a; 5a. Agencies are regularly faced with a choice among competing interpretations of a statute that they are charged with admin-

In the end, therefore, the Second Circuit should have granted *Skidmore* deference to Section 552.109(a), even if the regulation were deemed merely "interpretive." The decision to apply the Section 213(a)(15) companionship services exemption to third party employees, as well as homeowner-employed employees, is not just a reasonable, but in fact the better, interpretation of the critical statutory provisions. The Second Circuit should have given it more respect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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istering. *See Chevron*, 467 U.S. at 844. It would introduce intolerable rigidity into this process if the choice made by an agency were regarded as undeserving of deference simply because the agency had expressed a tentative contrary view and sought public comment on the various possible interpretations.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 03-7666-CV

EVELYN COKE,
Plaintiff-Appellant,
v.
LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,
Defendants-Appellees.

Argued: March 4, 2004
Decided: July 22, 2004
Remanded: Jan. 23, 2006
Decided: Aug. 31, 2006

Before WALKER, *Chief Judge*, KATZMANN, Circuit Judge, and GLEESON,[*] *District Judge*.

Remand from the United States Supreme Court for reconsideration of a March 4, 2004, decision by this court (John M. Walker, Jr., *Chief Judge*) affirming in part and vacating in part a judgment of the United States District Court for the Eastern District of New York. Upon further consideration we adhere to the disposition of our original decision.

AFFIRMED in part, VACATED in part, and REMANDED.

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[*] The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

PER CURIAM.

A detailed discussion of the facts of this case and the regulatory scheme at issue is set forth in *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 121-25 (2d Cir.2004) ("*Coke I*"). The procedural history is this: Plaintiff-Appellant Evelyn Coke appealed from a final judgment entered in the United States District Court for the Eastern District of New York (Thomas C. Platt, *Judge*) granting Defendants-Appellees Long Island Care at Home and Maryann Osborne judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). *See Coke v. Long Island Care at Home, Ltd.*, 267 F.Supp.2d 332 (E.D.N.Y.2003). On appeal, this court affirmed in part and vacated in part the district court's judgment, holding that 29 C.F.R. § 552.6 is enforceable on its face but that 29 C.F.R. § 552.109(a) ("§ 552.109(a)") is unenforceable. *See Coke I*, 376 F.3d at 135. By an order dated January 23, 2006, the United States Supreme Court granted Defendants-Appellees' petition for a writ of certiorari, vacated this court's 2004 judgment, and remanded the case to "the Second Circuit for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No.2005-1 (December 1, 2005)." *Long Island Care at Home, Ltd. v. Coke*, --- U.S. ----, 126 S.Ct. 1189 (2006). For the reasons that follow, upon reconsideration in light of the Department of Labor's Wage and Hour Advisory Memorandum ("DOL Memo"), we adhere to our original position.

An administrative agency's rule implementing a statutory provision is entitled to the deference described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). There is no dispute that Congress delegated to the Department of

Labor ("DOL" or "the Department") the authority to promulgate legislative rules, which carry the force of law. But for substantially the same reasons set forth in our 2004 decision, we conclude that § 552.109(a) was not intended, at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule. While the original notice of proposed rulemaking indicates that the entirety of Part 552 of the Code of Federal Regulations was adopted pursuant to the authority delegated by 29 U.S.C. § 213(a)(15), it also indicates that the DOL proposes to add Part 552

> defining and delimiting, in Subpart A, the terms "domestic service employee," [and other terms undefined in the statute] and setting forth, in Subpart B, a statement of general policy and interpretation concerning the application of the Fair Labor Standards Act to domestic service employees.

Employment of Domestic Services Employees, Recordkeeping, Definitions and General Interpretations, 39 Fed.Reg. 35,382, 35, 382 (Oct. 1, 1974). This statement acknowledges that Part 552 is divided into two subparts, each of which has a different purpose. That statement, in combination with the facts that Subpart B is labeled "Interpretations" and that 29 C.F.R. § 552.2(c) indicates that "[t]he definitions required by section 13(a)(15) [of the FLSA] are contained in §§ 552.3, 552.4, 552.5, and 552.6," convinces us that our original conclusion that § 552.109(a) is an interpretive rule was correct. As such, it is entitled only to the level of deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (courts should defer to non-legislative agency rules according to their power to persuade). *See also Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The arguments to the contrary presented in the DOL Memo are not persuasive. The memo indicates that the DOL considers § 552.109(a) legally binding, and points out that, when it promulgated the final rule, it explained that the original

version would not have "allowed" the exemption for employees of third parties and that the DOL concluded that the exemptions "can be available" to such employees. The memo asserts that the quoted language indicates that DOL must have believed, at the time the rule was promulgated, that the availability of the exception to employees of third parties turned definitively on its pronouncement in § 552.109(a). But even if all other regulatory provisions were silent on the issue of third-party employees, § 552.109(a) could have been simply intended to provide guidance to DOL employees as to how the agency planned to interpret "domestic service employment" in the third-party employer context. This is, after all, the function that interpretive rules, opinion letters, agency manuals, enforcement guidelines, and other non-legislative agency rules that have been denied *Chevron* deference perform. *See Christensen*, 529 U.S. at 587. So even if the agency's determination of whether employees of third parties qualify for the companionship services exemption has always been dependent on § 552.109(a), that does not mean that regulation was promulgated as a legislative regulation intended to have the force of law outside of the agency.

Applying *Skidmore* deference to § 552.109(a), we see nothing in the DOL Memo to persuade us that our original conclusion was in error. We rested that conclusion on our determinations that the regulation is (1) inconsistent with Congress's likely purpose in enacting the 1974 amendments; (2) inconsistent with other regulations; (3) inconsistent with other DOL positions over time; and (4) insufficiently explained by DOL, evidencing a lack of thorough consideration. *Coke I*, 376 F.3d at 133.

After consideration of the DOL Memo, we acknowledge that, like most complex statutes, the FLSA has multiple purposes, some of which are in tension with one another. Among these purposes are a desire to expand the coverage of the FLSA to domestics, S.Rep. No. 93-690, 93d Cong., 2d

Sess., at 16, 18-20 (1974), to exempt companionship services from that coverage, *id.* at 20, to ensure that companionship and babysitting services remain affordable for working families, 18 Cong. Rec. 24,715 (1972), and to ensure minimum wage and overtime compensation for domestic workers who were regular bread-winners, responsible for supporting their families, S.Rep. No. 93-690, at 20. The third-party employer regulation as currently written would be consistent with some of these purposes and inconsistent with others. Consideration of congressional intent therefore does not lead to any definitive conclusion regarding the enforceability of § 552.109(a).

Our previously expressed concerns about the regulation remain valid. To the extent that the DOL Memo invites us to reconcile § 552.109(a) and 29 C.F.R. § 552.3 ("§ 552.3") with one another by ignoring the "extraneous vestige of the language's origin" included in the text of § 552.3, we decline to accept the invitation. While we agree that we must make every effort to interpret regulations in such a way as to give each of them meaning and effect, an effort that requires us to ignore the plain language of a regulation with the force of law places more weight on that rule of construction than it can bear. Moreover, we need not defer to an agency's interpretations of its own regulations when those regulations, like § 552.109(a) and § 552.3, are unambiguous. *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655.

With respect to the agency's inconsistent positions regarding § 552.109(a), we acknowledge DOL's statement in the DOL Memo withdrawing and repudiating all previous statements questioning the validity of that regulation. But a current repudiation of those past positions does not mean that they were never advanced. As firm as DOL's conviction is now that the current form of § 552.109(a) is the appropriate one, it cannot change the fact that, at multiple times in the past, the Department's position has been otherwise.

Finally, in our original opinion, we were specifically concerned with DOL's failure to explain both the inconsistency between § 552.109(a) and § 552.3 and the Department's decision in 1975 to promulgate a rule that was contrary to the one originally proposed. *Coke I*, 376 F.3d at 134. We acknowledge that the DOL Memo is evidence that the agency has spent some time considering its position with respect to § 552.109(a). We also recognize that the agency has considered and decided against amending the regulation on several occasions. But these facts do not address our concerns regarding the thoroughness of the original consideration and reasoning that went into the promulgation of § 552.109(a). To be sure, the DOL Memo attempts to explain the inconsistency between § 552.109(a) and § 552.3, but, as noted above, we find this explanation unpersuasive. And with respect to the "about-face," *Coke I*, 376 F.3d at 134, which the Department performed between the initial notice of proposed rulemaking and the adoption of the regulation in its current form, the DOL Memo is silent. As we pointed out in our March 2004 opinion, the explanation proffered in the Federal Register, see 40 Fed.Reg. 7404, 7405 (Feb. 20, 1975), ignored the plain language of the statute. *Coke I*, 376 F.3d at 134. The DOL Memo not only fails to acknowledge this faulty reasoning, it actually advances it once more as an argument that the current form of § 552.109(a) is consistent with the statutory text of 29 U.S.C. § 213(a)(15).

After reconsidering our 2004 decision in light of the DOL Memo, we find no reason to abandon the reasoning or the results reached in that decision. For the reasons set forth above and in our 2004 opinion, we AFFIRM the district court's ruling that 29 C.F.R. § 552.6 is enforceable on its face; VACATE the district court's ruling that 29 C.F.R. § 552.109(a) is enforceable; and REMAND the case for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,
v.
LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,
Defendants-Appellees.

Argued March 4, 2004
Decided July 22, 2004

Before: WALKER, *Chief Judge*, KATZMANN, *Circuit Judge*, and GLEESON, *District Judge*.[1]

JOHN M. WALKER, JR., *Chief Judge*:

At issue in this appeal is the enforceability of two regulations promulgated by the Department of Labor ("DOL") that define and interpret the "companionship services" exemption in the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 213(a)(15). The Act generally requires minimum wage and overtime compensation; the "companionship services" exemption relieves employers from paying such compensation to those employees who work in domestic service as babysitters and companions to the elderly and

[1] The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

infirm. The regulations at issue implement the exemption with respect to companions.

The first regulation we consider is a regulation that defines the exemption. It includes within the exemption (1) those who perform household work related to the care of the elderly or infirm and (2) those who also perform housework incidental to their "companionship services" as long as the housework accounts for less than twenty percent of the weekly hours worked. *See* 29 C.F.R. § 552.6. The second regulation we consider applies the exemption to "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services." *See* 29 C.F.R. § 552.109(a). The district court found both of these regulations to be entitled to the highest form of deference available to agency regulations and, accordingly, found them legally enforceable. *See Coke v. Long Island Care at Home, Ltd.*, 267 F.Supp.2d 332 (E.D.N.Y. 2003).

We affirm the enforceability of the first regulation, § 552.6, according it the highest level of deference available to agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). But we conclude that the second regulation, § 552.109(a), is neither entitled to *Chevron* deference nor enforceable; we find it to be entitled only to the more limited level of deference announced in *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), and reaffirmed in *United States v. Mead Corp*., 533 U.S. 218 (2001). Because the second regulation is unpersuasive in the context of the entire statutory and regulatory scheme, it fails *Skidmore*'s test and cannot be enforced. Accordingly, we AFFIRM in part, VACATE in part, and REMAND for further proceedings.

FACTUAL BACKGROUND

Plaintiff-appellant Evelyn Coke appeals from the judgment on the pleadings, entered pursuant to Federal Rule of Civil

Procedure 12(c), in favor of defendants-appellees Long Island Care at Home, Ltd. and owner Maryann Osborne, by the United States District Court for the Eastern District of New York (Thomas C. Platt, *District Judge*). *See Coke*, 267 F.Supp.2d at 332-41. The Secretary of Labor submitted an amicus brief arguing on behalf of defendants-appellees that the district court's ruling should be affirmed.

Unlike most, if not all, of the other courts that have considered the issues in this appeal,[2] we review Coke's case before the summary judgment stage and, thus, without any factual development. All we know is that Coke filed this action under the FLSA, alleging that she was employed as a "home healthcare attendant" by defendants, who did not pay her minimum wage or overtime compensation. While such compensation is generally required under the FLSA, Coke acknowledges that the "companionship services" exemption to the FLSA, as defined and interpreted by the DOL regulations, applies to her employment and that if the regulations at issue are enforceable, she cannot prevail. Her arguments are purely legal.

Coke contends that the two regulations defining and interpreting "companionship services" are unreasonable and impermissible in light of the statute's clear language and statutory purpose. Coke candidly calls her action a test case, "challenging the regulation[s] on [their] face." She does not allege

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[2] We collect the full citations to such cases here in chronological order for ease of reference: *McCune v. Or. Senior Servs. Div*., 894 F.2d 1107 (9th Cir.1990); *Cox v. Acme Health Servs., Inc*., 55 F.3d 1304 (7th Cir. 1995); *Salyer v. Ohio Bureau of Workers' Comp*., 83 F.3d 784 (6th Cir. 1996); *Terwilliger v. Home of Hope, Inc*., 21 F.Supp.2d 1294 (N.D.Okla. 1998); *Johnston v. Volunteers of Am., Inc*., 213 F.3d 559 (10th Cir.2000); *Madison v. Res. for Human Dev., Inc*., 233 F.3d 175 (3d Cir.2000); *Harris v. Dorothy L. Sims Registry*, No. 00 C 3028, 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill. Jan.29, 2001); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir.2004).

that the regulations are being improperly applied to a subclass of employees but, rather, that they contravene legislative will and are therefore unenforceable. After the district court accorded the two regulations *Chevron* deference and found them to be permissible under the statute, it granted defendants' motion for judgment on the pleadings. This appeal followed.

DISCUSSION

I. *Standards of Review*

We review the decision of the district court *de novo* both because the judgment below was entered on the pleadings on a matter of statutory construction, *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir.2001); *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir.1994), and, more specifically, because the decision as to whether an FLSA exemption may be applied to a class of claimants is a question of law, *Freeman v. NBC*, 80 F.3d 78, 82 (2d Cir.1996). Moreover, the question of the appropriate level of deference to accord agency regulations is one purely of law, subject to *de novo* review. *See Ossen v. Dep't of Soc. Servs. (In re Charter Oak Assocs.)*, 361 F.3d 760, 764 (2d Cir.2004) (pure questions of law are reviewed *de novo*). *See generally* 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law. . . ."). At this stage of the litigation, it is conceded by both parties that there are no disputed issues of material fact.

Our review in the FLSA context is guided by a few specialized principles. Because the FLSA is a remedial act, its exemptions are to be narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959). And an employer bears the burden of proving that its employees fall within an exemption in the FLSA. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Arnold*, 361 U.S. at 392; *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir.1983). In sum, "[t]o extend an exemption to other than

those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Bearing these guiding principles in mind, we undertake our *de novo* review of the district court's decision upholding the two regulations at issue here.

II. *Statutory Scheme*

The FLSA, enacted by Congress in 1938, requires that most workers receive minimum wage and overtime compensation for hours worked in excess of forty per week. *See generally* 29 U.S.C. § 201 *et seq.* In 1974, Congress amended the FLSA to broaden its coverage to a new set of workers, previously unprotected by the Act: employees performing "domestic services." While the statute itself did not define "domestic service employment," the Senate Committee Report confirms the commonly understood meaning of the term to include those employed within the home as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs, and the like. *See* S.Rep. No. 93-690, at 20 (1974); *see also* H.R.Rep. No. 93-913, at 35-36 (1974), U.S.Code Cong. & Admin.News at 2811, 2845. However, while extending FLSA protections to employees in domestic service, Congress carved out an exemption for employees engaged in "babysitting services" and "companionship services." The exemption withholds FLSA benefits from:

> any employee employed on a casual basis in domestic service employment to provide babysitting services or 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 [of Labor]) . . . .

29 U.S.C. § 213(a)(15). In order to more clearly delineate those who are subject to the exemption, the Secretary of

Labor, soon after the adoption of the 1974 amendments, promulgated a series of regulations, including the two that Coke challenges here.

III. *Regulatory Scheme*

The first regulation Coke challenges was promulgated in exercise of the authority delegated by § 213(a)(15) to define "companionship services." It defines "companionship services" as

> 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. They may also include the performance of general household work: *Provided, however,* [t]hat such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. § 552.6.

A related regulation (not challenged here), also promulgated in clear exercise of the authority delegated by § 213(a)(15), adopts the House Committee Report's definition of "domestic service employment." That regulation states that domestic service "refers to services of a household nature performed by an employee in or about a private home . . . . *of the person by whom he or she is employed.*" 29 C.F.R. § 552.3 (emphasis added); *cf.* H.R.Rep. No. 93-913, at 35, U.S.Code Cong. & Admin.News at 2845 (defining "domestic service employment" to be "services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed"); *see also* S.Rep. No. 93-690, at 20 (stating that the House's construction of "domestic service employment" to exclude third party employment is "generally accepted").

The second regulation Coke challenges, 29 C.F.R. § 552.109(a), also promulgated soon after the 1974 amendments, expressly extends the exemption by including employees "who are employed by an employer or agency other than the family or household using their services." Section 552.109(a) appears under the "Subpart B" heading, "Interpretations," as opposed to the "Subpart A" heading, "General Regulations," under which §§ 552.3 and 552.6 are listed. This regulation exempted employees who the DOL concedes were not exempt prior to the 1974 amendments. *See* Employment of Domestic Service Employees, 39 Fed.Reg. 35, 382, 35, 385 (proposed Oct. 1, 1974) (finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services" were "subject to the [FLSA] prior to the 1974 Amendments"). Prior to the promulgation of § 552.109(a), the DOL put out a different proposed rule for notice and comment: one that specifically declined to apply the "companionship services" exemption to employees of third party employers. *See id.* Following notice and comment on that proposed regulation, the agency reversed its position and offered the following explanation: "On further consideration, [the Secretary of Labor] ha[s] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." Application of the Fair Labor Standards Act to Domestic Service, 40 Fed.Reg. 7404, 7405 (Feb. 20, 1975) (codified at 29 C.F.R. pts. 516, 552). The statement accompanying the regulation did not explain how bringing these previously covered employees of third party employers within the exemption furthered the congressional purpose of expanding, and not narrowing, FLSA coverage from what it had been prior to 1974. The DOL did not extend the exemption to apply to those employees employed by third parties that provide "babysitting services." *See* 29 C.F.R. § 552.109(b).

The DOL has enforced the two regulations at issue since their promulgation in 1974 and Congress has not disturbed the details of the scheme recounted here in the nearly thirty years they have been in force. In early 2001, however, the agency proposed amendments to the regulations pertaining to the "companionship services" exemption, which were subsequently abandoned. In proposing the amendments, the DOL stated:

> Due 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. The number of workers providing these services has also greatly increased, and most of these workers are being excluded from the FLSA under the companionship services exemption. The Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section [2]13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of "companionship services," which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent.

See Application of Fair Labor Standards Act to Domestic Service, 66 Fed.Reg. 5481, 5482 (proposed Jan. 19, 2001). The DOL further explained what it understood to have been the congressional intent in 1974:

> [I]t clearly was Congress' intent under the 1974 FLSA Amendments to cover all workers who performed domestic services as a vocation, excluding casual babysitters and providers of companionship services who

> were not regular bread winners or responsible for their [own] families' support. . . . Personal and home care aides perform a variety of tasks in the home, including household work and assistance with nutrition and cleanliness. Employers have generally treated workers employed as home health aides and personal and home care aides as exempt companions, based upon the Department's current regulations. . . . As a result, the Department believes it is necessary to amend the regulations to focus them on fellowship and protection duties that Congress originally intended the companion exemption to cover.

Id. at 5483. The 2001 proposed amendments to the regulations would have extended FLSA protection to employees who are hired by "someone other than a member of the family in whose home he or she works." *Id.* at 5482. The DOL expressly acknowledged that there exists an internal inconsistency between § 552.109(a) and § 552.3 and that § 552.3 is more consistent with the congressional purpose as it existed in 1974. *Id.* at 5485. Nonetheless, without further addressing the inconsistency, the DOL withdrew the proposed amendments in April 2002 because "numerous comment[s] on the proposed rule, including [comments offered by] multiple government agencies . . . seriously called into question the Department's conclusion that there would be little economic impact." Application of the Fair Labor Standards Act to Domestic Service, 67 Fed.Reg. 16,668 (Apr. 8, 2002). Upon withdrawing the proposed amendments, the DOL did not question or otherwise comment upon its 2001 conclusion about what congressional intent had been in 1974.

IV. *The Enforceability of 29 C.F.R. § 552.6*

A. Degree of deference to accord to the DOL

The district court accorded *Chevron* deference to § 552.6's definition of "companionship services." Neither party in

this case objects to this because the statute directed the DOL to promulgate legislative regulations to define the term "companionship services" as it appears in 29 U.S.C. § 213(a)(15), and the regulations are plainly an exercise of that authority. *See Mead*, 533 U.S. at 226-27, 121 S.Ct. 2164 (clarifying that *Chevron* deference is appropriate when a statute clearly delegates authority to an agency and the agency acts purporting to exercise that authority); *Chao v. Russell P. Le Frois Builder, Inc*., 291 F.3d 219, 226 (2d Cir.2002); 29 C.F.R. § 552.2(c) (expressly stating that "[t]he definitions required by § [2]13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6"). Accordingly, § 552.6 is binding on the courts unless procedurally defective, "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Here, Coke argues that § 552.6 is unenforceable as being manifestly contrary to the statute.

In applying *Chevron* deference, we follow a two-step analysis: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. When the terms of a statute are unambiguous, the judicial inquiry is complete. However, if there is ambiguity in the statute, we proceed to step two and inquire whether the agency's legislative regulation is a reasonable and permissible construction of the statute. *Id.* at 843-44. "If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding." *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) (internal quotation marks omitted) (citing *Chevron*, 467 U.S. at 843 n. 11). We are also mindful that "a long-standing, contemporaneous construction of a statute by the administering agenc[y] is entitled to great weight." *Leary v. United States*, 395 U.S. 6, 25 (1969) (internal quotation marks and citations omitted).

B. Application of *Chevron*

Coke argues that we needn't arrive at step two of the *Chevron* inquiry and that we should find that the statute plainly and on its face prohibits the agency's definition of "companionship services." In particular, she contends that the regulation's inclusion within the definition of both housework *related to* the care of the elderly or infirm and housework *incidental to* that care are violative of the statute's command to fashion an exemption only for "companionship services." Coke suggests that the large amount of incidental housework permitted by the current regulation (twenty percent of the work) is an abuse of the delegation under the statute. Indeed, she argues, under a particular reading of the regulation's second sentence (the one that allows work "related to" the care of the elderly or infirm), "household work" would be exempt even if no companionship were provided at all: "Under the regulation, an elderly person unable to care for him or herself could hire a full-time companion *and* a full-time cook, pay the cook less than the minimum wage, and successfully assert that cooking is a companionship service . . . ." Appellant's Br. at 16. Thus, because Congress clearly indicated that "companionship services" were meant to be a subset of domestic services, and the regulation can be read to exempt pure domestic service without companionship, Coke argues that the regulation was drawn too broadly on its face. Since Congress wanted to make sure domestic service employees got FLSA protection, she argues that § 552.6's extension of the exemption to "meal preparation, bed making, [and] washing of clothes" places too many domestic service employees within the exemption, a result that Congress could not have intended. The district court properly rejected these arguments.

The statute plainly gives the DOL authority to define "companionship services," a vague term with no obvious plain meaning; and the DOL did so very soon after the

passage of the amendments to the FLSA. On the face of the statute, we discern no unambiguous congressional intent to keep all "incidental" services and domestic services "related to" the care of the elderly and infirm outside the exemption, especially when such services would naturally follow from or be part of a reasonable job description of a companion to the elderly or infirm.

Although the Supreme Court has issued mixed messages as to whether a court may consider legislative history at this stage of the analysis (step one of *Chevron*),[3] that history plainly presupposes that some incidental or other related housework would accompany "companionship." For example, Senator Quentin Burdick wanted to extend FLSA coverage for "professional domestic[s]" but was concerned about the potential burden on household employers where "people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them. This, of course, entails some work, such as perhaps making lunch . . . . This would be incidental to the main purpose of the employment." 119 Cong. Rec. 24,773,

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[3] *Compare FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133, 137, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (effectively considering legislative history at step one of *Chevron* analysis), *Pauley v. BethEnergy Mines, Inc*., 501 U.S. 680, 697-99, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) (same), *Pension Benefit Guar. Corp. v. LTV Corp*., 496 U.S. 633, 649-50, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (same), *and Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233-41, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (same), *with K Mart Corp. v. Cartier, Inc*., 486 U.S. 281, 293 n. 4, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) (opinion of Kennedy, J.) (noting in the first step of a *Chevron* inquiry that "any reference to legislative history [ ] is in the first instance irrelevant"), *Sutton v. United Air Lines, Inc*., 527 U.S. 471, 482, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (finding statutory text clear enough to ignore any arguments from legislative history), *and Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (finding only statutory text to be relevant for first-step *Chevron* analysis).

24,801 (1973). Senator Harrison Williams explained the purpose of the "companionship services" exemption through an analogy to the "babysitting" exemption:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for-to watch the youngsters.
>
> "Companion," as we mean it, is in the same role-to be there and to watch an older person, in a sense.
>
> . . . . .
>
> [Household work] which is purely incidental would not change the category of the person being there in the household.

Id. Without attaching primacy to using legislative history at step one, it seems to us more likely than not that Congress understood that when employees are in the home "first" to be companions or babysitters, they may engage in "incidental" housework without falling outside the exemption. The DOL's regulatory choice of the twenty percent allowance for incidental work is not clearly contravened by either the text of the statute or the intent of Congress to the extent it is discernable.

More troubling is the second sentence of the regulation, which is not delimited by the twenty percent rule. It does seem to allow, as Coke argues, virtually unlimited household work as long as it is "related to the care of the aged or infirm person." The DOL, however, in its amicus brief explains:

> Under section 552.6, an employee must "provide fellowship, care, and protection" for a person unable to care for himself in order to meet the requirements of the "companionship services" exemption. While the regulation allows for the performance of some household work, it must be either "related to" or "incidental" to the "care of the aged or infirm person. *See* 29 C.F.R.

> 552.6." Thus, contrary to [Coke's] suggestion, an employee hired only to perform household work or as a "full-time cook" would not meet the requirements of the regulation. An employee who has not been hired primarily to provide "fellowship, care, and protection" will not be considered exempt under the Act or the regulations.

Br. of Amicus Curiae DOL at 19 (citations omitted). The DOL's explanation is adequate. At best, the regulation is ambiguous on the question of whether the first sentence of the regulation must be satisfied—that an employee must first provide "fellowship, care, and protection"—before proceeding to the inquiry about whether to exempt the "related" household work.

We note, however, that we have no occasion to limit the enforcement of § 552.6 to the DOL's litigation position here because Coke concedes that her challenge is to the regulation "on its face," that is, in all its applications. Coke has specifically refused to challenge the regulation "as applied" to any particular class of employees. We do not rule out the possibility of an application that would contravene the plain statutory mandate, but because there are many applications of the regulation that are consistent with the statute, we cannot declare it invalid on its face. *See generally Reno v. Flores*, 507 U.S. 292, 301 (1993) (extending the no-set-of-circumstances test for facial constitutional challenges to statutes under *United States v. Salerno*, 481 U.S. 739 (1987), to *Chevron* challenges). In any event, Coke presents no facts upon which we could conclude that the agency has ever applied the regulation in the purportedly impermissible way she envisions.

If we refused to consider the unequivocal legislative history at step one of *Chevron*, the statute is at best ambiguous on the question of whether incidental services and household work related to the care of the individual may accompany the

fellowship and companionship focus of the exemption.[4] And step two of *Chevron* requires us to inquire if the DOL's regulation "harmonizes with the language, origins, and purpose of the statute." *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir.1998). Consideration of legislative history is generally accepted at this stage of the analysis. *E.g.*, *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *Bankers Life*, 142 F.3d at 983.

Coke also argues that § 552.6 fails step two of *Chevron.* Coke repeats the arguments she makes in connection with step one and also focuses on Senator Burdick's statement in the legislative history that sums up the "companionship services" exemption as one targeted for "elder sitter[s]." *See* 119 Cong. Rec. at 24,801. Coke intimates that a sitter must only sit, without lifting a hand to help the elderly or infirm with incidental housework. But, again, we agree with the district court that § 552.6 survives the *Chevron* inquiry. The Senate Report, cited by Coke, makes clear that some incidental household work and housework related to the care of the elderly or infirm does not contravene the purpose of the exemption. *See* 119 Cong. Rec. at 24,801 (1973). The idea that a sitter merely sits is belied by Senator Burdick's analogy: Sitters provide care, and care entails other incidental tasks such as food preparation, feeding, cleaning up messes, changing diapers, and other services. Accordingly, given the deference afforded the agency under *Chevron*, we are unable

[4] The DOL's 2001 statements do not prove that § 552.6 is unenforceable. First, the DOL's contemporaneous assessment of congressional intent is more probative: Apparently, the DOL thought § 552.6 represented congressional intent in 1974 and the enacting Congress expressed no discontent. Second, the DOL's interpretation of congressional intent, whether in 2001 or 1974, could never be dispositive for our *Chevron* inquiry. Of course, the entire purpose of the *Chevron* inquiry is to determine congressional intent quite apart from what the agency interprets that intent to be. Only if we conclude that the enacting Congress's intent is ambiguous do we defer to reasonable interpretations of the gap left by the ambiguity.

to conclude that § 552.6 is arbitrary, capricious, or manifestly contrary to the statute with respect to either (1) the twenty percent allowance for incidental housework in the agency's legislative regulation, or (2) the agency's allowance for household work related to the care of the individual.

Every circuit to have considered the question of the enforceability of § 552.6 has found the regulation enforceable on its face. *See, e.g.*, *Johnston*, 213 F.3d at 565; *Salyer*, 83 F.3d at 787; *McCune*, 894 F.2d at 1110. Only *Harris*, 2001 WL 78448, at *5, 2001 U.S. Dist. LEXIS 23263, at *17, a district court decision from the Northern District of Illinois, found the regulation too broad. *Harris*, of course, in no way binds us. Moreover, *Harris* was an "as applied" case and its ultimate pronouncement was narrow. While it calls § 552.6 "unreasonably broad" in the text of the opinion, *id.* at *3, 2001 U.S. Dist. LEXIS 23263, at *11, it is more circumspect when it announces its final holding: "§ 552.6, as currently drafted, is invalid *to the extent it exempts homemakers from [FLSA] coverage*," *id.* at *5, 2001 U.S. Dist. LEXIS 23263, at *17 (emphasis added); only the particular case of the regulation "as applied" to homemakers—as the plaintiffs were in that case—was held to be outside the "companionship services" exemption.

In the case before us, however, because Coke does not tell us anything about what "home healthcare attendants" actually do, it is impossible for us to pass on the question of whether the particular work she did was considered by Congress to be outside the exemption. Consistent with her facial challenge to § 552.6, Coke refused to amend her complaint to be more specific about what she does. For the foregoing reasons, the regulation withstands *Chevron* deference on this challenge. Accordingly, we AFFIRM the district court's ruling with respect to the enforceability of § 552.6.

V. *The Enforceability of 29 C.F.R. § 552.109(a)*

We now turn to Coke's challenge to § 552.109(a), which applies the exemption to "companionship services" rendered by those who are employed by third parties, rather than by the family of the recipient of the services.

A. Degree of deference to accord to the DOL

The threshold question concerning § 552.109(a)'s enforceability is the degree of deference to be afforded the DOL. Coke argues that the district court erred by according *Chevron* deference to the regulations that the DOL itself calls "interpretations." The DOL argues that such deference was appropriate. Although the district court did not directly consider the question, it is purely one of law, which we consider *de novo*. *See Ossen*, 361 F.3d at 764.

In favor of applying *Chevron* deference is *Chevron* 's own broad statement and *Mead*'s endorsement of that statement:

> When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or Capricious in substance, or manifestly contrary to the statute.

Mead, 533 U.S. at 227 (citation omitted) (quoting *Chevron*, 467 U.S. at 843-44). Thus, to the extent that the statute is silent on the definition of a "domestic service employee" and contains no reference to third party employers, such matters might be understood to be appropriately delegated to the DOL. An agency interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27, 121 S.Ct. 2164 (emphasis added). The

statute, 29 U.S.C. § 213(a)(15), expressly delegated authority to the DOL to define and delimit the terms "companionship services" and "domestic service employee," and the DOL argues that *Chevron* deference follows accordingly.

Moreover, the regulation at issue is "a long-standing, contemporaneous construction of a statute," and, as such, "entitled to great weight." *Leary*, 395 U.S. at 25 (internal quotation marks omitted). Indeed, Congress has revisited § 213 by amending it seven times since 1974, without expressing any disapproval of the DOL regulation at issue, *see* Pub.L. No. 95-151 (1977); Pub.L. No. 96-70 (1979); Pub.L. No. 101-157 (1989); Pub.L. No. 103-329 (1994); Pub.L. No. 104-88 (1995); Pub.L. No. 104-188 (1996); Pub.L. No. 105-78 (1997). Such congressional acquiescence is "persuasive evidence that the [agency] interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).[5]

Finally, when an agency action is "'the fruit[ ] of notice-and-comment rulemaking or formal adjudication,'" courts generally accord the agency *Chevron* deference. *Chao*, 291 F.3d at 227 (quoting *Mead*, 533 U.S. at 230). Here, no one contests that, although the agency calls § 552.109(a) an

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[5] The argument from congressional acquiescence-affectionately known as the "dog didn't bark canon"-must always be qualified by the observation that evidence of what subsequent Congresses intend pales in comparison to probative evidence about what the enacting Congress intended; even *Schor* did not rely on what it called the "silence" rule. 478 U.S. at 846, 106 S.Ct. 3245. *See generally* William N. Eskridge, Jr. et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 1020-21 (3d ed.2001) (discussing the "dog didn't bark canon"). Furthermore, because Congress, in amending § 213, never reenacted the FLSA or the relevant provisions thereof, this is not a case that implicates the "re-enactment rule" delineated in *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), where "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without [relevant] change."

"interpretation," it was promulgated following notice and comment procedures. However, it is also true (and a cause of concern) that the rule the agency adopted after comments were received was the opposite of the rule proposed in the original notice. There was no separate notice and comment on the rule as ultimately adopted.

All courts that have considered § 552.109(a) have accorded it *Chevron* deference. *See, e.g., Johnston,* 213 F.3d at 561-62; *Terwilliger v. Home of Hope, Inc*., 21 F.Supp.2d at 1299 n. 2. But Coke is correct that none of these prior cases carefully considered the question before us now: Does *Mead,* which post-dates the cases affording § 552.109(a) *Chevron* deference, require a different analysis yielding a different result insofar as it holds that some agency regulations should be accorded less than *Chevron* deference?

Coke argues that *Mead* requires us to apply a lesser degree of deference to § 552.109(a) as an "interpretive," rather than a "legislative" regulation. Indeed, "interpretive rules . . . enjoy no *Chevron* status as a class." *Mead,* 533 U.S. at 232.

This circuit, even before the Supreme Court's clarification in *Mead,* contemplated that interpretive regulations should not receive full *Chevron* deference. In *Reich v. New York,* 3 F.3d 581, 587 (2d Cir.1993), we considered DOL regulations promulgated to define and delimit the administrative exemption in the FLSA at 29 U.S.C. § 213(a)(1). We held, "In contrast to the controlling authority given the [DOL's] *legislative* rules—i.e., those promulgated pursuant to an express grant of Congressional authority—the respect accorded the [DOL's] *interpretive* regulations depends upon their persuasiveness . . . ." *Id.* We foretold the precise distinction later drawn in *Mead* when that Court distinguished between those regulations that are accorded *Chevron* deference and those that are not. In *Reich v. New York*, the interpretations from which *Chevron* deference was withheld were classified as "interpretations" by the regulations themselves. *See also*

Freeman, 80 F.3d at 83-84 (refusing to accord *Chevron* deference to DOL interpretations under the FLSA despite their promulgation with notice and comment procedures); *Reich v. Gateway Press, Inc*., 13 F.3d 685, 699 n. 18 (3d Cir.1994) ("The DOL interpretations do not have the force of law.").

We find § 552.109(a) to be an interpretive rather than a legislative regulation. While the rule "grants rights, imposes obligations, or produces other significant effects on private interests," as legislative regulations do, *White v. Shalala*, 7 F.3d 296, 303 (2d Cir.1993) (internal quotation marks omitted), a rule can only be legislative "if the agency intended to use [the legislative power delegated to it by Congress] in promulgating the rule at issue," *American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 707 F.2d 548, 558 (D.C.Cir.1983). Here, the DOL did not intend to use the legislative power delegated in § 213(a)(15) when it promulgated § 552.109(a). This is most apparent from its inclusion of the regulation under "Subpart B—Interpretations" as opposed to "Subpart A—General Regulations." This appearance is supported by substance.

Congress expressly delegated to the DOL authority to define terms in § 213(a)(15), and the DOL expressly states in 29 C.F.R. § 552.2(c) that "[t]he definitions required by § [2]13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." Accordingly, the regulation at issue, § 552.109(a), is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15). *Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless "it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. Thus, § 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15).

The DOL places emphasis on the fact that in 1974 § 552.109(a) was promulgated after notice and comment and, indeed, *Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference. *Mead*, 533 U.S. at 230-31, 121 S.Ct. 2164. However, "while notice and comment are required for legislative rules, they are by no means prohibited for interpretive rules." *Mejia-Ruiz v. INS*, 51 F.3d 358, 365 (2d Cir.1995). *Mead* does nothing to undermine this conclusion. *See Mead*, 533 U.S. at 230-31, 121 S.Ct. 2164; Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L.Rev. 807, 814 (2002) ("I do not think the Court was saying [in *Mead*] . . . that if an agency adopts notice-and-comment or trial-type hearing procedures *on its own authority*, its interpretation is presumptively entitled to *Chevron* deference." (emphasis removed and emphasis added; citations omitted)).

In this case, the agency undertook a notice and comment procedure for an interpretative regulation despite the fact that the procedure was not required. While *Mead* does not offer specific guidance on whether putting a proposed interpretation out for notice and comment has any effect on deference, following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what it did; it does not alter the fact that the agency did not act pursuant to legislative authority.

In any event, here we cannot ignore that the notice and comment procedure for § 552.109(a) was at best idiosyncratic and at worst insufficient. The original notice informed the public that employees of third party employers were *not* going to be exempt from the FLSA (consistent with § 552.3), *see* 39 Fed.Reg. 35,385 (proposed Oct. 1, 1974), but the final rule provided exactly the opposite without a detailed explanation, *see* 40 Fed.Reg. 7405 (Feb. 20, 1975). Because we conclude that § 552.109(a) is interpretative, and thus need not

have conformed with notice and comment procedures, we have no occasion to decide whether this regulation is invalid under the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A). *Cf. Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir.1986) ("[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.") (internal quotation marks omitted). Nevertheless, we decline the DOL's invitation to bootstrap an entitlement to *Chevron* deference for an interpretative regulation from this substandard notice and comment procedure.[6]

While we agree with Coke that § 552.109(a) does not command *Chevron* deference, *Mead* nevertheless requires us to afford the agency some level of deference with the vague prescription to "tailor deference to variety," 533 U.S. at 236, 121 S.Ct. 2164. We believe that *Skidmore* deference based upon the regulation's "power to persuade" is the appropriate level of deference to be applied where, as here, "the agency has some special claim to expertise under the statute." Merrill, *supra*, at 812. To the extent that the regulation represents "more specialized experience and broader investigations and information" available to the agency, we will defer to reasonable regulations. *Skidmore*, 323 U.S. at 139-40; *see also Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inapplicable). In deter-

[6] Merrill finds "interpretive regulations adopted after notice-and-comment procedures" to be within an "area of uncertainty" after *Mead* for lower courts trying to determine whether to apply *Chevron* deference. Merrill, *supra*, at 821. *But see* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo. Wash. L.Rev. 347, 350 (2003) (treating notice and comment procedures as affording the agency a "safe harbor" entitlement to *Chevron* deference). We needn't choose between Merrill and Vermeule here because even if Vermeule is right, special circumstances surrounding the notice and comment procedures here militate against furnishing the agency with a safe harbor.

mining its "power to persuade," we look to § 552.109(a)'s "consisten[cy] with the congressional purpose," *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); its consistency with other regulations, *see Skidmore*, 323 U.S. at 140; the "consistency of the agency's position" over time, *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977); the "thoroughness evident in [the agency's] consideration"; and the "validity of its reasoning," *Skidmore*, 323 U.S. at 140.

B. Application of *Skidmore*

Considering the regulation's persuasiveness under *Skidmore*'s less deferential standard, we agree with Coke that § 552.109(a) is unenforceable. The regulation is inconsistent with Congress's likely purpose in enacting the 1974 amendments; inconsistent with other regulations (which themselves deserve *Chevron* deference); and inconsistent with other agency positions over time. Moreover, the agency does not proffer valid reasoning for § 552.109(a)'s enforceability, evidencing a lack of thorough consideration.

(1) Congressional purpose

When Congress sought to amend the FLSA in 1974, it desired to expand FLSA coverage to "domestic service employees," and to exempt from coverage only those "domestic service employees" engaged in "companionship services." At the time, persons who were employed by a third party were outside the category of "domestic service employees" and were protected by the FLSA before the 1974 amendments. *See Homemakers Home & Health Care Servs., Inc. v. Carden*, 538 F.2d 98 (6th Cir.1976); 39 Fed.Reg. 35,385 (Oct. 1, 1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . [were] subject to the [FLSA] prior to the 1974 Amendments"); 66 Fed.Reg. 5485 (Jan. 19, 2001). *See generally* Molly Biklen, Note, *Healthcare in the Home:*

Reexamining the Companionship Services Exemption to the Fair Labor Standards Act, 35 Colum. Hum. Rts. L.Rev. 113, 117 (2003). It is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered.

(2) Consistency with other regulations and through time

Section 552.109(a) is also jarringly inconsistent with other regulations the DOL itself promulgated under the FLSA immediately following the 1974 amendments. In 29 C.F.R. § 552.3, the DOL defined the term "domestic service employment" to refer "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*." 29 C.F.R. § 552.3 (emphasis added). Unlike § 552.109(a), this regulation was legislative, issued pursuant to § 213(a)(15) and, thus, entitled to *Chevron* deference. *See* 29 C.F.R. § 552.2(c) ("[t]he definitions required by [§ 213(a)(15)] are contained in [ ] § 552.3"). Plainly, under § 552.3, employees employed by third parties do not qualify for the exemption. Indeed, § 552.3 tracks the relevant legislative history that the DOL would have reasonably taken as its guidance. *See* H.R.Rep. No. 93-913, at 35 ("the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home *of the person by whom he or she is employed*" (emphasis added)). Thus, the stark internal inconsistency between § 552.109(a) and § 552.3, when coupled with the latter's entitlement to greater deference and its greater consistency with congressional purpose, strongly counsels against enforcement of § 552.109(a).

Moreover, the agency's position with regard to FLSA coverage through time has hardly been a model of consistency. We have recounted above how, in 1974, the agency proposed a regulation that would have afforded FLSA coverage to

employees of third party employers only to reverse itself with the promulgation of § 552.109(a). In 2001, the DOL again proposed that employees of third party employers get FLSA coverage (contrary to the view it endorses in this litigation), only to withdraw the proposal shortly thereafter based on economic considerations that have no bearing on the more relevant question of what Congress intended in 1974.

(3) Validity of the DOL's reasoning

Finally, the DOL's inadequate reasoning in support of the regulation is matched by its failure to exhibit thoroughness in its consideration. Two omissions are particularly notable. First, the DOL offered virtually no explanation for the direct inconsistency between § 552.109(a) and § 552.3. Second, the DOL has not adequately explained-either in the Federal Register or in its submissions to this court-what accounted for the about-face after putting the regulations out for notice and comment in 1974, resulting in third party employers, for the first time, being entitled to claim the exemption. *Compare* 39 Fed.Reg. 35,385 (proposing a regulation on October 1, 1974 that retained the FLSA coverage of employees of third party employers), *with* 40 Fed.Reg. 7405 (adopting a regulation on Feb. 20, 1975 allowing such employees to be subject to the exemption). While the Federal Register recited that "[o]n further consideration, [the Secretary of Labor] ha[s] concluded that the ['companionship services'] exemption can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services," 40 Fed. Reg. 7404, the DOL ignored the plain language of the statute, which precluded an interpretation that the exemption could apply to "any" employee; on its face, it may apply only to employees in "domestic service employment." 29 U.S.C. § 213(a)(15); *see also* 29 C.F.R. § 552.3 (defining "domestic service employment" to preclude employees of third party employers).

The agency's reasoning has not improved with time. Acknowledging the internal contradiction between § 552.109(a) and § 552.3 in its brief, the DOL today is reduced to asserting that we should uphold the regulation because other courts have done so. This is hardly an argument. As we have explained, the decisions relied upon by the DOL were all prior to the Supreme Court's *Mead* decision, based on which we hold that *Chevron* deference is inapplicable to § 552.109(a). Thus, no other court has considered § 552.109(a) under the proper *Skidmore* level of deference and carefully analyzed the regulation's "power to persuade" in accordance with the factors appropriate to *Skidmore* 's inquiry.

Accordingly, finding that § 552.109(a) cannot survive *Skidmore* analysis, we decline to enforce it. We hereby Vacate the judgment of the district court upholding it, and Remand the case for further consideration consistent with this opinion.

CONCLUSION

For all the foregoing reasons, we Affirm the district court's ruling that 29 C.F.R. § 552.6 is enforceable on its face; Vacate the district court's ruling that 29 C.F.R. § 552.109(a) is enforceable; and Remand the case for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT, E.D. NEW YORK

No. 02-CV-2010(TCP)(ARL)

EVELYN COKE, individually and
on behalf of others similarly situated,
Plaintiff,

v.

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,
Defendants.

May 23, 2003

MEMORANDUM AND ORDER

PLATT, District Judge.

Defendants Long Island Care At Home, Ltd. ("LIC") and Maryann Osborne ("Osborne")(collectively "Defendants") move for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff Evelyn Coke ("Coke" or "Plaintiff") opposes the motion and also moves for the circulation of a Notice of Pendency and a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b). This Court heard oral arguments on April 2, 2003.

At issue is whether certain regulations promulgated by the Department of Labor ("DOL") pursuant to the Federal Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.* (the "FLSA") are legally enforceable. At oral argument Plaintiff's counsel clarified that Plaintiff could not meet the requirements of the

relevant regulations as written and that the purpose of this action was to determine the validity of such regulations.[1] (Tr. at 2-5.) As set forth below, because the Court finds that the DOL's regulations are proper Defendants' Motion is GRANTED.

BACKGROUND

A. Factual Background

Plaintiff is a resident of the State of New York, County of Queens, and a former employee of Defendants. LIC is a corporation formed pursuant to the laws of New York State. Osborne is the owner and sole shareholder, as well as a director and officer of LIC.

The pleadings provide little factual background.[2] According to the Complaint, Plaintiff has been employed by Defendant since 1997 and that "her occupations include, but are not limited to, work as a home healthcare attendant." (Compl. at 10.) Plaintiff contends that despite working more than 40 hours a week she never received overtime payments and that her hourly wage was less the minimum wage outlined in the FLSA.

B. Plaintiff's Claims

Plaintiff has asserted two claims in her Complaint. The First Claim is brought under the FLSA on behalf of Plaintiff and any other persons who consent in writing to join this action pursuant to 29 U.S.C. § 216(b). Plaintiff contends that she was entitled to, but was not paid, minimum wages and an overtime hourly wage of time and one-half for all hours worked in excess of forty hours per week. Plaintiff's Second

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[1] References to the transcript of the April 2, 2003 are cited as Tr. at _.

[2] While the Plaintiff has provided more details of her employment in an affidavit, the Court may not consider such statements when deciding a Rule 12(c) motion.

Claim is brought under the Labor Law of the State of New York and the New York Minimum Wage Act ("NYMWA"), on behalf of Plaintiff and all persons similarly situated. The nature of the claims are identical to those under the First Claim. As relief, Plaintiff requests a judgement for unpaid overtime wages and minimum wages, liquidated damages, attorney's fees, interest and costs as provided for by the FLSA.

Defendant has asserted nine affirmative defenses, including that, workers such as Plaintiff are exempt from eligibility for minimum wage and overtime compensation under the FLSA and the FLSA's implementing regulations.

At oral argument, the Court inquired of Plaintiff's counsel whether he could amend the Complaint to sufficiently allege a cause of action under the FLSA and the regulations promulgated thereunder. Counsel indicated that he could not. (Tr. at 2-5.)

DISCUSSION

A. Rule 12(c) Standard

Rule 12(c) provides that,

> [a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Judgement on the pleadings, pursuant to Fed.R.Civ.P. 12(c) is appropriate where material facts are undisputed and a judgment on the merits is possible merely by considering the contents of the pleadings. *See Mennella v. Office of Court Admin.*, 938 F.Supp. 128, 131 (E.D.N.Y.1996) (Spatt, J.) (citing *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642

(2d Cir.1988)). "In considering a motion for a judgment on the pleadings, the Court must accept as true all of the non-movant's well pleaded factual allegations, and draw all reasonable inferences in favor of the non-movant." *Id.* (citing *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir.1994)).

B. The FLSA Generally

The FLSA of 1938 was enacted for the purpose of regulating minimum wages, *335 maximum working hours, and child labor in industries within interstate commerce. While the FLSA sought to protect some of the nation's lowest paid workers, it did not apply to all employees. Since 1938, Congress has extended the FLSA's coverage to many other low-paying occupations through periodic amendments.

Among these extensions of coverage were the amendments of 1974, in which Congress extended coverage to employees in "domestic service." Through the 1974 amendments Congress intended to "not only raise the wages of these workers but [to] improve the sorry image of household employment." H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in*, 1974 U.S.Code Cong. & Admin. News 2811, 2843. The 1974 amendments made domestic service employees subject to the minimum wage and maximum working hours requirements of the FLSA.

The 1974 amendments Congress do provide for a limited exemption from the FLSA for certain domestic service employees, as set forth in 29 U.S.C. § 213(a)(15) ("Section 213(a)(15)"). Section 213(a)(15) provides, in pertinent part, that the provisions minimum wage and maximum hour requirements of Sections 206 and 207 of the FLSA shall not apply to,

> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or 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 in the regulations of the Secretary*) (emphasis added).

Pursuant to this Congressional delegation of authority, the DOL promulgated 29 C.F.R. § 552.6 ("Section 552.6") which defines "companionship services." It states, in pertinent part,

> 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. They may also include the performance of general housework: Provided however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.

In discussing the policy reasons for the "companionship services" exemption the Ninth Circuit has stated, "[w]e are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA". *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 1110 (1990).

"Domestic service" itself is not defined in the FLSA. However, the legislative history of the 1974 amendments state,

> the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. The domestic service must be performed in a private home which is a fixed place of abode of the individual or family . . . [g]enerally, domestic service in and about a private home includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, jani-

> tors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. H.R.Rep. No.93-913, 93rd Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 2811, 2845.

The legislative history also "reveals that Congress used the term 'domestic service employment' interchangeably with the terms 'domestic service in households,' 'private household workers,' and 'household employment.'" *Lott v. Rigby*, 746 F.Supp. 1084, 1088 (N.D.Ga.1990)(citing H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in*, 1974 U.S.Code Cong. & Admin. News 2811, 2842-2843).

The DOL has incorporated the legislative history into 29 C.F.R. § 552.3 ("Section 552.3") which states that domestic service "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." 29 C.F.R. § 552.3. Importantly however, through 29 C.F.R. § 552.109(a) ("Section 552.109(a)") the DOL extends the exemption to "[e]mployees who are engaged in providing companionship services, as defined by § 552.6, and *who are employed by an employer or agency other than the family or household using their services.*" 29 C.F.R. § 552.109(a) (emphasis added.)

C. Validity of Sections 552.6 and 552.109(a)

Plaintiff argues that both of these regulations are inconsistent with Congress's intent of extending coverage of the FLSA to domestic service employees. Specifically, Plaintiff argues that the definition of "companionship services" in Section 552.6 is overbroad and that Section 552.109(a) improperly extends the exemption to employees who are employed by an agency.[3]

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[3] Subsequent to oral argument, the Court invited the parties to submit additional materials related to the legislative history of the 1974 amend-

In regards to Section 552.109(a), Plaintiff asserts that prior to the 1974 amendments home healthcare employees employed by certain agencies would have been covered by "enterprise coverage" as set forth in 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a), which extends FLSA coverage to all employees of businesses that exceed a certain gross revenue. Plaintiff cites *Homemakers Home and Health Care v. Carden*, 538 F.2d 98 (6th Cir.1976) to support her position. In that case the Sixth Circuit upheld a stipulated finding of fact that the plaintiff, who was a home health care services company, was subject to FLSA enterprise coverage. Plaintiff reasons that in enacting the 1974 amendments Congress intended to extend coverage to domestic services employees, and not to remove coverage already provided to employees employed by FLSA "enterprises." (Pl. Suppl. Mem. at 8.)

Nearly all courts, however, have upheld both of these regulations. *See e.g., McCune v. Oregon Senior Services Division*, 894 F.2d 1107 (1990)(upholding Section 552.6); *Salyer v. Ohio Bureau of Workers' Compensation*, 83 F.3d 784 (6th Cir.1996)(same); *Johnston v. Volunteers of America, Inc*., 213 F.3d 559 (10th Cir.2000)(upholding Section 552.109). One recent district court decision is to the contrary. *See Harris v. Dorothy L. Sims Registry*, 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001). The Second Circuit has never expressly ruled on these issues.

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,

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ments. Plaintiff's supplemental materials, in part, raised for the first time the issue of whether 552.109 was procedurally invalid due to an alleged failure to comply with the Administrative Procedures Act, 5 U.S.C. § 553. Because this argument was not raised until several weeks after oral argument, does not appear in the Complaint or Plaintiff's initial brief, and was outside the scope of the Court's invitation, this argument was not considered by the Court.

and the principle of deference to administrative interpretations" has consistently been followed. *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc*., 467 U.S. 837, 844 (1984). If there is "statutory ambiguity and the agency's interpretation is reasonable, its interpretation must receive deference." *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 123 S.Ct. 371, 378 (2002) (citing *Chevron*, 467 U.S. at 844). "[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.*

In deciding whether a regulation is reasonable, the Supreme Court has stated,

> [w]e ask first whether 'the intent of Congress is clear' as to 'the precise question at issue.' If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.' *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-843 (1984)).

Moreover, "a long-standing, contemporaneous construction of a statute by the administering agencies is 'entitled to great weight.'" *Leary v. United States*, 395 U.S. 6, 25 (1969) (citations omitted). Where an agency changes its interpretation, "a revised interpretation deserves deference because 'an initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider

varying interpretations and the wisdom of its policy on a continuing basis.'" *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (citing *Chevron*, 467 U.S. at 862-864,).[4]

Both Sections 552.6 and 552.109(a) were promulgated in 1975, soon after the 1974 amendments and have been in effect for over twenty-eight years and are therefore entitled to great weight. The DOL did propose amendments to both regulations in January 2001, but those proposed amendments were withdrawn in 2001. In proposing to amend Section 552.6, the DOL stated,

> [t]he Department has reevaluated the regulations and determined that-as currently written-they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of 'companionship services,' which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent. *Federal Register*, Vol. 66, No. 13 (January 19, 2001).

The DOL's proposals emphasized that the proposed amendments were proper due to the significant changes in the home care industry since 1974 and that home care employees are "performing types of duties and working in situations that were not envisioned when the companionship services regula-

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[4] In addition, the Supreme Court has held that "[w]hen 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.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)). Here Congress has amended Section 213 seven times since 1974. *See* Pub.L. 95-151 (1977); Pub.L. 96-70 (1979); Pub.L. 101-157 (1989); Pub.L. 103-329 (1994); Pub.L. 104-88 (1995); Pub.L. 104-188 (1996); Pub.L. 105-78 (1997).

tions were promulgated." *Id.* After reviewing the legislative history, the DOL stated that the 1974 amendments were intended "to include all employees whose vocation was domestic service, but to exempt from the coverage babysitters and companions who were not regular bread winners or responsible for their families' support." *Id.*

In proposing to amend Section 552.6, the DOL stated that, "companionship services cannot be so broad as to include someone who essentially is serving as a maid or household worker." *Id.* The DOL then proposed three possible changes of the definition of "companionship services." All three of the proposals increased the emphasis on fellowship as a "critical component of a companion's duties." *Id.*

In proposing to alter Section 552.109(a), the DOL intended to make the exemptions of Section 213(a)(15) applicable "only with respect to the family or household using the worker's services." *Id.* Under the proposal, if an employee was hired by someone other than a member of the family in whose home he or she works, the employee would be covered by FLSA. *Id.* In this proposed amendment, the DOL noted that there was an internal consistency between Section 552.109(a), which allows employees of agencies to be exempt, and Section 552.3, fashioned from the legislative history, which states that domestic service employment must be "in or about" the private home of the employer. *Id.* Moreover, evidently in reference to "enterprise coverage", the DOL stated that since "[a]nyone who prior to 1974 had worked for a covered placement agency, for example, but who was assigned to work in someone's home, would have been covered previously by the FLSA," it was unlikely that Congress would have sought to change the status of employees who were already covered. *Id.*

In April 2002, the DOL withdrew the proposed amendments because "numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into

question the Department's conclusion that there would be little economic impact." *Federal Register*, Vol. 67, No. 67 (April 8, 2002). After reviewing the "rulemaking record as a whole," the DOL terminated the proposal. *Id.*

After the proposed amendments were issued, but before they were withdrawn, one district court did find that the definition of "companionship services" set forth in Section 552.6 was unreasonably broad. In *Harris v. Dorothy L. Sims Registry*, 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001), the court found that although an agency's interpretation of a statute is presumptively valid, "courts may not follow agency regulations that are inconsistent with congressional intent." *Id.*, 2001 WL 78448, *2, 2001 U.S. Dist. LEXIS 23263 at *8 (citing *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). In coming to its conclusion, the court relied heavily on the proposed amendments.

Applying the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), the *Harris* court first found that Section 213(a)(15) of the FLSA was ambiguous, since there was more than one reasonable interpretation of "companionship services." The plaintiffs in *Harris* argued that the term "referred to employees hired primarily to act as a companion for the elderly." *Harris*, 2001 WL 78448, *3, 2001 U.S. Dist. LEXIS 23263 at *9-*10. Defendants contended that the term meant "being with someone to help them with their extreme needs." *Id.*

After finding Section 213(a)(15) ambiguous, the *Harris* court then considered whether Section 552.6 was consistent with the language, origins and purpose of the statute. In this stage of the analysis, the court first considered the legislative history, from which it found, "[i]t is clear the senators did not intend to exempt employees whose primary job responsibilities went beyond fellowship and protection." *Id.*, 2001 WL 78448, *4, 2001 U.S. Dist. LEXIS 23263 at *12. After a review of the DOL's proposed amendments the court found

"it is obvious from the proposed amendments that the DOL agrees that the current definition of 'companionship services' under § 552.6 is unreasonable" and that this "alone is sufficient reason to disregard the current version of § 552.6." *Id*., 2001 WL 78448, *5, 2001 U.S. Dist. LEXIS 23263, at *17. Based on the legislative history and the proposed amendments, the court in *Harris* held that Section 552.6 was invalid, "to the extent it exempts homemakers from [FLSA] coverage."[5] *Id.*

Prior to *Harris*, all other courts had upheld the validity of the regulations. In *McCune v. Oregon Senior Services Division*, 894 F.2d 1107 (1990) the Ninth Circuit held that the DOL's definition of "companionship services" in Section 552.6 was not contrary to the FLSA and affirmed the district court's granting of summary judgment in favor of defendants.

The plaintiffs in *McCune* were live-in attendants for elderly and infirm individuals unable to care for themselves. The Ninth Circuit, noting the strong deference which is accorded to agencies entrusted to define a specific provision of a statute, held that the 20% limit on general household work was reasonable and upheld the district's courts finding that any household work "related" to the care of the individual would not be counted towards the 20% threshold. In coming to this conclusion, the court quoted parts of the legislative history of the FLSA, which stated:

> The fact that a person performing casual services as baby-sitters or services as companions do some incident of household work does not keep them from begin casual baby-sitters or companions for purposes of this exclusion.

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[5] In *Harris*, although the finding that § 552.6 was invalid mooted the argument that domestic employees hired by agencies should not be exempt, the court did note that Section 552.109(a) was also proposed to be amended for similar reasons Section 552.6 was proposed to be amended. *Id*., 2001 WL 78448, *5, n. 8, 2001 U.S. Dist. LEXIS 23263, at *17, n. 8.

McCune, 894 F.2d 1107, 1111 (quoting H.R.Rep. No. 913, 1974 U.S.Code Cong. and Ad. News at 2845).

In dissent in *McCune*, Judge Pregerson did "not propose challenging the agency's interpretation of its mandate when it promulgated section 552.6," but argued that the majority had improperly applied the regulation to the plaintiffs in that case. *McCune*, 894 F.2d at 1114. Judge Pregerson felt that the court should analyze whether the work performed by plaintiffs was actually "incidental" or whether it was only related to the care of their clients. As Judge Pregerson stated, "[t]hough simple laundry work might be 'incidental', what of bed-pan duty, catheterization, and soiled garments for bed-ridden invalids? These duties are certainly related to the care of the attendant's clients, but are by no means incidental." *Id.*

Courts have similarly upheld Section 552.109(a). Most recently, in *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir.2000), the Tenth Circuit rejected plaintiffs' claims that they were entitled to overtime pay under the FLSA because they were not employed by the individual receiving the care. Finding that Section 552.109(a) was not "arbitrary, capricious, or manifestly contrary to § 213(a)(15)", the Court held that "the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." *Id.* at 562. In refuting a similar claim, another court has stated, "[p]laintiff has identified no authority, and the Court is unable to locate any, that supports this view of the companionship services exemption. In fact, the Court is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299, n. 2 (N.D.Ok.1998).

In regard to Plaintiff's argument that Congress did not intend to remove "enterprise coverage" to those employees who worked for covered agencies, the wording of the Section 213(a)(15) and the statements of the Administrator of the

Wage and Hour Division of the DOL (the "Administrator") support the conclusions of the *Johnston* and *Terwilliger* courts that Section 552.109(a) is valid. Section 213(a)(15), describes who is covered by the companionship exemption as "any employee employed on a casual basis in domestic service employment." (emphasis added.) The Administrator, in adopting 552.109(a) explicitly noted this language and stated "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions". 40 Fed.Reg. 7404 (1975). It may be that Congress did not intend to exempt employees hired by a third-party. However, based on the wording of the statute and the lack of any clear legislative history discussing this specific issue, this Court may not say that the Administrator's interpretation is arbitrary or unreasonable.

This Court does find the reasoning of *Harris* and the DOL's statements in the proposed amendments somewhat compelling. However, other factors counsel against holding the regulations unenforceable. The strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years, strongly cautions against a finding that these regulations are unenforceable.

Section 213(a)(15) of the FLSA explicitly gives the DOL the right to define the terms "companionship services" and "domestic service." The 20% requirement seemingly attempts to keep the exemption limited to those who predominately provide companionship, which is consistent with the legislative history. In regards to Section 552.109(a), the Court notes that the reasoning behind the companionship services exemption is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring

of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA.

The DOL's interpretation of Section 213(a)(15) in 1975 evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments shows that it still believes that these long-standing regulations are appropriate in the current home healthcare environment. Despite amending Section 213(a)(15) seven times since 1074, Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate. Accordingly, the Court finds that Sections 552.6 and 552.109(a) are not arbitrary, capricious or manifestly contrary to the FLSA.

D. The Sufficiency of the Complaint

1. The FLSA Claim

Having found the regulations proper, Plaintiff must properly allege a claim under them. The Court is aware that all of the cases cited above were in the context of motions for summary judgement, not motions on the pleadings pursuant to Rule 12(c). Nonetheless, the Complaint in its current form contains only conclusory allegations that Plaintiff was a home healthcare attendant and that she is therefore entitled to minimum wage and overtime pursuant to FLSA. Plaintiff's counsel clarified at oral argument that his client could not properly allege a claim under the FLSA based on the regulations as they currently stand. Plaintiff's counsel's agreement at oral argument that this was a test case and that his client could not meet the standards of Section 552.6 confirm that Plaintiff can not properly allege a violation of the FLSA and the DOL's

regulations promulgated thereunder. Accordingly, Defendants' motion on the FLSA claim is granted.

2. State Law Claim

Courts have consistently held that the dismissal of a plaintiff's federal claims merits dismissal of his pendent State law claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *Maric v. St. Agnes Hosp. Corp*., 65 F.3d 310, 314 (2d Cir.1995)(citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)); *In re Merrill Lynch Ltd. P'ships Litig*., 154 F.3d 56, 61 (2d Cir.1998). Having concluded that Defendants are entitled to judgment on the pleadings as to Plaintiff's underlying federal claims, this Court declines to exercise pendent jurisdiction over the corresponding State law claims. Plaintiff's State law claims are therefore dismissed without prejudice.

CONCLUSION

Defendants' Motion for judgement on the pleadings is GRANTED. Plaintiff's Motion for circulation of a Notice of Pendency and of a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b) is DENIED. The Clerk of the Court is directed to close this case.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666-cv

COKE

v.

LONG ISLAND CARE

October 10, 2006

ORDER

Before: Hon. John M. WALKER, Jr., Hon. Robert A. KATZMANN, *Circuit Judges*, Hon. John GLEESON, *District Judge*[*]

IT IS HEREBY ORDERED that Appellee's motion to stay the mandate for ninety (90) days pending submission of a petition for writ of certiorari to the United States Supreme Court is GRANTED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK
By: [Tracy W. Young, Motions Staff Attorney]

[*] The Honorable John Gleeson, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

APPENDIX E

WAGE AND HOUR ADVISORY MEMORANDUM

No. 2005-1

MEMORANDUM December 1, 2005

FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: ALFRED B. ROBINSON, JR.
Deputy Administrator

SUBJECT: Application of Section 13(a)(15) to Third Party Employers

Policy and Interpretation for Applying the Section 13(a)(15) Exemption

The purpose of this memorandum is to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). As indicated in Opinion Letter FLSA 2005-12, the Division continues to adhere to its regulation, set out at 29 C.F.R. § 552.109(a), exempting companions who are employed by third parties from the minimum wage and overtime requirements of the FLSA. Regional Administrators and District Directors are instructed to continue to apply the exemption in states outside the Second Circuit.

Rationale for Applying the Exemption

The following explains and justifies the Division's policy to continue to apply the section 13(a)(15) exemption in all jurisdictions except those that comprise the Second Circuit Court of Appeals.

The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee's activities and the place of their performance, without regard to the identity of the employer. Section 13(a)(15) ex-

empts "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). 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.

The Department's regulations explicitly state that the companionship exemption applies to companions employed by third party employers. The Department promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its additional authority to issue regulations to implement the 1974 FLSA amendments. 40 Fed. Reg. 7404 (1975); *see* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (authority to issue implementing regulations). Section 552.109(a) of Part 522 [*sic*] provides:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime requirements by virtue of section 13(a)(15).

In promulgating 29 C.F.R. § 552.109(a), the Department explained that applying the exemption to employees of third parties "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975). The Department continues to agree with that assessment because the statutory phrase "any employee" indicates that the exemption is natu-

rally read to apply based on the activities of the employee, not identity of the employer. *See, e.g.*, 29 C.F.R. § 780.303 (exemption in 29 U.S.C. § 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); 29 C.F.R. § 780.403 (exemption in 29 U.S.C. § 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities").

Section 552.109(a) is also consistent with the policy objectives that Congress was pursuing in creating the companionship exemption. Soon after the regulations were promulgated, the Department explained that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. Op. Ltr. WH-368, 1975 WL 40991 (DOL Nov. 25, 1975). In particular, legislators were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. *See* 119 Cong. Rec. 24,797 (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick). That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party.

In *Coke v. Long Island*, *supra*, the Second Circuit ruled that section 552.109(a) of the Department's regulations is inconsistent with congressional intent and with section 552.3 of the regulations. The Department disagrees. As explained above, Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment. Thus, it is unsurpris-

ing that the text of the statute focuses exclusively on the nature of the activities that companions perform and does not even hint that the source of a companion's employment is a relevant factor. Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions. *See, e.g.*, 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air").

Moreover, the congressional committee reports that discuss section 13(a)(15) repeatedly emphasize that the key factors in determining whether an employee qualifies for the companionship exemption are the nature of the employee's activities, *see, e.g.*, H.R. Rep. No. 93-913, at 33 (1974) ("The bill exempts . . . employees employed *in the capacity* of companion to an individual who, by reason of age or necessity, necessitates a companion.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) ("It is not, however, the Committee's intent to include within the term 'domestic service' such activities as casual babysitting and acting as a companion.") (emphasis added); 119 Cong. Rec. 24,801 (1973) (describing tasks performed by companions) (statements of Sens. Burdick and Williams); H.R. Conf. Rep. No. 93-413, at 27 (1973) (explaining that the kinds of services that are performed by trained personnel such as nurses do not fall within the exemption), and the place that the activities are performed. *See, e.g.*, S. Rep. No. 93-300, at 22 (1973) ("The domestic service must be performed in a private home which is a fixed place of abode of an individual or family"); S. Rep. No. 93-690, *supra*, at 20 (same); 119 Cong. Rec. at 24,799 ("A dwelling used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.") (statement of Sen. Williams).

The Department's regulations are not only consistent with congressional intent, but they are also internally consistent. The regulations address the issue of third party employment in only one place-section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption. The Department intentionally chose to include third party employees within the exemption after careful deliberation. When the regulations were first proposed, the Department drafted section 552.109 to exclude companions employed by third party employers from the exemption. 39 Fed. Reg. 35,382, 35,385 (1974). After reviewing the comments it received, however, the Department reconsidered its position. When the regulations were issued in final form, the Department adopted the present language of section 552.109(a), which expressly includes companions employed by third party employers within the exemption. The Department explained that "[o]n further consideration, [it had] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975).

The Department's January 19, 2001 NPRM and the Second Circuit's decision in *Coke v. Long Island* identified a conflict between section 552.109(a)'s pronouncement that the companionship exemption extends to third party employers and section 552.3's definition of "domestic service employment." *See* 66 Fed. Reg. at 5485; *Coke v. Long Island*, 376 F.3d at 133-34. The Department has reviewed section 552.3 and another regulation, 29 C.F.R. 552.101(a), which also addresses the concept of "domestic service employment." The regulations' definition of "domestic service employment" is relevant to determining the scope of the companionship exemption because the text of section 13(a)(15) exempts only those companions who are "employed in *domestic service*

employment to provide companionship services." Thus, the statute seems to contemplate that to qualify for the exemption, an employee must *both* "provide companionship services" *and* be "employed in domestic ser vice employment." If the definition of "domestic service employment" in sections 552.3 and 552.101(a) is properly read as excluding all third party employees, then those provisions can fairly be said to be significantly in tension with section 552.109(a), which expressly includes companions employed by third party employers.

The Department does not believe, however, that sections 552.3 and 552.101(a), when properly read in context, speak to the issue of third party employment. Neither provision explicitly mentions the subject. And unlike section 552.109(a), there is no indication that the Department ever considered the potential impact of the provisions on the coverage of third party employees, much less that it actually intended the provisions to entirely exclude them. To the contrary, at the time the regulations were promulgated the Department seems to have believed that sections 552.3 and 552.101(a) did not resolve the issue of third party employment, since it included a separate section-section 552.109-in both the NPRM and the final rule to expressly address the subject.

Admittedly, there are phrases in sections 552.3 and 552.101(a) that could potentially be read to exclude third party employees from the definition of "domestic service employment." Section 552.3 provides:

> As used in section 13(a)(15) of the Act, 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. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handy men, gardeners, footmen, grooms, and chauffeurs

> of automobiles for family use. It also includes baby sitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

And section 552.101(a) explains:

> The definition of *domestic service employment* contained in § 552.3 is derived from the regulations is sued under the Social Security Act (20 CFR 404.1057) and from the "generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." *See* S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

The statement in section 552.3 that domestic service employment is "performed by an employee in or about the private home . . . *of the person by whom he or she is employed*," and the statement in section 552.101(a) that domestic service employment "must be performed in or about the private home *of the employer*," could be read to exclude companions who are employed by third party employers from the scope of the exemption. As explained above, however, there is no reason to believe that the Department intended the provisions to have that effect. Because there are available readings of the various regulations that allow them to be internally reconciled, the Department believes that they can and should be read in harmony. *See generally* 73 CJS Public Admin. Law and Proc. § 211 (2005) ("The court should read a regulation as an entirety, and should harmonize the various parts and provisions of the entire regulation and give them effect, if possible.").

Sections 552.3 and 552.101 are best read as describing the kinds of work that constitute domestic service employment and establishing that such work must be performed in a private home, rather than in a place of business. The references in those provisions to domestic service employment needing to be performed in the home of the employer are not intended to address the issue of third party employment, but rather are an extraneous vestige of the language's origin in the Social Security regulations. *See* S. Rep. No. 93-690, *supra*, at 20. *See also* 20 C.F.R. § 404.1057 (social security regulation describing "[d]omestic service in the employer's home"); 26 C.F.R. § 31.3121(a)(7)-1(a)(2) (social security tax regulation describing "[d]omestic service in a private home of the employer").

Because the Department borrowed the language of sections 552.3 and 552.101 from the congressional committee reports underlying the 1974 amendments to the FLSA without discussion or elaboration, the legislative history must be consulted to determine their meaning. Significantly, while the legislation was being drafted, Congress repeatedly referred to and discussed in detail its view that work must be performed in a private home to qualify as "domestic service employment." For example, the 1974 amendments extending FLSA coverage to domestic workers did so by referring to employees "employed in domestic service *in a household*." P.L. 93-259, § 7(b)(1), 88 Stat. 55, 62 (1974) (emphasis added). The committee reports, in turn, described the newly covered workers using a variety of phrases emphasizing the importance of the employment bring performed in a private home: "domestic service employees in *private households*," S. Rep. No. 93-300, *supra*, at 20 (emphasis added); "domestic service *in and about a private home*," *id.* at 22 (emphasis added); "domestic service employees *employed in households*," H.R. Rep. No. 93-232, *supra*, at 31 (emphasis added); "*household* domestic employees," S. Rep. No. 93-758, *supra*, at 27 (emphasis added); "employee in domestic service *in a house-*

hold," *id.* (emphasis added); "domestic service workers," H.R. Rep. No. 93-913, *supra*, at 11; and "*private household* workers." S. Rep. No. 93-690, *supra*, at 19 (emphasis added). Indeed, the reports contain a detailed discussion of Congress's intention to require that covered domestic ser vice be performed in a private home:

> The domestic service must be performed in a private home which is a fixed place of abode of an individual family. A separate and distinct dwelling maintained by an individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of sup plying such services to the public, as a business enterprise, is not a private home.

S. Rep. No. 93-300, *supra*, at 22. *See also* S. Rep. No. 93-690, supra, at 20 (same); H.R. Rep. No. 93-913, *supra*, at 33 (same). This passage is particularly significant because it supplies content and meaning to the sentence immediately preceding it-specifically, the previously referenced sentence that draws upon the language of the Social Security regulations to define "domestic service employment" and states that its generally accepted meaning relates to "services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed." The fact that the sentence is immediately followed by a descriptive passage elaborating on the sentence's requirement that domestic service employment must be performed in a private home, but making no mention at all of the issue of third party employment, makes it clear that the sole purpose of the sentence is to specify the place where domestic service employment must be performed.

The sentence from the committee report is incorporated virtually verbatim into section 552.3, with the only modification being the addition of a brief parenthetical specifying that a private home can be fixed or temporary. In the view of the

Department, when the sentence was imported into the regulations from the committee report, it carried with it the meaning ascribed to it by Congress. The Department signaled its understanding that the sentence should be read as addressing place of performance but as not speaking to third party employment in two distinct ways. First, the one change the Department made to the sentence was the insertion of a parenthetical explaining that, with respect to the place of performance, a private home can either be fixed or temporary. The insertion of the parenthetical shows that the Department was primarily concerned with clarifying the operative effect of the regulation on the place of performance requirement. Second, the Department drafted a separate regulatory provision specifically to address the issue of third party employment. This would have been entirely unnecessary if the definition of domestic service employment excluded third party employment-particularly at the NPRM stage, when the meaning of the two provisions would have been aligned. In sum, all signs indicate that neither Congress nor the Department intended the sentence that first appeared in the committee report and was then incorporated into section 552.3 to be construed as excluding employees who are employed by third party employers from the definition of domestic service employment.

In fact, if the sentence in question were construed as excluding all employees of third party employers from the definition of domestic service employment, it would have the perverse effect of excluding many domestic workers from the coverage of the FLSA-despite Congress' express intent "to include within the coverage of the Act all employees whose vocation is domestic service," excepting only casual babysitters and companions for the aged and infirm. *See* S. Rep. No. 93-690, *supra*, at 20 (emphasis added); s*ee also* H.R. Conf. Rep. No. 93-413, at 27 (1973); S. Conf. Rep. No. 93-358, at 27 (1973). Prior to the enactment of the 1974 amendments, the only domestic workers that were covered by the

FLSA were those employed by "covered enterprises," which are currently defined by the FLSA as businesses with annual gross sales of at least $500,000 that employ at least two employees in interstate commerce. *See* 29 U.S.C. § 203(s); see also 29 U.S.C. § 203(s) (1970) ($250,000 threshold applicable at time of 1974 amendments). Two categories of domestic workers generally were not covered prior to the amendments: those employed by homeowners because there usually was no basis for individual coverage and those employed by third party employers that did not meet the test for enterprise coverage. There can be no question that Congress intended for the 1974 amendments generally to cover both of these categories, with only a few expressly enumerated exceptions. Yet if the sentence in the committee report is construed as excluding all third party employers from the definition of domestic service employment, then those domestic workers who are employed by third party employers that are not covered enterprises would to this very day not be covered by the FLSA.[1] That result is contrary to Congress' express intent, and cannot be correct.

---

[1] Unlike the sentence in the committee report, section 552.3 of the regulations purports to define domestic service employment only "[a]s used in section 13(a)(15) of the Act." As mentioned previously, however, since the Department copied the sentence from the committee report virtually verbatim into the regulations, there is no reason to believe that the Department intended for it to have a different meaning than the one that was attached to it by Congress. Indeed, there is good reason to believe that despite section 552.3's purported limitation of the definition to the companionship exemption, the Department in fact intended the provision to supply a general definition of the term as used throughout the Act. First, there is no other provision in the regulations that supplies an alternative definition of domestic service employment. Second, the examples that the regulation provides of workers that qualify as domestic service employees-including gardeners, handy men, janitors, grooms, and valets-have little or nothing to do with the provision of companionship services, but instead fall within the broader category of domestic workers generally. *See* 29 C.F.R. 552.3.

Sections 552.3 and 552.101(a) should also not be read as addressing the issue of third party employment because doing so would render them inconsistent with themselves. Section 552.101, which elaborates on the definition of domestic service employment provided by section 552.3, specifies that "private household workers" are included within the definition of domestic service employees. The term "private household workers" has long been understood by both Congress and the Department to include the employees of third party employers. During the time Congress was considering the 1974 amendments to the FLSA, the Department submitted reports defining the term as:

> [A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence.

See Department's 1973 Report to Congress on Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act at 27; 1974 Report at 31-32. The second prong of the definition unambiguously includes domestic workers who are employed by third party employers. It is not surprising that the Department incorporated private household workers into the regulations' definition of domestic service employment, since Congress referred to the Department's reports on several occasions, *see* H.R. Rep. No. 92-232, *supra*, at 31; H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19-20; 119 Cong. Rec. 24,796 (statement of Sen. Dominick), and repeatedly used the phrase "private household workers" interchangeably with the term "domestic service employees." *See* H.R. Rep. No. 93-233, *supra*, at 31 (using the term "domestic service employees" and "private household workers" in a single paragraph to describe the same set of employees); S. Rep. No. 93-300, *supra*, at 21-22

(describing the same set of employees in successive paragraphs using the interchangeable terms "private household workers," "domestics," "household workers," and "domestic workers"); H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19. In fact, the Department's definition of "private household worker" was quoted in full during the floor debate in the Senate on the amendments to the FLSA. *See* 119 Cong. Rec. at 24,796 (statement of Sen. Dominick). Since section 552.101(a) clearly states that at least some domestic workers employed by third party employers are included within the definition of domestic service employees, it makes no sense to construe the ambiguous language requiring that domestic service "be performed in or about the private home of the employer" as designed to exclude them.

The governing rules of legal interpretation require the Department to adopt a reading of the regulations that harmonizes them and renders them internally consistent as a whole. *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) (Court must read regulations "so as to give effect, if possible, to all of its provisions"); *APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) ("[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error") (citations and internal quotations omitted); *Miller v. AT&T Corp.*, 250 F.3d 820, 832 (4th Cir. 2001) ("Whenever possible, this court must reconcile apparently conflicting provisions"). If sections 552.3 and 552.101(a) were read to exclude third party employees from the definition of domestic service employment, it would not only create a conflict with section 552.109(a), but it would also be inconsistent with section 552.101(a)'s inclusion of "private household workers" within the definition of domestic service employment and with Congress's express intent "to include within the coverage of the

Act all employees whose vocation is domestic service." *See* S. Rep. No. 93-690, *supra*, at 20; H.R. Conf. Rep. No. 93-413, *supra*, at 27; S. Conf. Rep. No. 93-358, *supra*, at 27. By contrast, when sections 552.3 and 552.101(a) are read as requiring that domestic service employment be performed in private homes, but as not addressing the issue of third party employment, the regulations are fully harmonized and rendered internally consistent. Consequently, the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment. Read in that context, I find no inconsistency between sections 552.3 and 552.109(a). All prior statements by the Department to the contrary, including the Department's January 19, 2001 NPRM, *see* 66 Fed. Reg. at 5485, are hereby repudiated and withdrawn.

The Department is aware that the Second Circuit suggested in *Coke v. Long Island Health Care, Ltd.*, 376 F.3d at 131-33, that the Department's regulations governing third party employment were intended to be advisory interpretations only, and that they therefore do not have the force and effect of law. That is not the case; the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding. When the Department promulgated the final regulations in February 1975, it noted that as originally proposed, section 552.109(a) "would not have allowed the [FLSA] section 13(a)(15) or the [FLSA] section 13(b)(21) exemption for employees who, although providing companionship services, are employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. 7404-05 (emphasis added). The Department stated in the final rule that it had changed its mind, "conclud[ing] that these exemptions *can be available* to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Id.* at 7405 (emphasis added). The highlighted language makes it clear that at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third

party employers turned decisively on its pronouncement in the regulations-something that could be true only of a legislative rule. Accordingly, the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis.

APPENDIX F

STATUTES

Pertinent provisions of the current Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, include:

§ 203. Definitions

As used in this chapter—

. . .

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

. . .

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

. . .

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other

organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

. . .

§ 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

. . .

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

. . .

(f) Employees in domestic service

Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not

because of section 209(a)(6) of the Social Security Act [42 U.S.C.A. § 409(a)(6)] constitute wages for the purposes of title II of such Act [42 U.S.C.A. § 401 et seq.], or

(2) who in any workweek—

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

. . .

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent a mendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

. . .

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

. . .

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

. . .

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or 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);

. . .

******

The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, April 8, 1974, 88 Stat. 55, also included the following provision, at 88 Stat. 76:

§ 29(a). Except as otherwise specifically provided, the amendments made by this act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act."

REGULATIONS

Pertinent provisions of 29 C.F.R., Subtitle B. Regulations Relating to Labor, include:

Chapter V. Wage and Hour Division, Department of Labor
Subchapter A. Regulations

Part 552. Application of the Fair Labor Standards Act to Domestic Service

Subpart A. General Regulations

. . .

§ 552.2 Purpose and scope.

(a) This part provides necessary rules for the application of the Act to domestic service employment in accordance with the following amendments made by the Fair Labor Standards Amendments of 1974, 88 Stat. 55, et seq.

(b) Section 2(a) of the Act finds that the "employment of persons in domestic service in households affects commerce." Section 6(f) extends the minimum wage protection under section 6(b) to employees employed as domestic service employees under either of the following circumstances:

(1) If the employee's compensation for such services from his/her employer would constitute wages under section 209(a)(6) of title II of the Social Security Act, that is, if the cash remuneration during a calendar year is not less than $1,000 in 1995, or the amount designated for subsequent years pursuant to the adjustment provision in section 3121(x) of the Internal Revenue Code of 1986; or

(2) If the employee was employed in such domestic service work by one or more employers for more than 8 hours in the aggregate in any workweek.

Section 7(l) extends generally the protection of the overtime provisions of section 7(a) to such domestic service employ-

ees. Section 13(a)(15) provides both a minimum wage and overtime exemption for "employees employed on a casual basis in domestic service employment to provide babysitting services" and for domestic service employees employed" to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." Section 13(b)(21) provides an overtime exemption for domestic service employees who reside in the household in which they are employed.

(c) The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6.

§ 552.3 Domestic service employment.

As used in section 13(a)(15) of the Act, 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. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

§ 552.4 Babysitting services.

As used in section 13(a)(15) of the Act, the term babysitting services shall mean the custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside. The term "babysitting services" does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational, or practical nurses. While such trained personnel do not qualify as babysitters, this fact does not

remove them from the category of a covered domestic service employee when employed in or about a private household.

§ 552.5 Casual basis.

As used in section 13(a)(15) of the Act, the term casual basis, when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

§ 552.6 Companionship services for the aged or infirm.

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. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

. . .

Subpart B. Interpretations

§ 552.99 Basis for coverage of domestic service employees.

Congress in section 2(a) of the Act specifically found that the employment of persons in domestic service in households affects commerce. In the legislative history it was pointed out that employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce (S. Rep. 93-690, pp. 21-22). The Senate Committee on Labor and Public Welfare "took note of the expanded use of the interstate commerce clause by the Supreme Court in numerous recent cases (particularly Katzenbach v. McClung, 379 U.S. 294 (1964))," and concluded "that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act" (S. Rep. 93-690, pp. 21-22).

§ 552.100 Application of minimum wage and overtime provisions.

(a)(1) Domestic service employees must receive for employment in any household a minimum wage of not less than that required by section 6(a) of the Fair Labor Standards Act.

(2) In addition, domestic service employees who work more than 40 hours in any one workweek for the same employer must be paid overtime compensation at a rate not less than one and one-half times the employee's regular rate of pay for such excess hours, unless the employee is one who resides in the employer's household. In the case of employees who reside in the household where they are employed, section 13(b)(21) of the Act provides an overtime, but not a minimum wage, exemption. See § 552.102.

(b) In meeting the wage responsibilities imposed by the Act, employers may take appropriate credit for the reasonable cost or fair value, as determined by the Administrator, of food, lodging and other facilities customarily furnished to the employee by the employer such as drugs, cosmetics, dry-cleaning, etc. See S. Rep. 93-690, p. 19, and section 3(m) of the Act. Credit may be taken for the reasonable cost or fair value of these facilities only when the employee's acceptance of them is voluntary and uncoerced. See regulations, part 531. Where uniforms are required by the employer, the cost of the uniforms and their care may not be included in such credit.

(c) For enforcement purposes, the Administrator will accept a credit taken by the employer of up to 37.5 percent of the statutory minimum hourly wage for a breakfast (if furnished), up to 50 percent of the statutory minimum hourly wage for a lunch (if furnished), and up to 62.5 percent of the statutory minimum hourly wage for a dinner (if furnished), which meal credits when combined do not in total exceed 150 percent of the statutory minimum hourly wage for any day. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing meals, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair value is different from the meal credits specified above: Provided, however, that employers keep, maintain and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures.

(d) In the case of lodging furnished to live-in domestic service employees, the Administrator will accept a credit taken by the employer of up to seven and one-half times the statutory minimum hourly wage for each week lodging is furnished. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing lodging, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair

value is different from the amount specified above, provided, however, that employers keep, maintain, and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures. In determining reasonable cost or fair value, the regulations and rulings in 29 CFR part 531 are applicable.

§ 552.101 Domestic service employment.

(a) The definition of domestic service employment contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from "the generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

(b) Employees employed in dwelling places which are primarily rooming or boarding houses are not considered domestic service employees. The places where they work are not private homes but commercial or business establishments. Likewise, employees employed in connection with a business or professional service which is conducted in a home (such as a real estate, doctor's, dentist's or lawyer's office) are not domestic service employees.

(c) In determining the total hours worked, the employer must include all time the employee is required to be on the premises or on duty and all time the employee is suffered or permitted to work. Special rules for live-in domestic service employees are set forth in § 552.102.

§ 552.102 Live-in domestic service employees.

(a) Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day. However, section 13(b)(21) provides an exemption from the Act's overtime requirements for domestic service employees who reside in the household where employed. But this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. See regulations Part 785, § 785.23.

(b) Where there is a reasonable agreement, as indicated in (a) above, it may be used to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. The employer shall keep a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If it is found by the parties that there is a significant deviation from the initial agreement, a separate record should be kept for that period or a new agreement should be reached that reflects the actual facts.

§ 552.103 Babysitting services in general.

The term "babysitting services" is defined in § 552.4. Babysitting is a form of domestic service, and babysitters other than those working on a casual basis are entitled to the same benefits under the Act as other domestic service employees.

§ 552.104 Babysitting services performed on a casual basis.

(a) Employees performing babysitting services on a casual basis, as defined in § 552.5 are excluded from the minimum wage and overtime provisions of the Act. The rationale for this exclusion is that such persons are usually not dependent upon the income from rendering such services for their livelihood. Such services are often provided by (1) Teenagers during non-school hours or for a short period after completing high school but prior to entering other employment as a vocation, or (2) older persons whose main source of livelihood is from other means.

(b) Employment in babysitting services would usually be on a "casual basis," whether performed for one or more employees, if such employment by all such employers does not exceed 20 hours per week in the aggregate. Employment in excess of these hours may still be on a "casual basis" if the excessive hours of employment are without regularity or are for irregular or intermittent periods. Employment in babysitting services shall also be deemed to be on a "casual basis" (regardless of the number of weekly hours worked by the babysitter) in the case of individuals whose vocations are not domestic service who accompany families for a vacation period to take care of the children if the duration of such employment does not exceed 6 weeks.

(c) If the individual performing babysitting services on a "casual basis" devotes more than 20 percent of his or her time to household work during a babysitting assignment, the

exemption for "babysitting services on a casual basis" does not apply during that assignment and the individual must be paid in accordance with the Act's minimum wage and overtime requirements. This does not affect the application of the exemption for previous or subsequent babysitting assignments where the 20 percent tolerance is not exceeded.

(d) Individuals who engage in babysitting as a full-time occupation are not employed on a "casual basis."

§ 552.105 Individuals performing babysitting services in their own homes.

(a) It is clear from the legislative history that the Act's new coverage of domestic service employees is limited to those persons who perform such services in or about the private household of the employer. Accordingly, if such services are performed away from the employer's permanent, or temporary household there is no coverage under sections 6(f) and 7(l) of the Act. A typical example would be an individual who cares for the children of others in her own home. This type of operation, however, could, depending on the particular facts, qualify as a preschool or day care center and thus be covered under section 3(s)(1)(B) of the Act in which case the person providing the service would be required to comply with the applicable provisions of the Act.

(b) An individual in a local neighborhood who takes four or five children into his or her home, which is operated as a day care home, and who does not have more than one employee or whose only employees are members of that individual's immediate family is not covered by the Fair Labor Standards Act.

§ 552.106 Companionship services for the aged or infirm.

The term "companionship services for the aged or infirm" is defined in § 552.6. Persons who provide care and protection for babies and young children, who are not physically or

mentally infirm, are considered babysitters, not companions. The companion must perform the services with respect to the aged or infirm persons and not generally to other persons. The "casual" limitation does not apply to companion services.

§ 552.107 Yard maintenance workers.

Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as independent contractors who are not covered by the Act as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors.

§ 552.108 Child labor provisions.

Congress made no change in section 12 as regards domestic service employees. Accordingly, the child labor provisions of the Act do not apply unless the underaged minor (a) is individually engaged in commerce or in the production of goods for commerce, or (b) is employed by an enterprise meeting the coverage tests of sections 3(r) and 3(s)(1) of the Act, or (c) is employed in or about a home where work in the production of goods for commerce is performed.

§ 552.109 Third party employment.

(a) Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). Assigning such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during

each assignment come within the definition of companionship services.

(b) Employees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a "casual basis" for purposes of the section 13(a)(15) exemption. Such employees are engaged in this occupation as a vocation.

(c) Live-in domestic service employees who are employed by an employer or agency other than the family or household using their services are exempt from the Act's overtime requirements by virtue of section 13(b)(21). This exemption, however, will not apply where the employee works only temporarily for any one family or household, since that employee would not be "residing" on the premises of such family or household.

§ 552.110 Recordkeeping requirements.

(a) The general recordkeeping regulations are found in part 516 of this chapter and they require that every employer having covered domestic service employees shall keep records which show for each such employee: (1) Name in full, (2) social security number, (3) address in full, including zip code, (4) total hours worked each week by the employee for the employer, (5) total cash wages paid each week to the employee by the employer, (6) weekly sums claimed by the employer for board, lodging or other facilities, and (7) extra pay for weekly hours worked in excess of 40 by the employee for the employer. No particular form of records is required, so long as the above information is recorded and the record is maintained and preserved for a period of 3 years.

(b) In the case of an employee who resides on the premises, records of the actual hours worked are not required. Instead, the employer may maintain a copy of the agreement referred

to in § 552.102. The more limited recordkeeping requirement provided by this subsection does not apply to third party employers. No records are required for casual babysitters.

(c) Where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may: (1) Indicate by check marks, statement or other method that such hours were actually worked, and (2) when more or less than the scheduled hours are worked, show the exact number of hours worked.

(d) The employer may require the domestic service employee to record the hours worked and submit such record to the employer.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

COKE,

v.

LONG ISLAND CARE AT HOME, *et al.*

DECLARATION OF MARYANN OSBORNE

MARYANN OSBORNE, pursuant to 28 U.S.C. § 1746, and subject to the penalties of perjury, declares as follows:

1. I am a defendant-appellee in the above-captioned appeal and vice president of Long Island Care at Home, Ltd. ("LICAH"), also a defendant-appellee herein (collectively, "Defendants"). I make this declaration in support of Defendants' motion to stay this Court's mandate for ninety (90) days pending Defendants' application for certiorari review in the Supreme Court of the United States. The information contained in this declaration is based upon the personal knowledge I have acquired as an officer of LICAH.

2. LICAH employs approximately forty (40) home health care aides, who provide companionship services to approximately thirty (30) homebound patients.

3. Pursuant to the exemption from federal overtime wage and hour requirements permitted by 29 C.F.R. § 552.119(a), LICAH currently pays its home health care aides $8.00 per hour for an average 70-hour work week. Thus, on average, LICAH home health care aides earn approximately $560.00 per week.

4. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for LICAH employees and clients.

5. Given current limitations on government reimbursement for Medicaid patients receiving home health care companionship services, LICAH's existing business plan will result in tremendous and unsustainable losses to the company if LICAH is obligated to comply with federal overtime wage and hour requirements.

6. Thus, in order to comply with federal law while also avoiding such losses, LICAH will be forced to limit each employee's total work schedule to forty (40) hours per week, thereby avoiding higher overtime pay rates, and/or to reduce each employee's hourly wage. As a consequence, most employees will likely suffer an average 43% weekly salary reduction—or, stated differently, most LICAH home health care aides will be limited to earning $320.00 per week rather than their current $560.00 per week.

7. LICAH's homebound elderly and infirm clients will also suffer the brunt of this Court's ruling. Because it will be economically prohibitive for LICAH to assign any one home health care aide to work with a patient for more than forty (40) hours per week, the majority of patients will have to accept multiple aides entering their homes. Indeed, depending on a given patient's needs and certain reimbursement conditions, the circumstances may require assigning as many as three or more home health care aides each week to assist a client.

8. In my experience, assigning multiple home health care aides to individual patients creates a serious hardship for the patients and their families. The presence of multiple care providers in a home is often very stressful for elderly and infirm individuals. The relationship

between home health care aides and their patients is often intimate and grounded in a trust that builds over time. Because of their physical and mental conditions, many elderly and infirm patients suffer from heightened fearfulness, and they find it extremely difficult to acclimate to different care providers. This troubling dynamic often assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being.

9. Coordinating the presence of multiple care providers in a single home also often imposes a difficult burden on the patient's family members. Numerous shift changes during the day raises the likelihood that gaps in care may occur between shifts—requiring family members to fill in for a missing home health care aide or to leave the patient unattended. When family members are unwilling or physically unable to step in, or are prevented from supplying the necessary care because of other family-related demands or work, serious problem can arise. Moreover, in my experience, home health care aides who are assigned shorter shifts, and therefore stand to earn less for each client visit than those aides who are assigned longer hours with an individual, have a lesser economic incentive to be reliable and dedicated to their patients.

10. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

January 14, 2005 /s/ Maryann Osborne
MARYANN OSBORNE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,
—against—
LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Defendants-Appellees.

DECLARATION IN SUPPORT OF MOTION

ROXANNE TENA-NELSON declares the following:

1. I am vice president of the Continuing Care Leadership Coalition, Inc. ("CCLC"), a non-party that has a strong interest in this case, because compliance with the Court's decision, upon issuance of the mandate, will have serious negative implications for not-for-profit continuing care providers in New York. I am the attorney who previously submitted a motion for leave to file an amicus curiae brief, on behalf of CCLC, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. CCLC represents the interests of over 100 not-for-profit and public organizations providing long term care services in metropolitan New York and beyond. Our membership includes forty-three (43) mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals in their homes. The remainder of our membership relies heavily on the existing home care system in order to provide a full range of long term care services to older and disabled individuals.

3. As charitable, not-for-profit providers obligated to serve their local areas, CCLC's members have a unique commitment to their religious or community-focused missions, strict accountability to their boards and to their communities, and an extensive record of innovation in caring for patients. Our mission-driven members are not focused on creating a bottom-line profit, but rather they reinvest in new services and assist their communities with service enhancements.

4. This declaration is submitted in support of Defendants-Appellees' motion to stay this Court's mandate for ninety (90) days pending Defendants-Appellees' application for certiorari review in the Supreme Court of the United States. Compliance with this Court's decision, upon issuance of the mandate, will have serious negative impact on the access and quality of care for the tens of thousands of older and disabled individuals receiving services through our member organizations based upon significant increased costs for home care services, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement.

5. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for CCLC members and patients by increasing expenses for other components of New York State's long term care system, which heavily relies on home care services. The resulting disruption in the continuum of care will negatively affect patients receiving and seeking health services.

IMPLICATIONS OF COMPLIANCE WITH THIS COURT'S DECISION

6. The Court's decision will destabilize New York State's overall long term care system, will diminish labor-management achievements in the metropolitan New York area, will hinder the broader health care system, and will under-

mine the State's commitment to supporting care of older and disabled individuals at home and in the community.

A. Impact on the Overall Long Term Care System

7. New York's long term care system provides a broad range of options for older and disabled individuals either to receive services at nursing facilities or to live in the community with supportive services. Unfortunately, long term care providers in New York and throughout the nation rely heavily on governmental payments that do not reflect current health care costs. Because CCLC's members are not-for-profit providers, they are particularly committed to serving the low-income population, a large portion who receive services through Medicaid. Based on CCLC's analysis of 2002 audited financial statements, CCLC has determined that over half of the long term care providers in New York are losing money. Of these financially distressed organizations, a substantial percentage operate home health agencies and thus would be subject to additional financial hardship should the Court's decision stand. These financial strains would compound existing cost pressures associated with expected cuts to the Medicaid system, an increasingly burdensome set of regulatory requirements, a variety of workforce challenges, and resource intensive quality improvement initiatives.

8. In addition, the Court's decision will disrupt other components of the long term care system that rely on home health care services, such as adult day health care, long term home health care or "nursing home without walls" program, senior housing, and managed long term care—a capitated plan that allows nursing home certifiable individuals remain at home with supportive services.

B. Impact on the Labor-Management Achievements

9. This Court's decision will hinder the monumental strides made during the recent labor-management bargaining process in the metropolitan New York area. Long term care providers

share an interest in paying home care workers a reasonable wage and benefit package in order to retain talented staff. Home care agencies and home care workers have made progress toward achieving important wage and benefit increases, reflected in recent labor negotiations. However, the Court's decision will significantly disrupt the progress of recognizing the common need for a reasonable wage and benefit package and undermine achievements made between labor and management.

C. Impact on the Broader Health Care System

10. The Court's decision will also obstruct the flow of health care delivery between hospitals and home health care agencies, particularly for individuals in New York City that are discharged from the hospital to a home health agency through The Bridge Program, expedited hospital discharge program that allows hospital patients to be discharged to home health agencies rather than lingering in the hospital setting. By creating disruptions in the continuity of care provided by home health agencies, the Court's decision impairs the ability of hospitals to discharge patients to more appropriate home and community settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of 2002 audited financial statements, CCLC estimates that a one day increase in the length of stay for patients in New York hospitals that are discharged to home health agencies would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, an additional day will increase costs to hospitals, the State, local governments, the federal government, and the workers' compensation system, and will result in less access to hospital beds for patients who need them.

D. Impact on New York's Commitment to Home Care as a Vital Service

11. The Court's decision will undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a core element of our long term care system, New York has continued its commitment to offering services in the least restrictive setting by supporting its home and community-based services programs. New York's commitment to home care is consistent with the U.S. Supreme Court's *Olmstead* decision, which found that state and public agencies must make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The generous mix of home and community-based programs available to older and disabled people has helped over 121,000 older New Yorkers, 76% of whom are in the New York City region, continue to live in the community with the needed supports.

CONCLUSION

12. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

WHEREFORE, it is respectfully submitted that Defendants-Appellees' motion for an order to staying the mandate the filing of a petition of a writ of certiorari in the U.S. Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 14, 2005.

January 14, 2005 /s/ Roxanne Tena-Nelson

ROXANNE TENA-NELSON
Tel (212) 258-5330 or
(212) 506-5412

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

———

Docket No. 03-7666

———

EVELYN COKE,
Plaintiff-Appellant,
—against—
LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Defendants-Appellees.

———

DECLARATION IN SUPPORT OF MOTION

SUSAN CHOI-HAUSMAN declares the following:

1. I am of counsel to MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, a non-party that has a strong interest in this case, because compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid-funded personal care services program. I am an Assistant Corporation Counsel in the Appeals Division of the Office of the Corporation Counsel and the attorney who previously submitted a motion for leave to file an amicus brief, on behalf of the City of New York, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. I am familiar with the facts contained in this affirmation, based on information received from the First Assistant Deputy Commissioner of the Home Care Services Program at the City's Human Resources Administration ("HRA"), which oversees the Medicaid-funded program that provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually,

through the use of approximately 60,000 personal care aides, commonly referred to as home attendants.

3. This affirmation is submitted in support of defendants-appellees' motion to stay the mandate. Compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid funded program, in both economic and noneconomic terms for everyone involved in the program, including the government, the home attendants, and individuals receiving personal care services. Additionally, as outlined in the defendants-appellees' motion papers, the certiorari petition to the Supreme Court will present a substantial question, including a split in the Circuits on an important federal issue. Given the important public interests involved, including the ramifications for the City's Medicaid-funded program upon compliance with this Court's decision, and the ensuing chaos in the program if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court, there is good cause for a stay. Therefore, it is respectfully requested that this Court stay the mandate, pending the filing of a petition for a writ of certiorari in the Supreme Court.

OVERVIEW OF THE CITY'S INVOLVEMENT IN THE PROVISION OF PERSONAL CARE SERVICES

4. The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

5. New York City residents include a large number of low-income frail elderly and disabled individuals, many of whom live alone. New York City has been instrumental in the development of a Medicaid-funded program to provide personal care services under which Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring, walking and nutrition) when these services are medically needed to allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of personal care service to be provided to Medicaid clients is the responsibility of HRA.

6. Authorized Medicaid-funded services are delivered through contracts with over 90 provider agencies throughout the City. Medicaid clients may be authorized to receive personal care services for periods of time ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

7. At the present time, the annual cost to the Medicaid program of personal care service in New York City is approximately $1.6 billion. This amount covers care provided to approximately 50,000 individuals annually by about 60,000 home attendants. There are a number of other modalities under which care is provided to Medicaid-eligible individuals in the home, but the City's oversight responsibility is limited to personal care services, which are discussed here.

RAMIFICATIONS OF COMPLIANCE WITH
THIS COURT'S DECISION

8. Compliance with this Court's decision, upon issuance of the mandate, will have serious implications for the Medicaid-funded personal care service program administered by the City. Compliance with this Court's decision is expected to increase the cost of the program and required Medicaid funding by over $263 million per year. While this cost arguably could be somewhat limited by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple home attendants providing care to a client, without jeopardizing the client's welfare.

Economic Implications

9. This Court's decision is estimated to increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $263 million annually. New York City's Medicaid funding will need to increase from $1.592 billion to about $1.855 billion annually in order to sustain its current client service levels. As set forth below, the estimated additional $263 million annual cost consists of: (a) overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (b) an increase in billable and overtime hours for 24 hour daily care provided by "sleep-in" home attendants; and (c) travel time, which will now have to be paid to attendants who serve more than one client and travel between cases.

a. Paid Overtime

10. The City currently authorizes the delivery of approximately 105,777,000 hours of service annually to approximately 42,000 personal care service clients. Services to most of these clients are rendered by not-forprofit providers

operating under the third-party employer exemption invalidated by this Court. New York City's HRA staff estimates that approximately 19% (20,098,000) of the personal care service hours provided in City Fiscal Year 2004 were provided by attendants working in excess of 40 hours weekly.

11. These hours would be subject to overtime pay if this Court's decision is upheld. The estimated incremental cost of overtime for the 20 million hours is approximately $102.9 million annually.

b. "Sleep-In" Cases

12. Among the innovations developed by the City to facilitate delivery of personal care services to its frail and vulnerable residents is a service modality known as "sleep-in" service. Under this approach, a home attendant stays with a client for a 24-hour period, during which time the attendant is on paid duty for 12 hours, and is off duty for the remaining 12 hours, and is provided with sleeping accommodations during this time. The "sleep-in" attendant may be roused up to three times during the unpaid hours, and so is available to assist the client with special needs, such as toileting or turning, during the night-time hours. Typically these services are provided by two home attendants during the week—one of whom stays with the client for five 24-hour periods, and the other for the remaining two. This program is well accepted by both clients and home attendants, and reflects the close relationship that is appropriately developed between them.

13. The City currently has 5,033 clients who receive 24 hour daily care from home attendants who "sleep-in". These sleep-in home attendants are present 24 hours daily and receive an hourly wage for each of 12 hours; they are not compensated for the 12 hour "sleep-in" portion of the day but, rather, receive a daily shift differential. Provider agencies are authorized to bill Medicaid for 84 hours weekly (12 hours daily x 7 days) for these cases.

14. Upon compliance with this Court's decision, the non-paid "sleep-in" hours would be limited to 8 hours daily under the Fair Labor Standards Act ("FLSA"). *See* 29 C.F.R. §785.22 (explaining generally that, where an employee is required to be on duty for 24 hours or more, a bona fide sleeping period of not more than 8 hours may be excluded from hours worked and that interruptions of sleep by a call to duty must be counted as hours worked). Accordingly, the provider agency service payment authorization for these cases would have to be increased from 12 to at least 16 hours daily. These additional 4 hours daily for 5,033 cases will increase the billable hours for the City's contracted home attendant provider agencies by 7,348,180 hours annually, with a resulting additional annual cost to the government of approximately $112 million for straight-time service.

15. Further, the additional paid hours on these sleep-in cases will also have an overtime impact since the home attendants presently servicing these cases are already working hours that would be subject to overtime pay, upon compliance with this Court's ruling. Accordingly, the 7 million additional hours subject to wages on the sleep-in cases will also be subject to paid overtime. The cost of the overtime (i.e., the additional one-half-time cost) for these 7 million hours is about $37.6 million annually.

c. Travel Time

16. The City's Medicaid-funded personal care service program includes approximately 12,300 clients who receive an average of 21 hours of service weekly. Many of the home attendants service more than one of these cases in order to earn a full-time wage.

17. Presently, home attendants' wages are limited to hours actually worked; the home attendant is not paid for the time spent traveling between cases. Upon compliance with this Court's decision, the time spent in transit by these employees

will be subject to wages under the FLSA. *See* 29 C.F.R. §785.38 (explaining generally that travel time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the work day, must be counted as hours worked). The City's HRA staff conservatively estimates the annual cost to government as about $11.4 million.

18. In short, the economic impact of this Court's decision is tremendous, and will require a renegotiation of the contracts with the over 90 different provider agencies throughout the City, which actually provide the services.

Limitations on Frequent Change of Attendants

19. It might be argued that some of the costs outlined above could be avoided by limiting the hours of service currently provided to an individual client by a home attendant to a maximum of 40 hours per week. However, there are substantive reasons why this is not readily doable. The relationship between a home attendant and the client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below:

a. Privacy in the Home

20. Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for the home attendant to build a trusting personal relationship with the client, as otherwise the atten-

dant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

21. Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

b. Continuity of Care

22. Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is comfortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

c. Family Compatibility

23. In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client.

24. In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, prevent the provision of additional home attendants for each client currently receiving personal care services, in order to keep costs down. As to clients newly entering the Medicaid-funded personal care services program, changes in the provision of personal care services, such as the provision of additional home attendants, may be required, in order to keep costs down.

CONCLUSION

25. In conclusion, complying with this Court's decision, upon issuance of the mandate, will have serious ramifications, in terms of both cost and the provision of care, for the entities and individuals involved in the City's Medicaid-funded personal care services program. There is good cause for a stay of the mandate, in light of: (1) the ramifications to the City's program; (2) the fact that the certiorari petition to the Supreme Court will present a substantial question, including a

split in the Circuits on an important federal issue; and (3) and the ensuing chaos in the City's program—including another change in the renegotiated provider contracts and the disruption in the lives of individuals newly receiving personal care services—if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court.

WHEREFORE, it is respectfully submitted that defendants-appellees' motion for an order staying the mandate pending the filing of a petition of a writ of certiorari in the Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 13, 2005.

/s/ Susan Choi-Hausman
SUSAN CHOI-HAUSMAN
Tel. (212) 788-1159 or 1065

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 03-7666

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EVELYN COKE,
Plaintiff-Appellant,
—against—
LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,
Defendants-Appellees.

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DECLARATION OF CAROL RODAT IN SUPPORT OF MOTION OF DEFENDANTS-APPELLEES LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE FOR A STAY OF THE MANDATE

Carol Rodat, under penalty of perjury, hereby declares as follows:

1. I am the president of the Home Care Association of New York State, Inc. (HCA). I make this declaration in support of the motion by Defendants-Appellees Long Island Care at Home, Ltd. and Maryann Osbome for a stay of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court.

2. The HCA is a not-for-profit organization that works to promote and support high-quality, cost-effective home care and community services for the citizens of New York State. HCA is an active participant in public policy discussions and legislative initiatives involving home health care services. HCA's membership encompasses approximately 250 home care provider agencies, including primarily non-profit and governmental organizations as well as some for-profit agen-

cies. Collectively, HCA's members serve the majority of Medicare and Medicaid beneficiaries who require home care services in New York.

3. Based on my first-hand knowledge as President of HCA, I believe that the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State.

4. The budgets of HCA's provider members are severely constrained. Most providers depend on some form of government reimbursement (Medicare and predominantly Medicaid) for the home health care services they provide to the elderly and infirm.[1] Medicaid reimbursement rates are calculated based upon cost report data from two years prior and are adjusted using the national Consumer Price Index.[2] As a result, reimbursement rates for home health care costs do not generally reflect current health care costs.

5. This situation is exacerbated by the fact that government spending on home health care has *decreased* during the last decade.[3] Such spending is likely to remain severely constrained despite the growing demand and need for home health care services.[4]

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[1] *Cf.* Policy Brief, Long-Term Care: Medicaid's Role and Challenges 6 (Prepared for the Kaiser Commission on Medicaid and the Uninsured, Nov. 1999), *http://www.kforg/medicaid/loader.cfin?cfin?url=/commonspot/security/getfile.cfin&PagelD=13448* (most longterm care is financed by Medicaid program).

[2] *See* N.Y. Pub. Health Law § 3614 (Consol. 2004). In addition, New York State caps the administrative and general costs of all certified home health agencies at the statewide average.

[3] *See* Ex. A (Setting the Record Straight: A Response to 'The Plight of New York's Home Health Aides' 1-2 (2004).

[4] *See, e.g.*, Jennifer Steinhauer, New York, Which Made Medicaid Big, Looks to Cut It Back, N.Y. Times, Mar. 3, 2003, at B1 (New York State

6. Given the limited public financial resources available for home health care, provider agencies face significant financial constraints. Their budgets cannot bear the cost of compliance with the Panel's holding without additional revenues from external sources, which are unlikely to be forthcoming.[5]

7. If required to comply with federal wage requirements for companionship services without such additional funding, providers would be forced to implement measures that seriously disadvantage their home care patients.

8. Given providers' inability to fund any increased overtime, they would have to staff home companion cases on shorter shifts in order to avoid those overtime costs. The limited supply of workers willing to take such short shifts would almost undoubtedly result in uncovered hours. As a result, home care patients would either be denied some periods of care or receive care with less continuity.[6] Many

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considering Medicaid a target for budget cuts); *cf.* U.S. Dept. of Health and Human Services, Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs 11 (Feb. 2004),ftp://ftp.hrsa.gov/*bhpr/national center/RNandHomeAides.pdf. at* 8 (despite major cuts in Medicare funding, the Bureau of Labor Statistics predicts that home health aides and personal aides will increase by 62% by 2010).

[5] *See* Ex. B (Letter from Senator Christopher S. Bond, Chairman of the United States Senate Committee on Small Business, to Thomas M. Markey, Acting Administrator, Wage and Hour Division, U.S. Dept. of Labor at 3 (July 26, 2001) (costs of eliminating the third-party employer exemption outweigh any perceived benefits); Ex. C (Letter from Thomas Hamilton, U.S. Dept. of Health and Human Services, to T. Michael Kerr, Administrator, Wage and Hour Division, U.S. Dept. of Labor at 1 (Mar. 20, 2001) (doing away with the third-party employer exemption would cause a dramatic increase in needed Medicaid program expenditures).

[6] For those New York State home care patients who pay for companionship services outof-pocket, the stakes are just as high. If employer agencies pass on the increased costs of wages, patients may be forced to forego services altogether or, at a minimum, to reduce the services they currently receive and require. *See McCune v. Oregon Senior Servs. Div.*,

patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services.

9. Home care workers will also themselves be harmed if HCA's provider members are forced to eliminate or shorten shifts. Home health workers who staff cases requiring companionship services depend upon the wages and benefits that result from the hours that they work. Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.

10. In short, eliminating the third-party employer exception will effect a massive disruption to the delicately balanced system that makes home care—a desired alternative to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State.

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

/s/ Carol A. Rodat
CAROL RODAT

Executed on: January 14, 2005

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894 F.2d 1107, 1110 (9th Cir. 1990); Joshua M. Wiener et al., *Catastrophic Costs of Long-Term Care for Elderly Americans,* in Persons with Disabilities: Issues in Health Care Financing and Service Delivery 182 (Joshua M. Wiener et al., eds., 1995).