No.

IN THE
SUPREME COURT OF THE UNITED STATES

HOME CARE ASSOCIATION OF AMERICA, *et al,*

Petitioners,

v.

DAVID WEIL, *et al,*

Respondents.

On Petition For Writ of Certiorari To The
U.S. Court of Appeals for the District of Columbia
Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents important questions left open by this Court's opinion in *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158 (2007), which upheld the exemption of third-party home care employees from the overtime provisions of the Fair Labor Standards Act (FLSA). The Department of Labor has now issued a rule that for the first time denies third-party employers their right to "avail themselves" of the statutory home care exemptions, presenting the following questions of great public importance to millions of home care providers and elderly and disabled home care consumers:

1. Whether this Court intended in *Coke* to allow the Department to deprive all third-party home care employers (who employ more than 90% of all home care employees) of their statutory right to avail themselves of exemptions to overtime under the FLSA.

2. Whether the D.C. Circuit erred in finding that Congress intended to exclude employees of third party employers from the home care exemptions, thereby conflicting with *Coke's* contrary reading of Congressional intent and creating a conflict in the circuits.

3. Whether the Department's new rule should be found to be unreasonable due to the agency's failure to meaningfully address the relevant factors of unaffordability and lack of adequate state funding of the increased costs of home health care under the new rule.

LIST OF PARTIES TO PROCEEDINGS IN THE COURTS BELOW AND CORPORATE DISCLOSURE STATEMENT

The Petitioners in this case are the Home Care Association of America, the International Franchise Association, and the National Association For Home Care and Hospice, which are all national trade associations. Petitioners are not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6.

Respondents in this case are David Weil, Thomas E. Perez, and the United States Department of Labor.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The ruling of the D.C. Circuit as to which the writ is being sought is reported as *Home Care Association of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015) (App. 1a). The Orders of the district court which were reversed by the D.C. Circuit are reported with the same caption at 76 F. Supp. 3d 138 (D.D.C. 2014) (App. 27a) and 78 F. Supp. 3d 123 (D.D.C. 2015) (App. 48a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The D.C. Circuit's order was issued on August 21, 2015. (App. 1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Section 207 of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207, reads in pertinent part as follows:

"[N]o employer shall employ any of his employees...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 regula rate at which he is employed."

Section 213 of the FLSA, 29 U.S.C. 213, reads in pertinent part as follows:

"(a) The provisions of Section 206...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 by regulations of the Secretary).

(b) The provisions of section 207 of this title shall not apply with respect to * * *

(21) any employee who is employed in domestic service in a household and who resides in such household;...."

29 U.S.C. 202, note, codifying Sec. 29(b) of the 1974 Amendments to the FLA, Pub. L. No. 93-259, states:

"(b) Notwithstanding subsection (a)[effective date], 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."

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, reads in pertinent part as follows:

"[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;...."

The challenged rule codified at 29 C.F.R. Part 552 is provided in the appendix to this Petition. (App. 64a).

STATEMENT OF THE CASE

At issue in this Petition is a Department rule that dramatically departs from the plain language and Congressional intent underlying statutory exemptions from the minimum wage and overtime requirements of the FLSA that have been in place since 1974. The exemptions have been a critical factor in maintaining the affordability of home care for millions of elderly and disabled individuals across the country. The district court vacated the Department's new rule upon finding that the Department had "gutted" the statutory exemptions in disregard of Congressional intent. (App. 27a, 43a). As further explained below, the district court action was plainly correct and the court of appeals was wrong to uphold the new rule. The Petition presents issues of substantial importance to the entire home care industry and to the separation of powers between the executive and legislative branches of government.

A. The Department's Challenged Rule

The Department's new rule is entitled "Application of the Fair Labor Standards Act to Domestic Service," 78 Fed. Reg. 60,454 (Oct. 1, 2013). (App. 64a). The new rule states that "[t]hird party employers of employees engaged in companionship services within the meaning of Section 552.6 may not avail themselves of the minimum wage and overtime exemption provided by Section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the service." Section 552.109(a). The new rule further declares that

"[t]hird party employers of employees engaged in live-in domestic service employment within the meaning of Section 552.102 may not avail themselves of the overtime exemption provided by Section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of he family or household using the services." Section 552.109(c).

The statutory exemptions referred to in the new rule were added to the FLSA in the 1974 Amendments.[1] Section 13(a)(15) exempts from the minimum wage and overtime compensation requirements of the Act "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)." Section 13(b)(21) of the Act further exempts from the overtime compensation requirements of the Act "any employee who is employed in domestic service in a household and who resides in such household."

Neither of the statutory provisions cited in the new rule contains any language authorizing the Department to exclude a class of employers from "availing themselves" of any exemption applicable to their employees. To the contrary, both exemptions apply by their plain language to "any" employee performing the specified home care duties. This is the first instance in the history of the Act in which the executive branch has unilaterally excluded a class of employers from availing themselves of *any*

[1] Pub. L. No. 93-259, 88 Stat. 55.

Congressionally mandated exemption to the Act's overtime provisions, other than those employers already excluded by Congress in the Act itself.[2]

Under the FLSA, the obligation of employers to pay covered employees overtime for hours worked over 40 in a week derives exclusively from Section 207 of Title 29; and the obligation of any employer to pay overtime under Section 207 is *cancelled* by Section 213 of Title 29, with respect to "any employee" identified in one of the several dozen exemption provisions of that Section. As stated at the outset of Section 213(a) with respect to any such exempt employee, "the provisions of ... section 207 of this title *shall not apply.*" (emphasis added). An identical provision appears at the outset of Section 213(b) which again nullifies the provisions of Section 207 as to any employer whose employees are exempted by any provision of Section 213(b).[3]

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[2] Congress has expressly limited the classes of employers whose employees are deemed to be exempt in several other provisions of the Act. *See, e.g.*, 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is amusement or recreational establishment, organized camp, or religious or non-profit education conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air"); 29 U.S.C. 207(i) ("any employee of a retail or service establishment").

[3] The provisions of Section 213(a) also cancel the minimum wage requirements of Section 206 of the Act along with the overtime provisions of Section 207. Section 213(b) only nullifies the overtime requirements of Section 207 and does not affect minimum wages. Only the overtime provisions are pertinent to this case, because "few affected workers, if any, have an hourly rate less than the minimum wage." 78 Fed. Reg. at 60456.

In conflict with the D.C. Circuit, the Tenth Circuit has declared that "Congress created the companionship services exemption in order 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." *Welding v. Bios Corp.*, 353 F. 3d 1214, 1217 (10th Cir. 2004). *See also McCune v. Oregon Senior Servs. Div.*, 894 F. 2d 1107, 1108-09 (9th Cir. 1990) ("[C]ritical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. * * * [M]any private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization."); *accord Sayler v. Ohio Bureau of Workers' Comp.*, 83 F. 3d 784, 787 (6th Cir. 1996); *Cook v. Diana Hays and Options, Inc.*, 212 F. Appx. 295, 296-7 (5th Cir. 2006).

Numerous statements in the Congressional Record, including the statement of Sen. Johnston cited by this Court in *Coke*, confirm this Congressional intent. *See* 119 Cong. Rec. 24,798 (statement of Sen. Johnston), cited at 551 U.S. at 167. See also 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick); *Id.* at 24,801 (statement of Sen. Burdick).[4] None of these

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[4] During the Senate debate on the 1974 amendments, Senator Dominick approvingly read into the record the following definition of "private household worker:" "The term 'private household workers" includes all workers ... in or about a private residence ... employed by ... a household ***service***

statements, or any others in the legislative history, purport to restrict the issue of affordability solely to caregiving provided by family members as opposed to third party employers.

Neither the Senate Report nor the House Report cited in the appeals court's opinion indicates that Congress intended to exclude from the exemption any caregivers merely because they are employed by third party employers.[5] Also, neither Committee Report purports to exclude individuals who perform companionship services as their "vocation;" such a reference appears only with regard to *non*-exempt domestic service workers. Senate Report at 20; House Report at 36. By contrast, the exemption of babysitters, listed in the same section of the statute, is expressly restricted to those babysitting employees who are "employed on a casual basis." 29 U.S.C. 213(a)(15). As noted by the district court, no such restriction appears in the companionship portion of the exemption. (App. 41a).

Based upon its contemporaneous understanding of legislative intent, the Department issued regulations in 1975 to implement the 1974 FLSA Amendments. 40 Fed. Reg. 7404 (Feb. 20, 1975), codified at 29 C.F.R. Part 552. For the past 40 years, until the new rule, the 1975 regulations exempted all companion caregivers "who are

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business whose services have been requested by a member of the household occupying that residence. 119 Cong. Rec. at 24,796 (emphasis added).

[5] *See* S. Rep. No. 93-690 (1974); H.R. Rep. No. 93-913 (1974).

employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. at 7407 (the previous Section 552.109). The Department declared in 1975, and has reiterated since, that "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Id.* at 7405. *See also* Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005); *see also Long Island Care at Home Ltd. v. Coke*, Brief for the United States as *Amicus Curiae*, Docket No. 06-593 (U.S. 2007).

In 2007, this Court granted certiorari to consider a challenge to the Department's 1975 rules in the case of *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). In that decision, the Court rejected the challenge and upheld the Department's 1975 rule, thereby reaffirming the exempt status of employees of third party employers.[6]

In the *Coke* case, this Court was not asked to review, and did not consider, the question presented by the present Petition. Specifically, the Court did not consider whether the Department is authorized to issue a rule that prevents employers from "availing themselves" of the Act's statutory exemptions of their employees.

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[6] As the Court held: "The question before us is whether, in light of the statute's text and history,...the Department's [1975] regulation is valid and binding. [citation to *Chevron* omitted] We conclude that it is." *Id.* at 158.

Also in the *Coke* decision, the Court specifically held that the FLSA's legislative history did not support the Department's current claim that Congress somehow intended to limit the companionship exemption by excluding those employees who are employed by third parties. Both Evelyn Coke and the Second Circuit Court of Appeals made almost exactly the same arguments regarding the legislative history of the 1974 Amendments that the D.C. Circuit has now relied on in support of the new rule.[7] But this Court *rejected* Coke's (and now the D.C. Circuit's) reading of legislative history, flatly stating: "We do not find these arguments convincing." *Id.*, 127 S. Ct. at 2346.

The *Coke* Court did state that the statutory language at issue "instructs the agency to work out the details" of the broad definitions of employees covered by the exemption. The Court added: "And whether to include workers paid by third parties within the scope of the definitions is one of those details." But because it was not confronted with a rule that purported to exclude third parties

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[7] Respondent Coke's Supreme Court filings pointed to the supposed overall purpose of the 1974 Amendments to extend FLSA coverage, and that the FLSA previously covered companionship workers employed by third party employers large enough to qualify as "enterprises." *Id.* at 2346-7. Coke likewise highlighted statements made by some members of Congress distinguishing between "professional domestics" and mere family members or neighbors, as well as language in a different statute (the Social Security Act) which defines "domestic service employment" differently from the FLSA. In addition, numerous amicus briefs asserted that the industry had greatly expanded and been transformed in ways that Congress did not intend.

altogether from "availing themselves" of the statutory exemption, the *Coke* Court neither considered nor authorized such a rule as is presented in the present case.[8]

As noted by the district court, Congress has amended the FLSA on numerous occasions since the promulgation of the Department's 1975 rules recognizing the exemption of companionship and/or live-in employees of third party employers. *See, e.g.*, Act of Dec. 9, 1999, Pub. L. No. 106-151, § 1, 113 Stat. 1731; Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 2105(a), 110 Stat. 1755, 1929. (App. 43a-44a). Congress has chosen not to amend the home care exemptions during that time period and has otherwise expressed no disagreement with the Department's previous longstanding interpretation of either the companionship or live-in statutory exemptions.

In addition, since the *Coke* ruling in 2007, Congress has specifically considered and rejected legislation seeking to overrule this Court's decision by excluding third party employers from the FLSA home care exemptions. *See* "The Fair Home Health Care Act of 2007, H.R. 3582 and S. 2062 (110th Cong. 2007); "The Direct Care Job Quality Improvement Act of 2011," H.R. 2341 and S. 1273 (112th Cong. 2011); and "The Direct Care Workforce Empowerment Act of 2013," H.R. 5902 and S. 3696

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[8] The Court posed, but did not answer, a series of questions about the possible scope of the companionship exemption. 511 U.S. at 167. The only question that the Court answered was whether the Department rightly included third party employees within the coverage of the exemption in the current rule. The Court answered that question in the affirmative. *Id.*

(113th Cong. 2013). As pointed out by the district court, none of these bills had sufficient Congressional support to reach a vote on the floor of either house. (App. 44a).

Notwithstanding the above described judicial and legislative endorsement of the 1975 rules as being consistent with the 1974 FLSA amendments, the Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on December 27, 2011, 76 Fed. Reg. 81190 (Dec. 27, 2011), proposing to fundamentally change the longstanding exemption rules. Following public comment on the proposed exclusion of third party employers, the Department published its final rule in October 2013, with an effective date of January 1, 2015. The new rule relied on essentially the same grounds that this Court had so recently rejected in *Coke*, *i.e.*, the erroneous claim that Congress did not intend to exempt employees of such third party employers from the coverage of the Act. *Id.* at 60455, 60482. (App. 73a-74a).

The rule was (and is) opposed not only by the home care industry, but also by representatives of millions of disabled consumers of home care services who believe (correctly) that the new rule will make such services less affordable to those in need. State Medicaid directors also informed the Department that funds are not available to accommodate the increased costs associated with the new rule, further jeopardizing home care services for those unable to afford them. These and other comments provided detailed and specific evidence establishing that the most likely result of the proposed rule would be

increased institutionalization of elderly and infirm individuals, and/or more expensive, lower quality home care, exactly the opposite of what Congress intended when it passed the statutory exemptions.

B. Proceedings Before the District Court and Court of Appeals

As noted above, the new rule was originally scheduled to go into effect on January 1, 2015. Petitioners filed a complaint against the new rule in June 2014, challenging both the third party employer exclusion of Section 552.109 and the definitional exclusion of most "care" functions from the definition of companionship in Section 552.6.

In October 2014, while cross-motions for summary judgment were pending before the district court, the Department issued an announcement in the Federal Register that, due to serious concerns expressed by Medicaid Directors and others regarding the lack of readiness to implement the new rule, the Department would not seek to enforce the rule for six months beyond the rule's effective date. But the Department refused to delay the effective date of the new Rule, leaving employers exposed to private litigation. 79 Fed. Reg. 60,974-75 (App. 33a, n.6).

The district court proceeded to rule on the third party employer issue on December 22, 2014, granting Plaintiffs' motion and vacating Section 552.109 of the new Rule. (App. 45a). The district court agreed with the Petitioners that once the Department filled the "definitional gaps" in the statute as to the employee services covered by the

exemptions, the plain language and legislative history of the FLSA amendments prohibited the Department from excluding employers from "availing themselves" of the exemptions. (*Id.*).

The district court further held that this Court's *Coke* decision had found the Department's longstanding third-party employment rule to be "valid and binding" and that the Court had not considered the question presented by the present case:

> The Supreme Court did not consider the question with which I am presented by this new rule: whether the Department is authorized to craft a rule which prevents employers from "availing themselves" of the Act's statutory exemptions of their employees in a manner inconsistent with the plain language of Section 213? To the extent the Supreme Court analyzed the statutory language of the exemption (rather than how different regulations interacted with one another), the Court focused on the Department's authority to define statutory terms, which is not the method by which the Department promulgated the new third-party employer regulation here.

(*Id.* at App. 42a). For each of the foregoing reasons, as more fully set forth in the court's opinion, the district court found that the Department's exclusion of employers from availing themselves of the Act's

statutory exemption of their employees violated the plain language and legislative intent underlying both of the statutory exemptions, and vacated Section 552.109 of the Rule.

Following issuance of the district court's ruling on the third party employer issue, Petitioners filed an emergency motion to enjoin enforcement of the redefinition of companionship services contained in Section 552.6 of the new Rule. Section 552.6 was still scheduled to go into effect on January 1, 2015 and had not yet been addressed by the court. The district court issued a temporary restraining order against implementing Section 552.6 on December 31, 2014 and, following further briefing and argument, granted summary judgment vacating the companionship redefinition as well on January 14, 2015. (App.48a).

On appeal by the Department, the D.C. Circuit reversed. (App. 1a). The appeals court held that the Petitioners' (and the district court's) contention that the FLSA does not delegate to the Department the authority to exclude a class of employers from access to the Act's exemptions is "foreclosed by the Supreme Court's decision in *Coke*." (*Id.* at 12a). According to the D.C. Circuit, this Court rejected "arguments that the statutory text compels a result in either direction," leaving the Department "with the power to fill ... gaps through rules and regulations...." (*Id.* at 13a). Giving deference to the Department at *Chevron* Step II, the appeals court found that the Department's exclusion of third party employers from availing themselves of the exemption of their employees was not arbitrary or capricious and

should therefore be upheld. (*Id.* at 18a-19a). In reaching this conclusion, the court of appeals relied on findings of Congressional intent that this Court expressly rejected in the *Coke* case. (*Id.*)[9]

On September 18, 2015, The D.C. Circuit refused to stay its mandate pending the filing of this Petition. The Chief Justice denied an application for emergency stay on October 6, 2015. Docket No. 15A326.

REASONS FOR GRANTING THE WRIT

This Court has already found that the question of the exempt status of home care workers under the FLSA presents an issue of great public importance, having granted certiorari in order to uphold the exemption of such workers in the *Coke* case. 551 U.S. at 158. The Department's new rule not only achieves the opposite result from that upheld by *Coke*, but does so by trampling on the statutory rights of employers to avail themselves of the FLSA exemptions mandated by Congress, all to the detriment of millions of elderly and disabled

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[9] Based upon its findings upholding the Department's exclusion of third party employers from availing themselves of the statutory exemptions, the D.C. Circuit found that the Petitioners lacked standing to challenge the Department's changes to the definition of companionship services in Section 552.6. The appeals court therefore reversed the district court's order vacating that additional section of the new rule without reaching its merits. (App.25a-26a). Petitioners continue to challenge the legality of the changes to section 552.6, and upon this Court's review and reversal of the appeals court's findings on the third-party issue, Petitioners seek a remand to the D.C. Circuit for consideration on the merits of the district court's order vacating the changes to Section 552.6.

home care consumers. These are certainly issues of great public importance that merit review by this Court.

In the 77-year history of the FLSA, the Department has never before been allowed to unilaterally exclude an entire class of employers from "availing themselves" of an exemption of their employees mandated by Congress. That is what has occurred here. This Court's review is required to prevent the Executive Branch from usurping Congress's authority to exempt third party employers from paying overtime to home care workers, where Congress has chosen by its plain language to give higher priority to maintaining the affordability of home care.

In addition, contrary to the D.C. Circuit, the statutory exemption of "any" employees performing companionship or live-in home care precludes a rule that excludes all employees of third-party employers. This Court did not address such a rule in *Coke*, but to the extent that the D.C. Circuit has relied on *dicta* in the Court's opinion to support the Department's new rule here, the Court should grant review in order to clarify or overrule such *dicta*, in order to correct the appeals court's misreading of the plain language of the Act.

As further discussed below, even if the D.C. Circuit were correct that the Department's new rule is not foreclosed by the plain language of the FLSA, review and reversal by this Court would still be called for under *Chevron Step II*, because the new

rule fails this Court's tests of reasonableness under its holdings in *State Farm* and *Michigan v. EPA*.[10]

First, the Department, supported by the D.C. Circuit, improperly declared that Congress intended by its 1974 amendments not just to leave a "gap" in the definition of covered home care workers, but also to *compel* the exclusion of third-party employees from the exemptions. (App. 18a-19a). This erroneous assessment of Congress's intent conflicts directly with *Coke* and creates a conflict with findings of the Tenth, Ninth, Sixth, and Fifth circuits, all of which have held that Congress was primarily concerned with maintaining the affordability of home health care, not with excluding employees of third party employers from providing such care.

Second, the D.C. Circuit and the Department failed to give adequate consideration to the relevant factor of the cost of the new rule, as required most recently by this Court in *Michigan v. EPA*. In particular, the Department and the court of appeals failed adequately to address the unavailability of government funding sources (primarily Medicaid) to handle the increased costs resulting from the new rule. Without adequate government funding sources, the Department's reversal of 40 years of policy exempting third-party employees from overtime will inevitably cause elderly and disabled consumers of home health to lose access to such services. Absent review and reversal by this Court, the new rule will have a severely disruptive impact on the home care

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[10] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983); *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

industry and the millions of consumers who rely on the FLSA exemptions to afford home care services.

I. This Court's Review Is Required To Resolve Conflicts Between The D.C. Circuit's Decision And This Court's Ruling in *Coke*, Which Will Otherwise Result In Unprecedented Expansion Of Executive Power To Rewrite The FLSA.

Congress declared at the outset of Section 213 that the exemption provisions of the FLSA cancel any obligation of employers to pay overtime under Section 207. The appeals court never addressed this plain language, claiming erroneously that this Court's *Coke* decision "foreclosed" any reliance by Petitioners on the plain language test of *Chevron* Step I. But the only "plain language" issue in *Coke* was whether the Department was permitted to define employees of third-party employers as being covered by the exemption, which the *Coke* Court approved. The Department's new rule achieves the opposite result, not by redefining exempt employees, but by an entirely different means: denying *employers* the exercise of their statutory rights to access FLSA exemptions.[11]

This Court has previously held that agencies are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomm. Corp. v. Am. Tel.*

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[11] As noted above, this is the first case in which any court has allowed the Department unilaterally to prevent any class of employers from availing themselves of access to any statutory exemption that otherwise applies to their employees.

& Tel. Co., 512 U.S. 218, 231 n.4 (1994). In conflict with *MCI,* the appeals court ignored the unlawful method adopted by the Department to achieve its announced objective of narrowing the coverage of the home care exemptions. This was clear error.[12]

Congress has never delegated to the Department the authority to deny employers their rights to avail themselves of statutory exemptions that apply to their employees. Specifically with regard to the home care industry, Congress has never authorized the Department to exclude more than 90 percent of employers in the home care industry from availing themselves of exemptions covering "any" of their home care employees. For that reason, *Chevron* Step I applies to this case, as the district court correctly held.

To hold otherwise, as the D.C. Circuit has done, renders limitless the ability of the Department to rewrite the FLSA's exemptions. What, for example, is to prevent the Department from declaring that selected categories of employers can no longer "avail themselves" of the "white collar" exemptions (section 213(a)(1)) such as presently cover all executive, administrative, professional, and other employees who meet the salary and job duties tests? What is to prevent the Department from excluding any class of employers from availing

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[12] The district court got it right: "[T]he [*Coke*] Court focused on the Department's authority to define statutory terms, which is not the method by which the Department promulgated the new third-party employer regulation here. * * * [The *Coke* decision] does not grant the Department judicial cover for what can only be characterized as a wholesale arrogation of Congress's authority in this area." (App. 43a).

themselves of the dozens of exemptions carefully crafted by Congress? The point is that regardless of whether the Department is or is not entitled to use its definitional authority to narrow the categories of *employees* who are eligible for exemption under the FLSA home care exemptions, the Department cannot be permitted to arbitrarily exclude an entire classification of *employers* from availing themselves of access to exemptions that by their terms apply to their employees.

Both the Department and the D.C. Circuit relied heavily on this Court's *dicta* in *Coke*, in which the opinion asked a series of questions that Congress left open in the statutory exemption of companionship services. (App. 16a). But the *Coke* Court's discussion of the "gaps" in the statutory language, in the limited circumstances of that case, does not bear the weight ascribed to it by the appeals court (and the Department).

Thus, in upholding the previous rule, the Court declared that the statutory language "instructs the agency to work out the details" of the broad definitions of employees covered by the exemption. 551 U.S. at 167. The Court added: "And whether to include workers paid by third parties within the scope of the definitions is one of those details." *Id.* The Court further asked a series of rhetorical questions as to what options the Department could consider in defining the scope of covered employees. *Id.*[13] The Court nevertheless

[13] The Court asked: "Should the FLSA cover *all* companionship workers paid by third parties? ... Should it cover *some* such

remained focused on upholding the exemption of employees under the statute; the Court did not consider or authorize the Department to exclude *employers* from availing themselves of their statutory rights to exemptions that otherwise apply to their employees.[14]

To the extent that the *Coke dicta* is found to support the D.C. Circuit's opinion, then this Court should grant review in order to reconsider and/or overrule that *dicta*, which was unnecessary to the Court's holding. Taken to its extreme, as the D.C. Circuit has done, it is inconsistent with the plain language of the Act, exempting "any employees" performing the exempt job duties, to find that Congress intended to give the Department the discretion to declare that the FLSA should cover "none" of the more than 90% of home care employees who work for third-party employees.

The appeals court further erred in declaring that the Department was not required to "define or delimit" the types of employees covered by the terms of Section 213(a)(15) or 213(b)(21) in order to exclude

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companionship workers...? Should it cover *none*?" *Id.* at 167-68, quoted by the appeals court at App. 16a.

[14] For the same reason, the appeals court erred in asserting that this Court in *Coke* considered and rejected Petitioners' *Chevron* Step I argument, based on the Court's failure to adopt the reasoning of an *amicus* brief filed by one of the present Petitioners in that case. (App. 12a). No party to the *Coke* case argued one way or the other about the Department's authority to exclude third party employers from availing themselves of the statutory exemption, because no such rule had been enacted or even suggested by the Department at that time.

third party employers from availing themselves of access to the exemptions, citing the general rulemaking authority provided by Section 29(b) of the Act. (App. 16a). Here again, the appeals court's opinion conflicts with the language of the Court's *Coke* opinion, which expressly referred to the Department's "definitional authority" as the basis for its holding. 551 U.S. at 167.

In any event, this Court has previously refused to allow the Department to use its general rulemaking authority to override the express statutory provisions of the laws the Department enforces. Thus, in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002), the Court rejected the Department's claim that its general rulemaking authority to carry out the purposes of the Family and Medical Leave Act somehow authorized the Department to issue a rule penalizing employers in a manner inconsistent with the statute. *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (forbidding an agency from exercising its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law."). As this Court has recently held, "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014).[15]

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[15] For similar reasons, there is no legal support for the Department's denial of third party access to the statutory exemption of live-in caregivers under Section 213(b)(21). The D.C. Circuit's reliance on Section 29 as the sole basis for violating the plain language of this FLSA exemption again conflicts with this Court's holding in *Ragsdale*.

The D.C. Circuit compounded its conflict with this Court's holdings by rejecting application of the Congressional reenactment doctrine as "persuasive evidence" of legislative intent. (App. 16a-17a). *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), quoting *NLRB v. Bell Aerospace v. NLRB*, 416 U.S.267, 274-75 (1974). *See also Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 827 (2013). Contrary to the appeals court's opinion, this Court in *Coke* did not need to address (and so did not address) Congressional acquiescence to the Department's previous home care rule, in order to hold that the previous rule was valid and binding.[16]

Ultimately, only this Court can definitively explain what it meant to hold in *Coke* and whether it intended to "foreclose" consideration of the plain language of the FLSA in judicial review of the Department's new and completely different rule. Given the importance of this issue to millions of disabled home care recipients and the industry as a whole, the Court should grant the present Petition in order to resolve this unanswered question.

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[16] The D.C. Circuit placed undue reliance on this Court's holding in *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187). (App. 17a). That decision dealt only with a failed legislative proposal that was not combined with decades of Congressional acquiescence to a longstanding agency interpretation.

II. The D.C. Circuit's Mistaken Findings In Support Of The New Rule Under *Chevron* Step II Directly Conflict With This Court's *Coke* Decision And With Other Circuit Courts of Appeal.

Even if the D.C. Circuit were correct in its holding that the Department's new rule does not exceed the agency's statutory authority under the plain language of the FLSA, review and reversal by this Court would still be called for in order to resolve the conflicts created by the appeals court's *Chevron* Step II analysis. In finding the Department's Rule to be "reasonable" under the Act, the D.C. Circuit (like the Department) relied heavily on findings of Congressional intent that this Court rejected in *Coke*. (App. 18a-19a). The appeals court's findings also conflict with the holdings of several different circuits on this issue.

Thus, according to the appeals court, it was "reasonable" for the Department to find that "the 1974 Amendments intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service;" exempting only "casual employees who are not regular bread-winners or responsible for their families' support." (App. 19a-20a, quoting from the Department's new rule at 78 Fed. Reg. at 60,454 and 60,481).[17]

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[17] The Department actually cited the legislative history of the 1974 Amendments 25 times in the Final Rule, indicating throughout that its erroneous view of Congressional intent was the principal motivating factor in promulgating the new Rule.

This Court squarely rejected in *Coke* the same interpretation of Congressional intent when it was advanced by the Second Circuit and by Evelyn Coke.[18] In response to these same arguments in the *Coke* case, this Court properly declared: "We do not find these arguments convincing." 551 U.S. at 167. The Court observed that the FLSA did not cover all third-party-paid workers in 1974, prior to the Amendments. The Court further cited Senator Johnston's expression of concern that failing to exempt companionship workers "might make such services so expensive that some people would be forced to leave the work force in order to take care of aged or infirm parents." *Id.*, citing 119 Cong. Rec. 24798.[19]

The D.C. Circuit's opinion similarly creates a conflict within the circuits as to Congress' intent in the home care exemptions. As noted above, the Tenth Circuit has held that "Congress created the companionship services exemption in order to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own

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[18] *See Coke v. Long Island Care At Home, LTD*, 376 F.3d 118, 133 (2d Cir. 2004), *rev'd*, 551 U.S. at 167. Respondent Coke similarly claimed that the 1974 Amendments sought to extend FLSA coverage to third-party employees, and she relied on the same legislative comments highlighted by the D.C. Circuit. *See* Supreme Court Brief of Respondent at 5, cited by this Court at 511 U.S. at 167.

[19] As further noted by the district court (App. 41a), Congress's omission of the word "casual" as a modifier of companionship services immediately after applying that term to limit exempt babysitters belies the claim in the appeals court's opinion that Congress intended to limit the companionship exemption only to "casual elder sitters." (App. 19a).

private homes as opposed to institutionalizing them." *Welding v. Bios Corp.*, 353 F. 3d 1214, 1217 (10th Cir. 2004). As the Ninth Circuit likewise held in *McCune v. Oregon Senior Servs. Div.*, 894 F. 2d 1107, 1108-09 (9th Cir. 1990): "[C]ritical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. * * * [T]he only alternative for these individuals may be institutionalization." *See also Sayler v. Ohio Bureau of Workers' Comp.*, 83 F. 3d 784, 787 (6th Cir. 1996); *Cook v. Diana Hays and Options, Inc.*, 212 F. Appx., 295, 296-7 (5th Cir. 2006).

Thus, in focusing on the supposed desire of Congress to expand coverage of domestic workers who were not engaged in home health care, the D.C. Circuit improperly gave short shrift to the core reason why Congress exempted home health care workers from such coverage in the first place, *i.e.*, affordability. It is undeniable that the new rule will increase the cost of home health care coverage and that many elderly and disabled workers will not be able to afford home health care services under the new rule.[20]

Also contrary to the appeals court ruling, this Court was made aware of changes to the home care industry that allegedly occurred between 1974 and

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[20] In this regard, the D.C. Circuit ignored the briefs of multiple *amici* representing the disabled community, who spoke from personal experience of their need to keep the overtime exemption in place in order to retain access to vital home care services. *See Amici* Brief to the D.C. Circuit filed by ADAPT and Council for Independent Living, Circuit Docket No. 15-5018.

the Court's 2007 decision in *Coke*. Yet unlike the D.C. Circuit, this Court properly found that Congress was primarily interested in exempting home care workers from overtime so as to maintain affordability of this vital service for elderly and disabled consumers. In the absence of any material change to companionship job duties since the Court's decision in *Coke*, no rational basis exists for the radical and expensive changes to home care that are compelled by the Department's new rule.

The D.C. Circuit's opinion also again conflicted with this Court's previous holdings that the Congressional reenactment doctrine is "persuasive evidence" of legislative intent. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), quoting *NLRB v. Bell Aerospace v. NLRB*, 416 U.S.267, 274-75 (1974). *See also Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 827 (2013). As noted above, the Department's 1975 regulation applying the home care exemptions to third-party employees was a "long standing, contemporaneous construction of a statute" (*Id.*), that Congress chose to leave in place while repeatedly re-enacting Section 213 over the past four decades. *See* citations above. Under such circumstances, it is the settled law of this Court that Congressional acquiescence is "persuasive evidence that the [previous] interpretation is the one intended by Congress." *Commodity Futures*, at 846.

The D.C. Circuit only addressed the Congressional reenactment doctrine (improperly) in connection with the appeals court's analysis of *Chevron Step I*, discussed above. (App. 16a). The

D.C. Circuit failed entirely to consider the doctrine in connection with its *Chevron Step II* holding that the Department "reasonably" believed Congress affirmatively intended to exclude third-party employees in the manner accomplished by the new rule. (App. 18a-19a). A substantial question exists, therefore, as to whether Congress's failure to overturn the Department's previous rule both *before and after* the *Coke* decision should be deemed to be persuasive evidence that Congress did *not* intend to exclude third-party employers from availing themselves of the statutory exemptions, contrary to the findings of the Department and the D.C. Circuit.

In addition to improperly relying on the foregoing impermissible interpretation of Congressional intent, the D.C. Circuit and the Department also failed to meaningfully consider an important aspect of the problem: the lack of affordability of the new rule, particularly for those businesses and consumers relying on inadequate funding under state Medicaid programs to pay the increased costs imposed by the new rule, noted above. *See Michigan v. EPA*, 135 S. Ct. at 2706 (overturning a rule under *Chevron Step II* for failure of the agency to consider the "relevant factor" of cost).

Here, the Department was made aware of the fact that many states do not have Medicaid funds available to fund the increased costs that are sure to result from the new rule. So was the D.C. Circuit. *See Amici* Brief to the D.C. Circuit by Kansas and Other State Agencies, Docket No. 15-5018 ("[T]he Department's new regulations expose States to an

unfunded liability for overtime wages under the FLSA;" and further noting: "In Kansas alone, almost 11,000 individuals rely upon a Medicaid-funded program to provide the care they need to live independently. The new regulations, however, threaten the operational viability of this program, both in letter and spirit."). The Department gave no meaningful consideration to the problem, and the D.C. Circuit ignored it altogether.

Instead, the appeals court accepted the Department's claim that limited experience under recent state laws justified the belief that increased rates of institutionalization will not result from the new rule's increased costs to consumers. The Department incorrectly exaggerated the number of state laws that currently treat third party caregivers as exempt from overtime.[21] The appeals court then faulted the Petitioners for failing to identify harm from statistical data that does not yet exist due to the small sample size. (App. 24a).

Contrary to the appeals court, it is unreasonable to believe that Congress went to the trouble of passing the companionship and live-in exemptions with the intent to have the Department eviscerate them by excluding more than 90 percent

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[21] It is simply untrue that fifteen states currently "provide minimum wage and overtime protections to all or most third party-employed home care workers". (App. 24a). Also contrary to the appeals court (*id.*), opponents of the rule testified to specific adverse impacts of the very few state laws that have removed the exemptions. *See, e.g.*, Statement of Wynn Esterline Before the House Committee on Education and the Workforce, March 20, 2012, attached as Exhibit to A.R. Comments of Husch Blackwell dated March 21, 2012.

of all home care providers from availing themselves of the exemptions. Nor does it make sense that Congress intended to achieve its primary goal of maintaining affordability of home care for the elderly and disabled by allowing the Department to increase the costs of such care at a time when state funding mechanisms are inadequate to meet the higher costs that will result from the new rule.

Neither the appeals court nor the Department explained why home care givers who perform exactly the same job duties, whether they are viewed as "breadwinners" or as "casual," should be treated as exempt when employed by the direct consumer but non-exempt when employed by a third party. The work performed is identical and Congress intended the exemption to apply equally to both. It cannot be a "permissible" construction of the FLSA exemptions to make home care unaffordable to 90 percent of the elderly and disabled individuals who need such care, solely because they obtain their care from someone hired outside the immediate family. If the "problem" identified by the Department is that home care providers have become overly "professional," then the proper remedy would be to impose restrictions on such professionalism, regardless of who the employer is.

Unlike the appeals court, the district court correctly understood that the Department's new Rule has given undue to weight to only "one side of the coin," *i.e.*, caregiver wages, which the Department has chosen to increase for those employers who seek to provide home care more than 40 hours per week, even though such cost increases

will adversely impact the neediest home health care consumers. (App. 41a). In conflict with other circuits, the D.C. Circuit's opinion will allow the Department to achieve its improper goal of narrowing the statutory home care exemptions, defying the will of Congress and disrupting a vital industry benefitting millions of elderly and disabled consumers, unless this Court intervenes by granting the present Petition and reversing the D.C. Circuit's decision.

CONCLUSION

The decision of the Court of Appeals directly conflicts with rulings of this Court and other circuits on issues of great public importance. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

A. Opinion of the D.C. Circuit in *Home Care Association of America v. Weil,* 799 F.3d 1084 (D.C. Cir. 2015).....1a

B. Opinion of the District Court for the District of Columbia in *Home Care Association of America v. Weil*, 76 F. Supp. 3d 138 (D.D.C. 2014).....27a

C. Order of the District Court for the District of Columbia in *Home Care Association of America v. Weil*, Case No. 14-cv-967 (Dec. 31, 2014).....46a

D. Opinion of the District Court for the District of *Columbia in Home Care Association of America v. Weil*, 78 F. Supp. 3d 123 (D.D.C. 2015).....48a

E. Final Rule and Previous Version of 29 C.F.R. 552.....64a

F. Federal Register, Vol. 78, Page 60480, (Oct. 1, 2013), Preamble to Third Party Provision of Final Rule (excerpt).....66a

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 7, 2015 Decided August 21, 2015

No. 15-5018

HOME CARE ASSOCIATION OF AMERICA, ET AL., APPELLEES

v.

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

Appeal from the United States District Court for the District of Columbia

(No. 1:14-cv-00967)

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

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

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

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

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

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

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

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

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

Derek Schmidt, Attorney General, Office of the Attorney General for the State of Kansas, *Jeffrey A. Chanay,* Chief Deputy Attorney General, *Toby Crouse,* Special Assistant Attorney General, *Mark Brnovich,* Attorney General, Office of the Attorney

General for the State of Arizona, *Samuel S. Olens*, Attorney General, Office of the Attorney General for the State of Georgia, *Bill Schuette*, Attorney General, Office of the Attorney General for the State of Michigan, *Adam Paul Laxalt*, Attorney General, Office of the Attorney General for the State of Nevada, *Wayne Stenehjem*, Attorney General, Office of the Attorney General for the State of North Dakota, *Herbert H. Slatery, III*, Attorney General, Office of the Attorney General for the State of Tennessee, *Ken Paxton*, Attorney General, Office of the Attorney General for the State of Texas, and *Brad D. Schimel*, Attorney General, Office of the Attorney General for the State of Wisconsin were on the brief for *amici curiae* States of Kansas, et al.

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

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

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

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

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

The Fair Labor Standards Act's protections include the guarantees of a minimum wage and

overtime pay. The statute, though, has long exempted certain categories of "domestic service" workers (workers providing services in a household) from one or both of those protections. The exemptions include one for persons who provide "companionship services" and another for persons who live in the home where they work. This case concerns the scope of the exemptions for domestic-service workers providing either companionship services or live-in care for the elderly, ill, or disabled. In particular, are those exemptions from the Act's protections limited to persons hired directly by home care recipients and their families? Or do they also encompass employees of third-party agencies who are assigned to provide care in a home?

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

Since the time the Department initially adopted that approach, the provision of residential care has undergone a marked transformation. The growing demand for long-term home care services and the rising cost of traditional institutional care have fundamentally changed the nature of the home care industry. Individuals with significant care needs increasingly receive services in their homes rather

than in institutional settings. And correspondingly, residential care increasingly is provided by professionals employed by third- party agencies rather than by workers hired directly by care recipients and their families.

In response to those developments, the Department recently adopted regulations reversing its position on whether the FLSA's companionship-services and live-in worker exemptions should reach employees of third-party agencies who are assigned to provide care in a home. The new regulations remove those employees from the exemptions and bring them within the Act's minimum-wage and overtime protections. The regulations thus give those employees the same FLSA protections afforded to their counterparts who provide largely the same services in an institutional setting.

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

We therefore reverse the district court and remand for the grant of summary judgment to the Department.

I.

The FLSA, 29 U.S.C. §§ 201 *et seq.*, generally requires covered employers to pay a minimum wage, and also requires payment of overtime compensation at an hourly rate equaling 150% of normal pay for weekly work hours beyond forty. 29 U.S.C. §§ 206(a), 207(a)(1). The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, extended the Act's minimum-wage and overtime protections to employees in "domestic service," *i.e.*, service in a household. 29 U.S.C. §§ 206(f), 207(l). The congressional committee reports accompanying the 1974 Amendments explained that domestic service "includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use." S. Rep. No. 93-690, at 20 (1974); H.R. Rep. No. 93-913, at 35-36 (1974).

The 1974 Amendments also exempted defined categories of domestic-service workers from certain FLSA protections. This case concerns two of those exemptions. First, 29 U.S.C. § 213(a)(15), pertaining to companionship services, provides that the FLSA's minimum-wage and overtime requirements shall not apply with respect to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by

regulations of the Secretary)." Second, 29 U.S.C. § 213(b)(21), pertaining to live-in domestic-service workers, provides that the Act's overtime protections shall not apply with respect to "any employee who is employed in domestic service in a household and who resides in such household." The 1974 Amendments included a broad grant of rulemaking authority empowering the Secretary of Labor to "prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 1974 Amendments, Pub. L. No. 93-259, § 29(b), 88 Stat. 76.

In 1975, the Department of Labor adopted implementing regulations. Those regulations addressed the treatment of companionship-services workers and live-in domestic-service workers who are employed by third-party agencies. The regulations provided that the § 213(a)(15) exemption for companionship services and the § 213(b)(21) exemption for live-in workers included individuals "who [were] employed by an employer other than the family or household using their services." 29 C.F.R. § 552.109(a), (c) (2014). The regulations also defined the term "companionship services" to mean "those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." 29 C.F.R. § 552.6 (2014). Additionally, "[s]uch services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services." *Id.*

Subsequently, in 1993, 1995, and 2001, the Department, citing dramatic changes in the provision of home care services, proposed regulatory

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

In 2002, the companionship-services portion of the third-party-employer regulation became the subject of a legal challenge brought by an employee of a third-party agency who sought overtime and minimum-wage protections. Ultimately, the Supreme Court rejected her challenge, upholding the regulation's inclusion of third-party-employed workers within the Act's companionship-services exemption. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). The employee argued that the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should not apply, and that, if it did, the statutory exemption unambiguously applied only to workers employed directly by private households, thus rendering the third-party regulation invalid. The Court disagreed. It held that the "the text of the

FLSA does not expressly answer the third-party-employment question"; that Congress had granted authority to the Department to resolve the issue; and that the Department's answer—*i.e.*, its regulation including employees who work for third-party agencies within the companionship-services exemption—was reasonable. *Coke*, 551 U.S. at 168, 171.

In 2013, the Department again considered reversing course on the third-party-employer issue, this time adopting a final regulation doing so. "In the 1970s," the Department observed, "many individuals with significant care needs were served in institutional settings rather than in their homes." Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,455 (Oct. 1, 2013). But "[s]ince that time, there has been a growing demand for long- term home care." *Id.* "As more individuals receive services at home rather than in nursing homes and other institutions, workers who provide home care services . . . perform increasingly skilled duties" analogous to the professional services performed in institutions. *Id.* The Department concluded that, "given the changes to the home care industry and workforce" since the original 1975 regulations, the new regulation would "better reflect Congressional intent" behind the 1974 Amendments. *Id.* at 60,454. As authority for the new regulation, the Department cited, in addition to the statutory exemptions themselves, the general grant of rulemaking authority in § 29(b) of the 1974 Amendments. *Id.* at 60,557.

Under the new regulation, third-party employers of companionship-services and live-in

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

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

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

II.

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

The Department contends that its revised third-party- employer regulation lies within the scope of its rulemaking authority under the general agency delegation in § 29(b) of the 1974 Amendments, as confirmed by the Supreme Court's

decision in *Coke*. The Department further argues that the new regulation is a reasonable exercise of the Department's authority at *Chevron* step two and is neither arbitrary nor capricious. We agree with the Department and uphold the regulation.

A.

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

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

agency, supported by the United States, put forward an intermediate position. In their view, the text of the statutory exemption "does not address third-party employment," leaving the agency discretion to resolve the matter at *Chevron* step two. Brief for United States as Amicus Curiae Supporting Petitioners at 8, 17-18, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 579234, at *8, *17-18; *see* Brief for Petitioners at 10-12, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 549107, at *10-12.

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

at 165.

The Court's conclusion precludes appellees' *Chevron* step-one argument. It is true that *Coke* addressed a challenge solely to the companionship-services portion of the prior regulation, while this case also encompasses a challenge to the live-in worker provision of the revised regulation. But the *Coke* Court's characterization of third-party-employer treatment as an "interstitial matter . . . entrusted [to] the agency to work out" equally applies to the Department's authority under the FLSA's live-in worker exemption. Indeed, Congress framed the companionship-services and live-in worker exemptions with precisely parallel construction and phrasing. Section 213(a)(15) exempts from the FLSA's minimum-wage and maximum-hour requirements "*any employee employed in domestic service employment* to provide companionship services for individuals who . . . are unable to care for themselves." 29 U.S.C. § 213(a)(15) (emphasis added). And § 213(b)(21) symmetrically exempts from the Act's maximum-hour requirements "*any employee who is employed in domestic service* in a household and who resides in such household." 29 U.S.C. § 213(b)(21) (emphasis added). Both provisions invite further specification, the details of which "turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses." *Coke*, 551 U.S. at 165, 167-68.

Appellees also stress that the companionship-services exemption provides for the Secretary to "define[] and delimit[]" its terms, while the live-in worker exemption contains no similar supplement.

Compare 29 U.S.C. § 213(a)(15), *with id.* § 213(b)(21). The Supreme Court in *Coke*, however, did not focus on the "define[] and delimit[]" language in § 213(a)(15). Rather, in holding that the Department had authority to "fill [the third-party-employment] gap[] through rules and regulations," the Court relied on § 29(b)'s general grant of authority to establish rules implementing the 1974 Amendments. *Coke*, 551 U.S. at 165. The Court invoked the precise terms of § 29(b)'s general grant of implementation authority—the authority "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act"—in the portion of its opinion holding that the third-party-employment question had been delegated to the Secretary. *Id.* And although the Court also cited 29 U.S.C. § 213(a)(15) as a source of agency authority alongside § 29(b), the "define[] and delimit[]" language, unlike the language of § 29(b), was neither reproduced nor highlighted. *See Coke*, 551 U.S. at 165. Because § 29(b) "gives an agency broad power to enforce *all* provisions" of the 1974 Amendments—including both § 213(a)(15) and § 213(b)(21)—the Department's "authority is clear" with respect to both FLSA exemptions. *Gonzales v. Oregon*, 54 U.S. 243, 258 (2006) (emphasis added) (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

Appellees get no further in arguing that, even if the regulation upheld in *Coke* amounted to a valid exercise of the Department's authority to "define" the terms of the companionship-services exemption, the revised regulation does not. Appellees posit that, while the Secretary may *define* terms within the phrase "employee employed in domestic service

employment to provide companionship services," the Department exceeded its authority when, instead of "defining" that phrase, it issued a rule providing that third- party employers "may not avail themselves" of the exemption. 29 C.F.R. § 552.109(a). That argument fails for the reason already given: The Department's authority does not flow solely from the "define[] and delimit[]" language of § 213(a)(15), but instead, as the *Coke* Court emphasized, comes from the general grant provided by § 29(b) to "work out" the statutory "gaps" through rules and regulations. *Coke*, 551 U.S. at 165.

Indeed, in finding it within the Department's "broad grant" of authority to decide "whether to include workers paid by third parties within the scope" of the companionship- services exemption, the Court explicitly contemplated that the full range of potential outcomes lay within the agency's discretion. *Id.* at 167-68. "Should the FLSA cover *all* companionship workers paid by third parties?," the Court asked. *Id.* at 167. Or should it instead "cover *some* such companionship workers . . . ? Should it cover *none*?" *Id.* All of those possibilities, the Court made clear, were the Department's to assess. *Id.*

Appellees' remaining step-one arguments are unavailing. Appellees contend that the Department's new rules conflict with the legislative history of the FLSA amendments. But the *Coke* Court explicitly found that the "statute's legislative history" provides no "clear answer" to the "third-party- employment question." *Coke*, 551 U.S. at 168. And while appellees seek to attach significance to Congress's amendment of other subsections of § 213 in 1996 and 1999 without altering either § 213(a)(15) or § 213(b)(21), the *Coke*

Court, having been advised about that congressional inaction, *see* Brief for the United States as Amicus Curiae at 20 n.5, *Coke*, 551 U.S. 158 (No. 06-593), apparently found it immaterial to the *Chevron* step one inquiry. Appellees similarly argue that Congress's more recent inaction in the face of proposed legislation to exclude third-party employers from the statutory exemptions shows congressional intent to allow employers to continue making use of the exemptions. But "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks omitted). And here, Congress's failure to enact legislation does nothing to upset *Coke*'s holding that "the text of the FLSA does not expressly answer the third-party-employment question." 551 U.S. at 168.

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

B.

Because we conclude that Congress delegated authority to the Department to determine whether employees of third- party agencies should fall within the scope of the companionship-services and live-in worker exemptions, we proceed to *Chevron* step two. At that step, "'if the implementing agency's construction is reasonable,' a court must 'accept the agency's construction of the statute.'" *Fin. Planning*

Ass'n v. SEC, 482 F.3d 481, 498 (D.C. Cir. 2007) (quoting *Brand X*, 545 U.S. at 980). The Department's interpretation readily satisfies that standard.

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

The Department's resolution of that question is entirely reasonable. The Department explained that bringing domestic-service workers paid by third-party employers within the FLSA's protections would be consistent with congressional intent. The 1974 Amendments "intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service," the Department observed, 78 Fed. Reg. at 60,454, not to "roll back coverage for employees of third parties who already had FLSA protections," *id.* at 60,481. Because Congress's overriding intent was to bring more workers within the FLSA's protections, the Department determined that the companionship-services and live-in exemptions from coverage should "be defined narrowly in the regulations to achieve the law's purpose." *Id.* at 60,482. In the Department's view, a narrow construction of the statutory exemptions

draws further support from "the general principle that coverage under the FLSA is broadly construed so as to give effect to its remedial purposes, and exemptions are narrowly interpreted . . . to those who clearly are within the terms and spirit of the exemption." *Id.* (citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)). The Department thus decided to interpret the exemptions as "narrow" ones that target individuals who are "not regular breadwinners or responsible for their families' support." *Id.* at 60,481 (citing H. Rep. No. 93-913, p. 36).

The Department's understanding is consistent with Congress's evident intention to "include within the coverage of the Act all employees whose *vocation* is domestic service." S. Rep. No. 93-690, at 20 (emphasis added); *see* H.R. Rep. No. 93-913, at 33-34, 36 (similar). Both the 1974 Senate and House Reports, in explaining the purpose behind the companionship exemption and another exemption covering "casual babysitting services," drew a contrast between "casual" employees and employees whose "vocation is domestic service." S. Rep. No. 93-690, at 20; H.R. Rep. No. 93-913, at 33-34, 36. And one Senator, when commenting on the expansion of the FLSA to cover domestic-service employees, contrasted the type of assistance provided by a "neighbor" or an "elder sitter" with "the professional domestic who does this as a daily living." 119 Cong. Rec. 24,801 (July 19, 1973) (statement of Sen. Burdick). It is true that the Department points to no legislative materials concerning the live-in exemption in particular. But it was reasonable for the Department to assume that Congress intended the live-in exemption to operate in much the same way as the similarly worded companionship exemption—*i.e.*, to exclude from the

FLSA's scope casual employees who are "not regular bread-winners or responsible for their families' support." 78 Fed. Reg. at 60,481 (citing S. Rep. No. 93-690, p. 20; H.R. Rep. No. 93-913, p. 36).

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

C.

Appellees contend that, even if the new third-party regulation passes muster at *Chevron* step two,

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

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

The Department's explanation for its updated rule meets those standards. In addition to reasoning that its original regulation misapplied congressional intent, the Department justified its shift in policy based on the "dramatic transformation of the home care industry since [the third- party-employer] regulation was first promulgated in 1975." 78 Fed. Reg. at 60,481. When Congress enacted the 1974 Amendments, the "vast majority of the private household workers were employed directly by a member of the household." Report to the Ninety-Third Congress by the Secretary of Labor: *Minimum Wage*

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

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

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

D.

Appellees see a "strong[] indicat[ion]" in the administrative record that removing third-party-

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

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

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

states suggesting any decline in access to (or quality of) home care services owing to the extension of minimum-wage and overtime protections to home care workers. *See* Addendum to Reply Br. 14, 21.

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

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

The Department instead reasonably credited comments suggesting that the new rule would improve the quality of home care services. The "rule will bring more workers under the FLSA's protections," the Department concluded, which "will

create a more stable workforce by equalizing wage protections with other health care workers and reducing turnover." *Id.* at 60,483. Increased protections will also "ensur[e] that the home care industry attracts and retains qualified workers," improving the quality of home care services. *Id.* at 60,548. The Department predicted that the revised regulations would benefit consumers "because supporting and stabilizing the direct care workforce will result in better qualified employees, lower turnover, and a higher quality of care." *Id.* at 60,459-60. Those sorts of "[p]redictive judgements about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable." *BellSouth Telecomm., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) (internal quotation marks omitted). The Department's judgments are.

III.

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

In light of our disposition with respect to the third-party- employer regulation, appellees cannot show that the revised definition of companionship services causes their member companies injury in

fact. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Appellees conceded before the district court that, until the court vacated the third-party-employer regulation, their members "lacked standing to pursue injunctive relief against [the enforcement of 29 C.F.R. § 552.6], because third-party employers were not allowed to avail themselves of the exemption under any definition of companionship services, and [appellees] were therefore not directly harmed by [§ 552.6]." Mem. in Supp. of Emergency Mot. for Temporary Stay of Agency Action and Req. for Expedited Consideration, No. 14-cv-967, Dkt. No. 23-1, at 1-2 (filed Dec. 24, 2014). Appellees make no effort in their appellate briefing to revisit that understanding. Because we now reverse the district court's vacatur of 29 C.F.R. § 552.109, appellees cannot make use of the companionship-services exemption, and their members thus suffer no direct injury as a result of the Department's narrowed definition of companionship services. We therefore lack jurisdiction to consider appellees' challenge to that definition.

* * * * *

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

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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

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

his official capacity as the Secretary of the Department of Labor; and the Department of Labor itself (together, "defendants" or "the Department"). Compl. 1 [Dkt. # 1]. Plaintiffs challenge this new Department of Labor regulation as an arbitrary and capricious exercise of authority inconsistent with Congresss language and intent. *See generally* Compl. Indeed plaintiffs contend, *inter alia*, that if this new rule, which goes into effect on January 1, 2015, is allowed to stand it will have a destabilizing impact on the entire home care industry and will adversely affect access to home care services for millions of the elderly and infirm. *See* Compl., 4.

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

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

BACKGROUND

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19, first passed in 1938, obligates employers to pay covered employees minimum wage for all hours worked and overtime wages for hours worked in excess of 40 in a week, *id.* §§ 206-07. Congress amended the FLSA in 1974 in part to extend certain labor protections, including the provision of minimum and overtime wages, to domestic service employees.[2] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7, 88 Stat. 55, 62; *see* 29 U.S.C. § 201 (finding that domestic service employment affects commerce); *id.* § 206(f) (extending minimum wage protection); *id.* § 207(l) (extending overtime protections). At the same time that it expanded FLSA coverage to domestic service employees, Congress included exemptions tied to certain types of domestic service work. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7(b)(3)-(4), 88 Stat. 55, 62. In particular, the statute explains that its overtime and minimum wage requirements shall not apply to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15) ("companionship services exemption"). Nor shall its overtime requirements apply to "any employee who is

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

employed in domestic service in a household and who resides in such household." 29 U.S.C. § 213(b)(21) ("live-in domestic employee exemption"). The exemptions at issue here have remained in place since the passage of the 1974 Amendments, though FLSA exemptions have been amended since that time. *See, e.g.*, Act of Dec. 9, 1999, Pub. L. No. 106-151, § 1, 113 Stat. 1731 (defining "fire protection activities" to clarify an overtime exemption); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 21 05(a), 110 Stat. 1755, 1929 (adding an exemption under 29 U.S.C. § 213(a) for certain computer professionals); Act of Sept. 30, 1994, Pub. L. No. 103-329, § 633(d), 108 Stat. 2382, 2428 (adding an overtime and minimum wage exemption for certain criminal investigators).

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

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

basis." *Id.*

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

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

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

regulations).

In 2007, the Supreme Court heard a challenge to the validity of the long-standing inclusion of employees paid by third parties within the companionship services exemption. In *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), a domestic worker who had been employed by a third party to provide companionship services sued her former employer, claiming she was entitled to minimum and overtime wages under the FLSA. With the United States defending the current regulation as amicus curiae, *see* Br. for the U.S. as Amicus Curiae Supporting Pet'rs, *Coke*, 551 U.S. 158 (No. 06-593), the Court concluded that the third-party rule was valid and binding, *Coke*, 551 U.S. at 62.

In response to the Supreme Court's decision in *Coke*, several bills were introduced in Congress seeking to abolish this exemption. *See* "Direct Care Job Quality Improvement Act of 2011," H.R. 2341 and S. 1273, 112th Cong. (2011); "Direct Care Workforce Empowerment Act," H.R. 5902 and S. 3696, 111th Cong. (2010); "Fair Home Health Care Act of 2007," H.R. 3582 and S. 2061, 110th Cong. (2007). Notwithstanding efforts by legislators in the majority party in both the House and Senate in three consecutive Congresses (110th, 111th, 112th),[5] none of their bills ever generated sufficient support to get out of committee and to the floor of either house of Congress. *See generally* Congress.gov,

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

https://www.congress.gov/ (searchable bill histories).

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

After receiving over 26,000 comments, 78 Fed. Reg. 60,460, including comments from plaintiffs, *see* J.A., Tabs D-J [Dkt. ## 17-4 - 17-10], the Department published the Final Rule on October 1, 2013, 78 Fed. Reg. 60,454 ("new rule" or "new regulation"). This new rule is scheduled to go into effect on January 1, 2015.[6] *Id.* Of relevance here, of course, is the new rule's effect on the application of the companionship services and live-in domestic service employee exemptions.[7] In a

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

[7] Plaintiffs also challenge the new rule's revised "companionship services" definition in their Complaint, Compl. ¶¶ 34-39, but that issue is not before the Court on this Motion for Expedited Partial Summary Judgment, Pls.' Mem. at 2 n.1. The change regarding third-party

section entitled "Third Party Employment," it states that "[t]hird party employers of employees engaged in companionship services . . . may not avail themselves of the minimum wage and overtime exemption" provided by the statute, and "[t]hird party employers of employees engaged in live-in domestic service employment . . . may not avail themselves of the overtime exemption" provided by the statute. 78 Fed. Reg. 60,557.

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

Plaintiffs move for partial summary judgment on Counts I and II of their Complaint, which involve the new third-party regulation. Pls.' Mot.; Pls.' Mem. in Supp. of Mot. for Expedited Partial Summ. J. ("Pls.' Mem.") [Dkt. #9-1]. Defendants move to dismiss those counts, or, in the alternative, cross-move for summary judgment. Defs.' Mot.; Defs.' Combined Mem. in Supp. of Mot. to Dismiss or in the Alternative Cross- Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. ("Defs.' Mem.") [Dkt. #13-1]. I heard oral argument on the cross-motions on November 19, 2014.

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employment was not effected through any revision to the definition of "companionship services," or any other definition, for that matter. 78 Fed. Reg. 60,557.

LEGAL STANDARD

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

ANALYSIS

I. *Chevron* Analysis

Plaintiffs first argue that the new rule conflicts with the plain language and legislative history of the FLSA. Pls.' Mem. at 11-17. The Department disagrees and counters that the new regulation is entitled to deference because it was promulgated pursuant to the Department's rulemaking authority in this area and reflects a reasonable interpretation of the statute. Defs.' Mem. at 13-28.[8]

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[8] Plaintiffs further argue that, should the Court find the new rule not to conflict with the statute, the Court nonetheless should set the rule aside as arbitrary and capricious because the Department of Labor did not provide an adequate

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

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

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justification for changing its long-established policy interpreting the FLSA. Pls.' Mem. at 17-22. The Department maintains that its use of the notice and comment rulemaking process and consideration of all of the relevant factors preclude plaintiffs from carrying their burden of proving the regulation is arbitrary and capricious. Defs.' Mem. at 29-35. For the reasons described below, I do not reach this *Chevron* Step II issue.

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

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

such a way as to effectively rewrite the exemption out of the law. Pls.' Mem. at 11-13. I agree with the plaintiffs.

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

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

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

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

That Congress intended the exemption to apply to *all* employees who provide companionship and live-in domestic services is further evidenced by analyzing the surrounding exemption text. *See Abramski v.*

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

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

United States, 134 S. Ct. 2259, 2267 (2014) (explaining that a court must "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose" (internal quotation marks omitted)). In particular, Congress did not hesitate in other exemptions listed within Section 213 to make distinctions on the basis of who employs the employee. *See, e.g.*, 29 U.S.C. § 213(a)(3) (exempting "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center" in certain circumstances); *id.* § 213(b)(3) (exempting "any employee of a carrier by air"); *id.* § 213(b)(10) (exempting salesmen for motor vehicles and certain other machinery, but only if employed by a certain type of employer).

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

60,557.

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

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

"Agencies are . . . 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Colo. River Indian Tribes*, 466 F.3d at 139 (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994)). Here, Congress has directed the Department of Labor to define statutory terms, and then include "any

employee" who provides services according to those definitions within the scope of the exemptions. The focus is on the type of the services provided, not who pays the check. As such, Congress has clearly spoken on this issue, and the Department's new, conflicting rule therefore cannot survive.

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

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

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

The Supreme Court did not consider the question with which I am presented by this new rule: whether the Department is authorized to craft a rule which prevents employers from "availing themselves" of the Act's statutory exemptions of their employees in a manner inconsistent with the plain language of Section 213? To the extent the Supreme Court analyzed the statutory language of the exemption (rather than how different regulations interacted with

one another), the Court focused on the Department's authority to define statutory terms, which is not the method by which the Department promulgated the new third-party employer regulation here. *Id.* at 168 (explaining that it was "reasonable to infer . . . that Congress intended its broad grant of *definitional* authority to the Department to include the authority to answer these kinds of questions" (emphasis added)). And the Supreme Court did not consider the live-in domestic employee exemption *at all.*

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

III. Congressional Inaction

Although not alone dispositive, I cannot overlook the fact that Congress has revisited the FLSA many times since the 1974 Amendments, while the 1975 regulations have been in place. Indeed, Congress has amended its statutory exemptions over the years in other ways, *see, e.g.*, Act of Dec. 9, 1999,

Pub. L. No. 106-151, § 1, 113 Stat. 1731; Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 2105(a), 110 Stat. 1755, 1929, but has not altered the exemptions at issue here. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

Following the *Coke* decision, Congress contemplated adjusting the statutory language of the companionship exemption at least three times, but never did so. *See* "Direct Care Job Quality Improvement Act of 2011," H.R. 2341 and S. 1273, 112th Cong. (2011); "Direct Care Workforce Empowerment Act," H.R. 5902 and S. 3696, 111th Cong. (2010); "Fair Home Health Care Act of 2007," H.R. 3582 and S. 2061, 110th Cong. (2007). Six bills were introduced—three in the House of Representatives, three in the Senate—over the course of three Congressional sessions, where the sponsors were in the majority party of each,[11] yet there was never sufficient support to get any of them to the floor of either house of Congress. This unequivocally represents a lack of Congressional intent to withdraw this exemption from third-party employers. The fact that the Department issued its Notice of Proposed Rulemaking *after* all six of these bills failed to move is nothing short of yet another thinly-veiled effort to do

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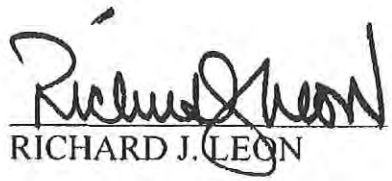
[11] *See* note 5, *supra*.

through regulation what could not be done through legislation.[12] Such conduct bespeaks an arrogance to not only disregard Congress's intent, but seize unprecedented authority to impose overtime and minimum wage obligations in defiance of the plain language of Section 213. It cannot stand.

CONCLUSION

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



RICHARD J. LEON

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

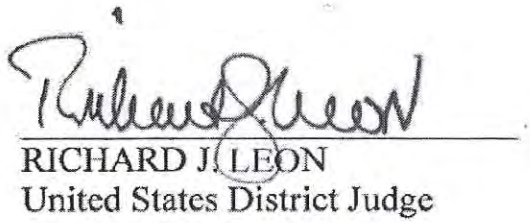
HOME CARE ASSOCIATION OF AMERICA, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 14-cv-967 (RJL)
DAVID WEIL, *et al.*,	)	
Defendants.	)	

ORDER

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

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

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



RICHARD J. LEON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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

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

of Labor's narrowed definition of "companionship services," Section 552.6 of the new rule, promulgated in 78 Fed. Reg. 60,557, and to be codified at 29 C.F.R. § 552.6.

On December 24, 2014, plaintiffs moved for emergency injunctive relief to keep Section 552.6 from coming into effect on January 1, 2015. Emergency Mot: for Temporary Stay of Agency Action and Req. for Expedited Consideration ("Pls.' Mot.") [Dkt. #23]. I granted a Temporary Restraining Order on December 31, 2014, staying the regulation from going into effect for fourteen days. Dec. 31, 2014 Order [Dkt. #26]. On January 8, 2015, having reviewed the parties' extensive briefing, I consolidated plaintiffs' motion for a preliminary injunction with consideration of the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). Jan. 8, 2015 Order [Dkt. #30]. The following day, I heard oral arguments from the parties on the merits of plaintiffs' case, construing plaintiffs' emergency motion as a motion for summary judgment on the merits. *See Morris v. District of Columbia*, No. 14-cv-0338, 2014 WL 1648293, at *2 (D.D.C. Apr. 25, 2014). After consideration of the parties' pleadings, the arguments of counsel, the relevant law, and the entire record in this case, plaintiffs' motion is GRANTED and the Department's revised companionship services regulation currently scheduled to go into effect on January 15, 2015, is VACATED.

(together, "defendants" or "the Department"). Compl. ¶ 1 [Dkt. #1].

BACKGROUND

This matter arises out of the same statutory and regulatory background described more fully in my December 22, 2014 Opinion. *See* Dec. 22 Op. at 2-7. It concerns the second prong of a two-prong attack on an exemption from paying overtime and minimum wages: the companionship services exemption of the FLSA, codified at 29 U.S.C. § 213(a)(15). I vacated the first prong, the third-party employer exemption, two weeks ago. *See* Dec. 22 Op. The second prong, of course, is the rewritten "companionship services" definition. The companionship services exemption prevents employers, whether third-party or not, from being required to pay minimum and overtime wages to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15).

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

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

> such as meal preparation, bed making, washing of clothes, and other similar services.

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

In October 2013, however, after engaging in a full notice-and-comment rulemaking process, the Department issued a Final Rule revising its domestic service employment regulations at 29 C.P.R. Part 552. 78 Fed. Reg. 60,454 ("new rule" or "new regulation"). The new rule, with the exception of those provisions challenged by plaintiffs, went into effect on January 1, 2015[2]. *Id.* Together with the eradication of the exemption for third-party employers, the Department issued a new, significantly-narrowed, definition of companionship services, Section 552.6 of the regulation. "As used in section 13(a)(l5) of the Act, the term companionship services means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself." 78 Fed. Reg. 60,557 (§ 552.6(a)). Although the new definition included the provision of care, the care provided had to be attendant to, and in conjunction

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

with, the provision of fellowship and protection and it could *not* exceed 20 percent of the total hours worked per person and per workweek. *Id.* (§ 552.6(b)). "Care," as defined by the new regulation, is assistance with "activities of daily living" like dressing, feeding, and bathing, as well as assistance with "instrumental activities of daily living" that allow the client to live independently at home, like driving and meal preparation. *Id.*[3]

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

> § 552.6 Companionship services.
>
> (a) As used in section 13(a)(15) of the Act, the term companionship services means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. The provision of fellowship means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events. The provision of protection means to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person's safety and well-being.
>
> (b) The term companionship services also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The provision of care means to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person

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

In their Complaint, filed in June 2014, plaintiffs challenged both the new companionship services definition, Compl. ¶¶ 34-39 (Counts III and IV), and the Department's third-party employment

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> to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).
>
> (c) The term companionship services does not include domestic services performed primarily for the benefit of other members of the household.
>
> (d) The term companionship services does not include the performance of medically related services provided for the person. The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants; the determination is not based on the actual training or occupational title of the individual performing the services.

78 Fed. Reg. 60,557.

regulation addressed in my previous opinion, *id.* ¶¶ 26-33 (Counts I and II). Plaintiffs have requested that I vacate both of the challenged provisions of the Department's new rule and enjoin the Department from enforcing them. Compl. at 15 (Prayer for Relief).

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

Thus, two days after my December 22, 2014, Opinion and Order vacating the new third-party employment regulation, plaintiffs filed an emergency motion seeking a temporary stay of the effective date of the revised companionship services definition. Pls.'

Mot. They now argue that this new, narrower, regulation defining companionship services violates the language and legislative intent of FLSA Section 13(a)(15) because it "remov[es] 'care,' for all practical purposes, from the regulatory definition." Pls.' Mem. at 3-4. They further contend, in essence, that this new definition would have the very same impact on the industry as the third-party employment regulation I just vacated, by effectively repealing the statutory exemption. Pls.' Mem. at 3.

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

LEGAL STANDARD

On the merits, plaintiffs' motion is one for summary judgment on the administrative record.

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

ANALYSIS

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

"[I]f the statute is silent or ambiguous with respect to the specific issue," the agency is entitled to

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

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

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[4] The Department points to a phrase from my December 22, 2014, Opinion in which I recognize that Congress delegated to the Department authority to define the term "companionship services": "'[t]he Department, appropriately, has filled those [statutory] gaps through regulations, including revised definitions for . . . "companionship services."'" Defs.' Opp'n to Pls.' Req. for Preliminary Injunction at 1 ("Defs.' Opp'n") [Dkt. #27] (quoting Dec. 22 Op. at 11-12) (alterations in defendants' brief). The Department neglects, however, to mention the footnote appended to the end of the sentence from which it pulls its quote, in which I explicitly note that "[t]he Department's effort to narrow the scope of those exempted services through its new changes to the regulatory definitions of statutory terms is not before me at this point." Dec. 22 Op. at 12 n.9; *see also id.* at 7

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

In light of the statutory language, this case is resolved at *Chevron* Step 1.[5]

Although Congress has not defined the outer bounds of companionship services, it has spoken on the precise issue presented here, which is whether that definition must include, in a meaningful way, the provision of care. The answer is yes. There are ambiguities in the statute, but this is not one of them. The exemption clearly targets workers who provide services to those who need care. Indeed, what services

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n.7 (recognizing that "[p]laintiffs also challenge the new rule's revised 'companionship services' definition in their Complaint, Compl. ¶¶ 34-39, but that issue is not before the Court"). No one—Court or plaintiffs—disputes that it is appropriate for the Department to issue a regulation defining "companionship services," or even that it may revise that regulation. But that definitional authority remains bounded by the statute the regulation implements, and is irrelevant when it comes to issues on which Congress has spoken.

[5] Even if one were to take the Department's position that the explicit delegation of authority to define "companionship services" automatically moves the question along to the second step of *Chevron*, where the agency is entitled to deference, *see* Defs.' Opp'n at 17, the distinction is academic. It is "manifestly contrary to the statute," *Chevron*, 467 U.S. at 844, to define the "companionship services" term of this statute as including such a stringent limitation on a companion's ability to provide care.

could possibly be required more by those "unable to care for themselves" than *care* itself? Limiting that care to only 20 percent of a worker's total hours defies logic,[6] and Congressional intent.

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

It is important to note, as I did in my previous

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

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

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

Dominick and Sen. Johnston).

Home care workers have been providing care to the elderly and disabled, under the umbrella of the companionship services exemption, since the enactment of the 1974 Amendments. Here, I am once again faced with a long-standing regulation left untouched by Congress for 40 years. *See* Dec. 22 Op. at 16. Congress has made numerous changes to the FLSA exemptions-including, notably, the addition of a definition of "fire protection activities" into the statute at 29 U.S.C. § 203(y), specifically to clarify the meaning of the overtime exemption codified at 29 U.S.C. § 213(b)(20). Act of Dec. 9, 1999, Pub. L. No. 106-151, § 1, 113 Stat. 1731 ("An Act To amend the Fair Labor Standards Act of 1938 to clarify the overtime exemption for employees engaged in fire protection activities."). But Congress has not shown one iota of interest in cabining the definition of companionship services, which has been interpreted by the Department the same way for 40 years. Indeed, not a single one of the six bills introduced in Congress after the Supreme Court's decision in *Coke* addressed the definition of "companionship services." *See* Dec. 22 Op. at 5-6, 17. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267,275 (1974)).

Thus, I cannot help but conclude that Congress's intent in 1974 to exempt from minimum

and overtime wage requirements domestic workers providing services, including care to the elderly and disabled, is still as clear today as it was forty years ago. Here, yet again, the Department is trying to do through regulation what must be done through legislation. *See* Dec. 22 Op. at 17 and n.12. And, therefore, it too must be vacated.

CONCLUSION

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

Thus, for all of the foregoing reasons, plaintiffs' motion for summary judgment [Dkt. #23] is

GRANTED. Accordingly, the United States Department of Labor's regulation defining "companionship services," promulgated in 78 Fed. Reg. 60,557 and to be codified at 29 C.F.R. § 552.6, is hereby VACATED. An appropriate order shall accompany this Memorandum Opinion.

RICHARD J. LEON

The Department of Labor's New Third Party Employment Rule (Now in Effect) Implementing The FLSA's Home Care Exemptions:

29 C.F.R. § 552.109 Third party employment

(a) Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption, if the employee meets all of the requirements of § 552.6.

(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) Third party employers of employees engaged in live-in domestic service employment within the meaning of § 552.102 may not avail themselves of the overtime exemption provided by section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption.

Department of Labor's 1975 (Previous) Third Party Employment Rule Implementing the Home Care Exemptions:

§ 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.

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D. Section 552.109 (Third Party Employment)

Section 552.109 addresses whether a third party employer, the term the Department uses to refer to an employer of a direct care worker other than the individual receiving services or his or her family or household, may claim the FLSA exemptions specific to the domestic service employment context. Current § 552.109(a) permits third party employers to claim the companionship services exemption from minimum wage and overtime pay established by § 13(a)(15) of the Act; current § 552.109(c) permits third party employers to claim the live-in domestic service employee exemption from overtime pay established by § 13(b)(21) of the Act. (Section 552.109(b) addresses third party employment in the context of casual babysitting, which is not a topic within the scope of this rulemaking.) In the NPRM, the Department proposed to exercise its expressly delegated rulemaking authority and bring the regulation in line with the legislative intent and the realities of the home care industry by revising current paragraphs (a) and (c) to prohibit third party employers from claiming these exemptions. Under the proposed regulation, only an individual, family, or household would be permitted to claim the exemptions in §§ 13(a)(15) and 13(b)(21) of the FLSA. In other words, where a direct care worker is employed by a third party, the individual, family or household using the worker's services could claim the exemptions, but the third party employer would be required to pay the worker at least the federal minimum wage for all hours worked and overtime pay at one and one-half

the employee's regular rate for all hours worked over 40 in a workweek. For the reasons explained below, the Department is adopting § 552.109 as proposed.

Many commenters, including employees, labor organizations, worker- advocacy organizations, and consumer representatives, expressed strong support for the proposed change to § 552.109. *See, e.g.,* the Center; SEIU Healthcare Illinois Indiana; AFSCME; Legal Aid Society. The National Consumer Voice for Quality Long-Term Care explained that "[e]ven though some individuals who hire their own workers may end up paying more under the proposed rules, consumers and advocates in our network believe that providing minimum wage, overtime, and pay for travel time for these crucial health care workers is the right thing to do." AARP noted that it "strongly agrees" with denying the exemptions to third party agencies and asserted that "requiring all home care and home health care agencies to pay minimum wage and overtime to their employees is a centrally important component of the NPRM."

Numerous commenters agreed with the Department's assertion that the proposed changes were consistent with Congressional intent. *See, e.g.,* PHI, NELP, and EJC. A comment signed by Senator Harkin and 18 other Senators stated that "[a] close look at the legislative history of the 1974 changes establishes that Congress clearly intended to include today's home care workforce within the FLSA's protections." PHI argued that "employment by a home care agency strongly suggests that the worker is providing home care services as a vocation and is a regular bread-winner responsible for the support of her family. Such a formal employment arrangement is

inconsistent with the teenage babysitters and casual companions for the elderly that Congress intended to exclude."

Additionally, many advocacy groups and others agreed with the Department's statements in the NPRM concerning the increased professionalization and standardization of the home care workforce. *See, e.g.,* DCA, Bruce Vladeck, NELP. The Westchester Consulting Group noted that third party employers "are in the trade and business of providing services to the public and experience financial profit and loss" while household employers are purchasing companionship services "for their personal use to address their specific support needs." Similarly, PHI argued that one of the companionship services exemption's "main goals" was to "limit application of [the] FLSA to workers whose vocation is domestic service (that is, not occasional babysitters and companions)" and this concern is not "relevant to agency- employed home care workers." The Legal Aid Society explained that "the proposed regulations appropriately recognize that this work is not the kind of casual neighborly assistance that Congress had in mind when it created the companionship services exemption. Rather, these workers are professional caregivers, who work long hours for agencies that are businesses, whether for-profit or not-for-profit." Additionally, the ACLU and others observed that many members of this workforce, such as home health aides and personal care assistants, are now often subject to training requirements and competency evaluations.

Employers and employer associations, however, generally opposed the proposed revision of § 552.109.

See, e.g., CAHSAH, 24Hr Home Care, ResCare Home Care, NASDDDS, Texas Association for Home Care & Hospice, Inc. Many of these commenters asserted the proposal is contrary to Congress's intent as well as the Department's longstanding interpretation of the companionship services exemption. BrightStar franchisees, among others, argued that the use of the words "any employee" in §§ 13(a)(15) and 13(b)(21) of the Act demonstrates that Congress intended for the exemptions to apply based upon the activities of the employee rather than the identity of the employer. BrightStar franchisees wrote that "floor debate included several statements related to concerns about the ability of working families to afford companionship services for their loved ones and keep them out of institutionalized nursing home care." A comment signed by Senator Alexander and 13 other Senators stated that the "statute and history clearly demonstrate that Congress intended to provide a broad exemption from the FLSA minimum wage and overtime requirements for all domestic workers providing companionship services." Husch Blackwell further commented that "Congress is certainly well aware of the exemption's application over these last several decades, and has not taken action upon this issue during that time. Its failure to do so is clear evidence that the regulations as they currently stand appropriately state Congressional intent." *See also* Chamber of Commerce. CAHSAH and the National Association of Home Care & Hospice (NAHC), among others, questioned the propriety of the Department's shift in position as to this issue, especially since it defended the current regulation in *Long Island Care at Home, Ltd.* v.

Coke, 551 U.S. 158 (2007). Additionally, NRCPDS asserted that "wages should be determined based upon the value of the tasks performed" and that the "idea that the same tasks are valued differently based solely upon the identity of the employer seems unjustifiable."

Employers and employer representatives also asserted that the proposed revision to § 552.109 would be harmful to direct care workers because raising the cost of services provided through home care agencies would incentivize employment through informal channels rather than through such agencies. The Virginia Association for Home Care and Hospice stated that the proposed change would "encourage workers to leave agencies and be hired directly by the client," and in this "underground economy," taxes would not be withheld, Social Security would not be paid, and workers' compensation insurance would not be provided. See also CAHSAH. VNAA asserted that by discouraging joint employment, the proposed change could undermine Medicaid's efforts to expand the use of consumer-directed programs, which rely on agencies to assist consumers who are not capable of being solely responsible for managing a direct care worker's employment.

Numerous commenters sought clarification as to which employers would be considered "third party employers" and how the proposed revisions would affect various types of consumer-directed programs and other arrangements that have developed to provide

home care—including registries, "agency with choice" programs, and "employer of record" or fiscal intermediary situations—in which third parties have roles such as handling tax and insurance compliance. *See, e.g.,* Private Care Association; Jim Small; ANCOR. Comments from these various types of entities requested guidance from the Department as to whether direct care workers under their particular programs could qualify for either exemption under the Final Rule. Additionally, several advocacy groups expressed confusion regarding whether the Department's proposed revision would hold consumers or their families jointly and severally liable for wages owed pursuant to the FLSA. For example, AARP noted that it "strongly opposes the proposal to impose joint and several liability for FLSA compliance on consumers when the worker is supplied and employed by a third party employer such as an agency. When agencies are involved, they should be considered the sole employer." *See also* The National Consumer Voice for Long-Term Care.

The Department has carefully considered comments submitted regarding the proposed revisions to § 552.109(a) and (c) and has decided to adopt the regulation as proposed. The rulemaking record includes views from a broad and comprehensive array of interested parties: Academics studying this issue, advocates for the individuals who need home care services, home care agencies that currently claim the companionship services exemption, labor unions, associations representing direct care

workers, and representatives of the disability community. As explained in the NPRM and for the reasons discussed below, the Department believes that the revised regulation is consistent with Congress's intent when it created these exemptions and reflects the dramatic transformation of the home care industry since this regulation was first promulgated in 1975.

As an initial matter, the Department observes that it is exercising its expressly delegated rulemaking authority in promulgating this rule. In creating the companionship services exemption, Congress "left a gap for the agency to fill" as to the meaning and scope of the exemption at section 13(a)(15), explicitly giving the Secretary authority to define and delimit the boundaries of the exemption. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984); *see Nat'l Cable & Telecomm Ass'n.* v. *Brand X Internet Servs.,* 545 U.S. 967, 980 (2005) ("Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."). When Congress expressly delegates authority to the agency "to elucidate a specific provision of the statute by regulation," any regulations promulgated pursuant to that grant of power and after notice and comment are to be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844; *see Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 165–68 (2007); *Gonzales* v. *Oregon,* 546 U.S. 243, 255–256 (2006) (*Chevron* deference is warranted "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" (internal quotation marks omitted)).

Accordingly, the Department is now adopting a revised regulation that is, as many commenters agreed, consistent with Congress's intent to provide the protections of the FLSA to domestic workers while providing narrow exemptions for workers performing companionship services and live-in domestic service workers. Prior to 1974, domestic service employees who worked for a placement agency that met the annual earnings threshold for FLSA enterprise coverage, but were assigned to work in someone's home, were covered by the FLSA. 39 FR 35385. However, the Department's 1975 regulations, by allowing those covered enterprises to claim the exemption denied those employees the Act's minimum wage and overtime protections. This Final Rule reverses this "roll back".

The legislative history makes clear that in passing the 1974 amendments to the Act, Congress intended to extend FLSA coverage to all employees whose "vocation" was domestic service, but to exempt from coverage casual babysitters and companions who were not regular breadwinners or responsible for their families' support. *See* House Report No. 93–913, p. 36. Indeed, it is apparent from the legislative history that the 1974 amendments were intended only to expand coverage to include

more workers, and were not intended to roll back coverage for employees of third parties who already had FLSA protections (as employees of covered enterprises). The focus of the floor debate concerned the *extension* of coverage to categories of domestic workers who were not already covered by the FLSA, specifically, those employed by an individual or small company rather than by a covered enterprise. *See, e.g.,* 119 Cong. Rec. at S24800 ("coverage of domestic employees is a vital step in the direction of insuring that *all* workers affecting interstate commerce are protected by the Fair Labor Standards Act"); *see also* Senate Report No. 93–690 at p. 20 ("The goal of the Amendments embodied in the committee bill is to update the level of the minimum wage and to continue the task initiated in 1961—and further implemented in 1966 and 1972—to *extend* the basic protection of the Fair Labor Standards Act to additional workers and to reduce to the extent practicable at this time the remaining exemptions." (emphasis added)).[20]

Further, there is no indication that Congress considered limiting enterprise

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[20] Several comments focused on statements made during floor debate concerning the cost of care and preventing nursing home placement. *See* BrightStar Care of Tucson; Visiting Nurse Service of New York. However, the Department notes that the floor debate cited by these commenters took place in 1972 on earlier domestic service legislation not containing the exemption that was considered by a different Congress than the one enacting the 1974 amendments. *See, e.g.,* 118 Cong. Rec. 24715 (July 20, 1972).

coverage for third party employers providing domestic services. The only expressions of concern by opponents of the amendment related to the new recordkeeping burdens on private households. *See, e.g.,* 119 Cong. Rec. 18,155 (statement of Rep. Harrington); 119 Cong. Rec. 24,797 (statement of Sen. Dominick). Recognizing this intended expansion of the Act, the exemptions excluding employees from coverage must therefore be defined narrowly in the regulations to achieve the law's purpose of extending coverage broadly. This is consistent with the general principle that coverage under the FLSA is broadly construed so as to give effect to its remedial purposes, and exemptions are narrowly interpreted and limited in application to those who clearly are within the terms and spirit of the exemption. *See, e.g., A.H. Phillips, Inc.* v. *Walling,* 324 U.S. 490, 493 (1945). The Department is not persuaded by comments contending that because section 13(a)(15) has never been amended, the prior regulations were therefore consistent with Congressional intent. *See, e.g.,* Husch Blackwell; U.S. Chamber of Commerce. As the Supreme Court has observed, Congressional inaction "is a notoriously poor indication of [C]ongressional intent." *Schweiker* v. *Chilicky,* 487 U.S. 412, 440 (1988); *see also Minor* v. *Bostwick Labs,* Inc., 669 F.3d 428, 436 (4th Cir. 2012). Therefore, the Department now acknowledges that the regulatory roll back of coverage for workers employed in private homes by covered enterprises that resulted from the 1975 version

of § 552.109 was not in accord with Congress's purpose of expanding coverage.

By excluding direct care workers employed by third party covered enterprises from FLSA coverage, the Department's 1975 regulations created an inequity that has increased over time. As the home care workforce has grown, the impact of the Department's roll back, which is inconsistent with the 1974 amendments, has become even more magnified. As noted by many commenters, today, few direct care workers are the "elder sitters" envisioned by Congress when enacting the exemption. *See* 119 Cong. Rec. at S24801. Instead, direct care workers employed by third parties are the sorts of domestic service employees Congress specifically intended the FLSA to cover: Their work is a vocation. *See* Senate Report No. 93–690, p. 20; House Report No. 93–913, pp. 36. For example, a direct care worker who has sought out work through a private home care agency is engaged in a formal, professional occupation and he or she may well be the primary "bread- winner" for his or her family. Thus, it is the Department's position that employees providing home care services who are employed by third parties should have the same minimum wage and overtime protections that other domestic service and other workers enjoy.

Significantly, the Supreme Court explicitly affirmed the Department's authority to address the issue of third party employment in the domestic service context in *Long Island*

Care at Home, Ltd. v. *Coke,* 551 U.S. 158 (2007). The Supreme Court acknowledged that the statutory text and legislative history do not provide an explicit answer to the "third party employment question." *Id.* at 168. Rather, the Court explained that the FLSA leaves gaps as to the scope and definition of statutory terms such as "domestic service employment" and "companionship services," and it provides the Department with the power to fill those gaps. *Id.* at 167. In particular, the Court stated its belief that "Congress intended its broad grant of definitional authority to the Department to include the authority to answer" questions including "[s]hould the FLSA cover *all* companionship workers paid by third parties? Or should the FLSA cover some such companionship workers, perhaps those working for some (say, large but not small) private agencies . . .? How should one weigh the need for a simple, uniform application of the exemption against the fact that some (but not all) third-party employees were previously covered?" *Id.* at 167–68. Further, when the Department fills statutory gaps with any reasonable interpretation, and in accordance with other applicable requirements, the courts accept the result as legally binding and entitled to deference. *Id.* The Supreme Court explicitly recognized that the Department may interpret its "regulations differently at different times in their history," and may make changes to its position, provided that the change creates no unfair surprise. *Id.*at 170–71. The Court also recognized that when the Department utilizes

notice-and-comment rulemaking in an attempt to codify a new regulation, as it has done with this Final Rule, such rulemaking makes surprise unlikely. *Id.* at 170.

Although the commenters who noted that the Department is changing its position as to the proper treatment of third party employers in § 552.109 are correct, such a change is not only permissible, but also reasonable. The Department did argue in *Coke,* as well as in Wage and Hour Advisory Memorandum ("WHAM") 2005–1 (Dec. 1, 2005) (found at *http://www.dol.gov/whd/FieldBulletins/index.htm*), that the third party regulation as written in 1975 was the Department's best reading of these statutory exemptions. In the past, however, the Department erroneously focused on the phrase "any employee," instead of focusing on the purpose and objective behind the 1974 amendments, which was to expand minimum wage and overtime protections to workers employed in private households that did not otherwise meet the FLSA coverage requirements. The Supreme Court has "stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat'l Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455 (1993) (internal quotation marks omitted). Moreover, in view of the Supreme Court's conclusion that the text of the FLSA does not expressly answer the third party employment question, the statutory phrase "any employee" cannot, standing alone, answer

the question definitively. Moreover, the WHAM failed to consider the industry changes that have taken place over the decades since the statutory amendment was enacted. After considering the purpose and objectives of the amendments as a whole, reviewing the legislative history, and evaluating the state of the home care industry, the Department believes that the companionship services exemption was not intended to apply to third party employers.

In addition, the Department does not believe commenters' concerns about the harmful effect of the change to § 552.109 are warranted because the Department did not identify or receive any information suggesting that such effects have occurred in the 15 states that already provide minimum wage and overtime protections to all or most third party-employed home care workers who may otherwise fall under the federal companionship services exemption. These states are Colorado, Hawaii, Illinois,[21] Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. In addition, Maine extends minimum wage and overtime protections to all companions employed by for-profit agencies.

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[21] In Illinois, 30,000 workers in the Home Services Program under the Illinois Department of Human Services are considered jointly employed by the state and the consumer and do not receive overtime pay.

Some, but not all, privately employed home care workers in California are exempt from overtime requirements as "personal attendants;" all receive at least the minimum wage. Five more states (Arizona, Nebraska, North Dakota, Ohio, and South Dakota) and the District of Columbia provide minimum wage coverage to home care workers, including companions, employed by third parties. Significantly, several of the states, such as Colorado and Michigan, have instituted these protections in the last several years. The existence of these state protections diminishes the force of objections regarding the feasibility and expense of prohibiting third parties from claiming the companionship services and live-in domestic service worker exemptions. Indeed, the comments received did not point to any reliable data indicating that state minimum wage or overtime laws had led to increased institutionalization or stagnant growth in the home care industry in any state. Rather, the Michigan Olmstead Coalition reported "we have seen no evidence that access to or the quality of home care services are diminished by the extension of minimum wage and overtime protection to home care aides in this state almost six years ago." PHI noted that the growth of home care establishments in Michigan "is actually higher in the period after implementing wage and hour protections than before—41 percent compared to 32 percent." *See* PHI; *see also* Workforce Solutions ("There is no data showing that states with minimum wage and overtime protections for home care workers have higher rates of institutionalization.").

Indeed, as summarized by AARP, there is no strong correlation between states that have minimum wage and overtime protections with expenditures on HCBS versus institutionalized care.

Moreover, the Department does not believe that this rule will create or significantly expand an underground economy where workers hired directly by a consumer or a third party are not treated as employees and thus are not paid proper wages, income and FICA taxes are not withheld, and unemployment and worker's compensation insurance are not provided. Although difficult to predict, the Department anticipates that rather than significantly expanding any underground economy, this rule will bring more workers under the FLSA's protections, which in turn will create a more stable workforce by equalizing wage protections with other health care workers and reducing turnover. A more stable home care workforce also dilutes arguments that continuity of care would be negatively affected by the rule. This industry is currently marked by high turnover, which can be very disruptive to consumers. The Department believes that consumers would benefit from reduced turnover among direct care workers and the accompanying improvement in quality of care.