No. 15-683

In the Supreme Court of the United States

HOME CARE ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

DAVID WEIL, IN HIS OFFICIAL CAPACITY AS ADMINSITRATOR, WAGE & HOUR DIVISION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* STATES OF KANSAS, ARIZONA, ARKANSAS, GEORGIA, MICHIGAN, NEVADA, NORTH DAKOTA, OKLAHOMA, TEXAS, UTAH, WISCONSIN, and WYOMING IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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 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 care under the new rule.

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INTEREST OF *AMICI CURIAE*[1]

The Department of Labor's new rule makes third-party employers of home health care providers liable for overtime obligations under the FLSA. The rule reverses a nearly forty-year interpretation and settled understanding that such employers were exempted from the overtime provisions of the FLSA. This Court blessed that understanding in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), and Congress repeatedly has refused to change it despite the introduction of several bills to do so over time.

The Department, however, decided to narrow the FLSA exemption by adopting a new regulation and interpretation that made third-party employers of such service providers—which includes the many States that provide such services under Medicaid programs—subject to the FLSA's overtime provisions, imposing a new and unforeseen unfunded liability on the States and other third-party employers. Under the Department's new rule and interpretation, States and other entities (such as managed care organizations or financial management services) responsible for administering the Medicaid-funded programs generally are required to pay overtime under the FLSA, even though they may exercise very limited control over these provider employees. As a result, the new rule both vastly expands the States' financial liability for such programs and necessarily undermines their

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* States have timely notified counsel of record for all parties of their intent to file this *amicus* brief.

sovereignty without *any* statement—much less a "clear statement"—of congressional intent to impose such a result.

The Department's new position will in fact harm many of the very people Congress intended to assist—the aged and infirm who can remain in their homes with support services (rather than being institutionalized). In Kansas alone, almost 25,000 individuals rely upon a Medicaid-funded program to provide the care they need to live independently. The new rule, however, may result in vastly increased expenses for Kansas and other *Amici* States, expenses that likely can be covered only by reducing the number of people the programs serve.

Moreover, the rule significantly alters the cooperative federalism that the States relied upon when they agreed to participate in the Medicaid program. The Department is attempting to subject the *Amici* States to liability that Congress did not contemplate and which the States did not agree to bear. Because the Department's new position is contrary to congressional intent, harms the very citizens Congress intended to protect, and intrudes on state sovereignty, the Department's rule should be struck down.

STATEMENT

1. In 1974, Congress amended the Fair Labor Standards Act ("FLSA"), Pub. L. No. 93-259, 88 Stat. 55, to extend minimum wage and overtime requirements to "domestic service" employees. *See* 29 U.S.C. §§ 206(f), 207(l). At the same time, however, Congress specifically exempted from the FLSA "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." 29 U.S.C. § 213(a)(15); *accord id.* § 213(b)(21).

Congress differentiated between home care workers based upon who they served and who was responsible for their compensation. While traditional domestic service staff may cook, clean, garden, and/or provide chauffeur services to a single family at that family's expense, home care service providers for the aged and infirm generally are funded by government programs. *See generally* Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa L. Rev. 1835, 1840 & n.16 (2007). The former category of workers are a convenience to those able to afford such services; the latter category keeps individuals who cannot afford private care out of more costly and restrictive institutions. *See generally Welding v. Bios Corp.*, 353 F.3d 1214, 1217 (10th Cir. 2004).

Congress was aware that both categories of domestic service workers are typically affiliated with a third-party agency that may try to avoid overtime obligations by using creative work assignments. Congress expressly precluded third-party employers

from avoiding overtime obligations for traditional domestic service employees by assigning the worker to multiple households. *See* 29 U.S.C. § 207(l). But, in contrast, Congress specifically exempted domestic service employees providing home care services to the aged or infirm from overtime coverage: the overtime provisions "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." 29 U.S.C. § 213(a)(15) (emphasis added).

2. The Department's original regulation—which existed for almost forty years—followed the statutory language and implemented the intent of Congress. In 1975, the Department confirmed that the companion and live-in service exemption applied to those workers employed by an employer or agency other than the family or household using their services. *See* 40 Fed. Reg. 7407. In 2007, more than thirty years later, the Solicitor General represented to this Court that the Department's longstanding rule was sound: "there is no legal or policy justification for treating employees providing companionship services differently under the FLSA based upon the identity of the employer." *See* Brief of the United States as *Amicus Curiae* in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), 2007 WL 579234, at *23 (Feb. 20, 2007) (explaining the exemption was supported by the text and history of FLSA, Congress's intent, and other Department of Labor regulations). This Court upheld the Department's interpretation in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). Following that decision, bills were introduced in the 110th, 111th, and 112th Congresses to alter or abolish the exemption, but

none of them ever got out of committee, much less to the floor of either house. App. 32a.

3. This dispute arises because the Department—in spite of *Coke* and nearly forty years of settled understanding of the FLSA exemption—recently adopted a new rule that dramatically narrows the statutory exemption, almost eliminating it entirely. Many of the *Amici* States, including Kansas, urged the Department not to alter the settled understanding. Nonetheless, despite the States' pleas and "[u]ndaunted by . . . the utter lack of Congressional support to withdraw this exemption," App. 33a, the Department published a new Final Rule on October 31, 2013. *See* 78 Fed. Reg. 60,454.

The Final Rule does not expressly apply to the States: the new 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 29 U.S.C. §§ 213(a)(15) and (b)(21). *See* 78 Fed. Reg. 60,557 (to be codified as 29 C.F.R. § 552.109(a) and (c)).

The Department, however, clarified that the new regulation applied to the States. In June 2014, the Department issued an Administrator's Interpretation, No. 2014-2, which declared that most public entities administering certain Medicaid-funded programs would be considered third-party joint employers of home care workers. *See* U.S. Dep't of Labor, Administrator's Interpretation No. 2014-2, (June 19, 2014), *available at* https://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf). In particular, the Department declared that, under the new third-party employment regulation, a state agency

"may be an employer of the direct care workers even if a private third party agency is also found to be an employer; such joint employment arrangements would result in the state or county agency and the private third party agency being jointly and severally liable for the direct care workers' wages." 78 Fed. Reg. 60,484.[2] This interpretation of the new regulation exposes the States to a substantial unfunded liability for overtime wages under the FLSA.[3]

4. The Department's interpretation of the new regulation significantly and adversely affects the States' operation of home care programs under a Medicaid program for "individuals who (because of age or infirmity) are unable to care for themselves . . . ." 29 U.S.C. § 213(a)(15).

Congress recognized that many aged and infirm individuals are capable of living independently with some support and care, but instead were being cared for in costly, long-term, Medicaid-funded institutions.

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[2] *See also* U.S. Dep't of Health & Human Servs., CMCS Information Bulletin (July 3, 2014), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf.

[3] The Department presumably relies upon *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), to conclude that its interpretation of the Final Rule has the force of law as applied to the States. The States contend that no deference is due under *Auer* because "it is the court that ultimately decides whether a given regulation means what the agency says." *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 n.4 (2015); *see also id.* at 1210-11 (Alito, J., concurring); *id.* at 1211-13 (Scalia, J., concurring); *id.* at 1213-25 (Thomas, J., concurring).

See generally Sanchez v. Johnson, 416 F.3d 1051, 1054 (9th Cir. 2005). In response, Congress created a waiver program—known as a Section 1915(c) waiver—in which those needing care could obtain Medicaid funding to help them live independently if their State certified that the cost of serving these individuals at home would be less than or equal to the cost of institutional care. *See generally* 42 U.S.C. § 1396n(c).

Kansas, like most States, participates in the Section 1915(c) waiver programs. Thus, Kansas "provides assurances" to the federal government that "necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver and to assure financial accountability for funds expended with respect to such services." 42 U.S.C. § 1396n(c)(2). These safeguards include setting a minimum age for service providers, minimum training requirements, electronic visit verification systems, background checks, and similar endeavors. All told, Kansas operates seven Section 1915(c) programs that provide assistance with critical activities of daily living to 11,000 Kansans.

The Department's new rule primarily affects "self-directed" care programs and services the States administer under Medicaid. In these programs, recipients of care or their guardians can "self-direct" their care and hire their own care-givers. *See* 42 C.F.R. § 1396n(i)(G)(iii). As the name implies, participants in these programs exercise significant discretion in choosing their care providers and carry the burden of making sure their care is appropriate. In Kansas, for example, Section 1915(c) participants "shall have the

right to choose the option to make decisions about, direct the provisions of and control the attendant care services received by such individuals including, but not limited to, selecting, training, managing, paying, and dismissing of an attendant." K.S.A. 39-7,100(b)(2). Frequently, the participating State contracts with a third-party to handle administrative tasks, such as payroll and processing of timesheets, maintaining employment records, and other clerical and administrative duties.

Given the unique and limited role of the States under the Section 1915(c) Medicaid waiver program and the cooperative federalism that program embodies, it is not readily apparent why the States should be deemed third-party employers not exempt from the FLSA, especially given the negative impact the Department's current rule and interpretation will have on the services provided to the aged and infirm these programs serve. This result is contrary to both the constitutional structure and the goals of Congress.

SUMMARY OF ARGUMENT

This case presents an opportunity for the Court to clarify that an agency's interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when that interpretation purports to impose liability upon the States without a clear statement that Congress intended such a result.

First, the Department's new rule undermines both horizontal and vertical separation of powers principles. The rule purports to implement by agency "interpretation" an about face, turning the

Department's back on a nearly forty-year understanding of the FLSA exemption that had been accepted by the agency itself, the Congress, and this Court. Several attempts were made in Congress to amend the FLSA in this respect, but none gained any traction. Instead, the Department has taken it upon itself to amend the FLSA by regulatory fiat.

The Department's action has at least two pernicious effects as a constitutional matter, separate and apart from its inevitable practical impact on services provided to the aged and infirm. One is the Department's undermining of the exclusive legislative authority that Article I vests in Congress. The other is elimination of the States' ability to protect their sovereign interests through the political process, *i.e.*, in Congress. Ultimately, the Department's actions make both Congress and the States bystanders to the lawmaking process.

Second, the Department's new rule is inconsistent with the text of the FLSA. Contrary to the traditional rules of statutory construction, it purports to subject the States to overtime liability without any clear statement by Congress that it intended or desired such a result.

ARGUMENT

For nearly forty years, the Department (and the Government) held the position that the FLSA exemptions for home care employees applied to workers employed by third parties. This Court, in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), accepted that interpretation as reasonable.

Following several failed legislative attempts to restrict this exemption after *Coke*, none of which went anywhere, the Department issued a Final Rule that prevented third-party employers from "avail[ing] themselves" of the exclusions from overtime coverage in 29 U.S.C. § 213(a)(15) and (b)(21). Fed. Reg. 60,557. In addition (and even though the Final Rule did not specify as much), the Department declared that States administering a Medicaid program generally also will be considered third-party employers unable to rely upon the statutory exclusions. As a result, the States face a substantial unfunded liability that they did not agree to bear, in derogation of their traditional sovereign rights, with the counterproductive result that these State programs likely will have to be reduced in scope, meaning some of the very citizens currently being served may be unable to remain in their homes without the care previously provided.

Amici States urge this Court to grant the petition for two primary reasons. *First*, the Department's new interpretation violates both horizontal and vertical separation of powers principles. The Department has purported to exercise legislative authority that resides in Congress and, as an inevitable consequence of that action, the Department also has circumvented the very political processes on which this Court, in *Garcia v.*

San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985), emphasized the States must rely in order to protect their sovereignty from federal encroachment.

Second, the Department's purported "interpretation" of the FLSA exemption is contrary to the FLSA itself and thus not entitled to any deference. Instead of hewing to the line Congress drew, the D.C. Circuit approved this ultra vires agency action.

I. The Department's new rule undermines both horizontal and vertical separation of powers principles.

This case provides the Court an opportunity to address whether agencies are entitled to deference when their actions violate separation of powers principles. Here, the Department acted not pursuant to a congressional delegation, but in spite of repeated congressional rejection of the interpretation the Department now has adopted. Thus, with regard to horizontal separation of powers, the Department has adopted a legislative policy that Congress considered and chose not to enact. In vertical terms, the Department's regulatory action prevented the States from participating in the political process in Congress—where every State is represented by two Senators and a number of Representatives—to protect their sovereign interests.

The federal system of government depends upon "what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Alden v. Maine*, 527 U.S. 712 (1999)). The Framers favored dual sovereignty as

a fundamental check on the potential abuses of power by a centralized government. The Federalist No. 51 (J. Madison) *reprinted in The Essential Federalist and Anti-Federalist Papers*, p. 248 (D. Wooton ed. 2003); *accord Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia*, 469 U.S. at 572 (Powell, J., dissenting)). For dual sovereignty to be effective, power must be shared between the Federal Government and the States so that they each may act as a restraint on the other. The Federalist No. 28 (A. Hamilton) *reprinted in The Essential Federalist and Anti-Federalist Papers*, p. 206 (D. Wooton ed. 2003). The promise of liberty lies "[i]n the tension between federal and state power." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991); *accord* L. Tribe, *American Constitutional Law*, § 1-2, p. 2 (2d ed. 1988).

A. *Chevron* does not permit an agency to administratively create a rule that Congress repeatedly considered and rejected.

The powers of the federal government are distributed like a three-legged stool. Stability comes from power divided equally among the three branches so that no single branch may cede to nor claim the power of the other branches. This horizontal balance, described as the "great security against a gradual concentration of the several powers in the same department," affords each branch of government both the constitutional means and motives to resist the encroachment of others. The Federalist No. 51 (J. Madison) *reprinted in The Essential Federalist and Anti-Federalist Papers*, p. 246 (D. Wooton ed. 2003).

The Department's reliance on *Chevron* deference here is at loggerheads with the legislative authority Article I exclusively grants to Congress.[4] Agencies must honor the lines Congress has drawn. *Chevron*, 467 U.S. at 842-43 & n.9. An agency may not rewrite a statute to reach a policy goal the agency wishes had been included in the statute. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015); *Utility Air Regulatory Group. v. EPA*, 134 S. Ct. 2428, 2442 (2015). That, however, is what the Department has done.

In *Coke*, respondent Coke argued that the Department's prior regulation (confirming that the exemption applied to those employed by third parties) was contrary to congressional intent. *See* 551 U.S. at 166. This Court, at the Government's suggestion, rejected that contention as "unconvincing." *Id.* at 167. Thereafter, attempts were made in Congress—in multiple years—to amend the FLSA to make third-party employers ineligible for the exemption. "Notwithstanding efforts by legislators in the majority party in both the House and Senate in three consecutive Congresses (110th, 111th, and 112th), none of their bills ever generated sufficient support to get out of committee and to the floor of either house of Congress." App. 32a. "Undaunted" by the "utter lack of Congressional support to withdraw this exemption," the Department "amazingly decided to try to do administratively what others had failed to achieve in either the Judiciary or the Congress." App. 33a.

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[4] The constitutional structure protects the States' sovereignty in much the same way that it protects individual liberties. *See Bond*, 131 S. Ct. 2364.

An agency lacks the authority to amend a statute in a way that Congress considered but rejected. *Chevron* declares that if "a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9. Here, that intent is confirmed by history. Immediately after the FLSA was amended in 1974, the Department concluded that third-party employees providing home care services are exempt from overtime. That position has remained, been defended by the Government, blessed by this Court, and Congress has repeatedly refused to amend the exemption in the very manner that the Department now has done. As this Court has held, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency 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) ((internal quotation marks and citation omitted)); *accord Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013) (deferring to the agency's nearly forty-year policy and Congress's six amendments that failed to overturn that policy). Because the intent of Congress is clear, "that is the end of the matter." *Chevron*, 467 U.S. at 842. The Constitution grants Congress—and Congress alone—the power to enact and amend statutes.

B. The Department's actions have thwarted the States' ability to rely upon the political process to protect their sovereignty.

Properly cabined, agency deference aids the necessary work of the federal government by providing "a stable background rule against which Congress can legislate." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Yet *Amici* States are not the first to observe that agency deference is strong medicine that can be (and frequently has been) exploited by the agencies themselves.[5] *See id.* at 1879 (Roberts, C.J., dissenting); *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in judgment); *Utility Air Regulatory Group*, 134 S. Ct. at 2446; *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).

The political process, ordinarily, is a powerful tool that States rely upon to protect their sovereignty. *Garcia* expressly recognized that "[t]he political process ensures that laws that unduly burden the States will not be promulgated." 469 U.S. at 556. That concept dovetails with and is reinforced by the clear statement rule: when a federal law may intrude into state

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[5] Executive agencies—and the Department of Labor, in particular—are no stranger to claiming legislative power, under the guise of agency deference, to pursue their policy goals. *See generally Perez*, 135 S. Ct. at 1204-05; *see also Michigan*, 135 S. Ct. at 2713 (2015) (Thomas, J., concurring in judgment); *Texas Dep't of Hous. & Cmty Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2529 n.4 (2015) (Thomas, J., dissenting). Of course, agencies have no power to tailor legislation to fit bureaucratic policy goals where Congress has expressed its intent. *Utility Air Regulatory Group*, 134 S. Ct. at 2446.

sovereignty, Congress must make clear its intent to cause such a result so that this Court is "absolutely certain that Congress intended such an exercise." *Gregory*, 501 U.S. at 464.

Unelected agency officials may have specialized technical knowledge of or familiarity with a subject matter area, but they have no license to rewrite federalism or separation of powers principles. *See Katie John v. United States*, 247 F.3d 1032, 1046 (9th Cir. 2001) (Kozinski, J., dissenting); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring). To the contrary, allowing agencies the unbridled authority to rewrite statutes—as the Department did with the FLSA exemption here—usurps Congress's power to legislate and precludes the States from protecting their sovereign interests by participating in the political process. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) [hereinafter *SWANCC*]; *accord* L. Tribe, *American Constitutional Law*, § 6-26, p. 480 (2d ed. 1988) ("To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."); see also Pet. at 20-21.[6]

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[6] This Court does not appear to have addressed whether *Chevron* deference applies to regulations or interpretations of regulations that purport to abrogate sovereign immunity. Several Justices have, however, expressed concern in the analogous context of agencies purporting to preempt state law by regulation, precisely because agencies—unlike Congress—are not designed or structured to represent or respect the States' sovereignty. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J.,

Agencies should not be permitted to override state sovereignty when Congress has not made a clear statement to that effect, much less when Congress has repeatedly refused to adopt the agency's new interpretation, and this Court has approved the agency's prior settled rule. This case presents the Court with an excellent vehicle to address the limits of agency authority under *Chevron*, particularly when the agency has done an about face on a settled understanding of the statutory scheme and in so doing will impose substantial new financial liability on the States.

II. The Department's new rule conflicts with the text and history of the FLSA.

Notwithstanding the broader constitutional concerns, deference remains inappropriate given the statutory text. In upholding the Department's new rule, the D.C. Circuit deferred to the Department based upon this Court's decision in *Coke*. In *Coke*, this Court concluded that Congress authorized the agency to work out the details of "whether to include workers paid by third parties within the scope of the definitions" within the statute. 551 U.S. at 167. As a result, the D.C. Circuit concluded that *Coke* "precludes [a] *Chevron* step-one" challenge to the third-party employer regulation," with the result that the only inquiry was whether the Department's regulation was reasonable. App. 14a-20a.

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dissenting); *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., dissenting); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 512 (1996).

The D.C. Circuit erred because agency discretion to fill a statutory gap is not a blank slate on which to rewrite a federal statute. *Chevron* affords deference to an agency's reasonable resolution of an ambiguity in a statute. No deference is due, however, when the gap is filled unreasonably. *Michigan*, 135 S. Ct. at 2707; *accord Utility Air Regulatory Group*, 134 S. Ct. at 2442. As petitioner Home Care has argued, the Department's identification of an ambiguity and its resolution of that ambiguity in Section 213 is not reasonable: Congress legislated to aid those who, because of age or infirmity, are "unable to care for themselves," not the workers that provide these services. *See* Pet. at 19-32.

Unlike in *Coke*, the Department's new third-party employment regulation (or, more accurately, its subsequent "interpretation" of that regulation) treats State entities administering home care provider programs under Medicaid as joint employers of the home care workers. As a result, States are unable to rely upon the statutory exemption and are exposed to claims for overtime liability. This unfunded liability threatens the continuity of care they can provide their citizens and may open States to claims for liability. *See Olmstead v. L.C.*, 527 U.S. 581 (1999) (States may violate the Americans with Disabilities Act of 1990 by institutionalizing individuals who can live in community setting with home care).

The Department's interpretation of the statutory exemption is entitled to no deference. The traditional tools of statutory construction confirm that the Department's interpretation of Section 213's exemption, especially as applied to the States, is unreasonable. Congress directed that the exemption

covers "any employee" providing specified services, knew how to limit the availability of the exemption when it wanted to do so, and legislated knowing that state and federal monies were the primary funding sources for the services subject to this exemption.

The Department's resolution of the alleged ambiguity when applied to the States is unreasonable. It purports to impose liability upon the States without any indication Congress intended that result.

A. The ordinary rules of statutory construction do not support the Department's interpretation.

The ordinary canons of statutory construction do not support the third-party regulation that the Department issued.[7] As even the Government has recognized, "there is no legal or policy justification for treating employees providing companionship services differently under the FLSA based upon the identity of the employer." Brief of the United States as *Amicus*

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[7] *Amici* States recognize that "[h]ow and even whether to apply [the canons of statutory construction] during a *Chevron* analysis has been a matter of debate in both the judiciary and academia." *American Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 301 (3d Cir. 2015); *accord Carter*, 736 F.3d at 731 (Sutton, J., concurring). *Amici* States believe that utilizing traditional canons of construction, including the federalism canon, is necessary to protect the States' sovereign rights. *See Gregory*, 501 U.S. at 460-61; *Carter*, 736 F.3d at 733 (Sutton, J., concurring); *accord* Scott A. Keller, *How Courts Can Protect State Autonomy From Federal Administrative Encroachment*, 82 S. Cal. L. Rev. 45, 48-49 (2008) (arguing that *Chevron* deference makes protecting federalism of utmost importance because agencies can easily "reduce state autonomy without Congress ever addressing" the States' concerns).

Curiae in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), 2007 WL 579234, at *23 (Feb. 20, 2007).

There were and remain sound reasons for the Government's wise concession. *First*, the FLSA home care exemption applies to "any employee." But the Department's new third-party employment regulation makes that exemption available to only a limited subset—some say less than 10%—of domestic service employees. *See* Pet. at 20. When Congress uses the words "*any* employee," there is ordinarily no basis for courts (or agencies) to limit its application to employees based upon their affiliation with one or more employer. *See Republic of Iraq v. Beaty*, 556 U.S. 848, 856 (2009) (the word "any" in phrase "any other provision of law" was no warrant to limit the class of provisions of law).

Second, Congress has demonstrated that it knows how to make third-party employers liable for overtime payments when it intended that result. Congress expressly imposed an overtime requirement upon employers who "employ any employee in domestic service in one or more households for a workweek." 29 U.S.C. § 207(l). Congress did not similarly limit the applicability of the exclusion for those providing government-funded services to the aged and infirm, extending it instead to "any employee," 29 U.S.C. § 213(a)(15). This differing treatment is compelling evidence of congressional intent: Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, the applicable canons of construction presume that Congress acted intentionally and purposefully in using different words in different provisions of the same

statute. *See Department of Homeland Security v. MacLean*, 135 S. Ct. 913, 921 (2015); *Dean v. United States*, 556 U.S. 568, 573 (2009). The Department lacks the authority to reach a conclusion contrary to the statute.

Third, the context of the statutory exemptions confirms that Congress had a good reason for this differing treatment. "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." *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 (10th Cir. 2004). Unlike traditional domestic services, government monies are the primary funding source for home care services being delivered to the aged and infirm. Congress never gave the Department so much authority that it could virtually repeal the core provision of the statutory exemptions that Congress created precisely for the benefit of the aged and infirm. *See Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014).

B. As applied to the States, the Department's resolution of the alleged ambiguity is unreasonable.

The Department's resolution of the alleged ambiguity is also unreasonable because of what it does to the States. For one, it exceeds the authority that Congress possessed by purporting to subject the States to FLSA liability. Even if the Department's construction were narrowly construed to avoid that issue, it remains unreasonable because it upends the federal-state relationship without any clear statement

that Congress even contemplated such a result, much less intended it.

1. In *Alden v. Maine*, this Court held "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S. 706, 712 (1999); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996). The Department's new regulation purports to make the States—just like private entities or municipal governments—liable for overtime liability payments to home care workers. *See* 78 Fed. Reg. 60,484 (a state agency "may be an employer of the direct care workers even if a private third party agency is also found to be an employer; such joint employment arrangements would result in the state or county agency and the private third party agency being jointly and severally liable for the direct care workers' wages"). But that obligation plainly cannot be enforced by lawsuits brought by private persons against the States.

Because *Alden* confirms that Congress lacked the authority to abrogate the States' constitutional immunity in this respect, no regulation of the Department can accomplish that result. Any rule that purports to do so is both unenforceable and unreasonable. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (agency "may not create a right Congress has not," as the agency is the sorcerer's apprentice, not the sorcerer).

2. Even if the Department's new third-party employment regulation is read narrowly to permit only federal enforcement against the States, that expansion of FLSA liability remains unreasonable. This Court has

held that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, [this Court] expect[s] a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. Insisting upon such a clear statement allows courts to avoid needlessly reaching difficult constitutional questions, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), and comports with the rational assumption that Congress would not implicitly authorize agencies to push the limits of congressional authority, *SWANCC*, 531 U.S. at 172-73.[8] As a result, this Court

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[8] *Amici* States are primarily concerned with the third-party employment regulation's impact upon their sovereign interests, but the unreasonableness of the Department's position is demonstrated by the seismic impact its new regulations will have. *See* Pet. at 20 (recognizing the new regulation applies to 90% of the home health care workers). This Court and others repeatedly have recognized that the dramatic impact of a regulatory change may suggest an agency has departed from and exceeded its congressional command. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000); *see also Port Auth. Trans-Hudson Corp. v. DOL*, 776 F.3d 157, 167-68 (3d Cir. 2015) (rejecting the Department's reading of a recently enacted sentence fragment that would have provided an entire industry with a right to unlimited sick leave); *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (rejecting IRS interpretation of "heretofore undiscovered carte blanche" power "for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry"); *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, at *5 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from denial of rehearing en banc) ("Where our Representatives have acted with such caution, any suggestion that Congress has – through a single word – conferred upon EPA the authority to steamroll through Congressional gridlock, upend the Senate's rejection of the Kyoto Protocol, and regulate GHGs for the whole of American industry must necessarily fail.").

construes the statute to avoid such problems unless such a construction is plainly intended by Congress. See *SWANCC*, 531 U.S. at 172-73.

It was and remains unreasonable to believe that Congress—silently and without consideration—delegated to the Department the ability to impose upon the States an unfunded liability for overtime obligations in the Medicaid programs. To the contrary, Congress treated home care workers for the aged and infirm differently precisely because public monies primarily fund the wages of such workers. *See Sanchez*, 416 F.3d at 1054; *Welding*, 353 F.3d at 1217; *see also* Smith, *Aging and Caring*, 92 Iowa L. Rev. at 1840 & n.16. The Department's actions must be evaluated in light of their broad impact upon the States and the very citizens Congress intended to assist and support with the exemption.

CONCLUSION

The petition for writ of certiorari should be granted.

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