[NOT SCHEDULED FOR ORAL ARGUMENT]

No. 15-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOME CARE ASSOCIATION OF AMERICA; INTERNATIONAL FRANCHISE ASSOCIATION; NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE,

Plaintiffs-Appellees,

v.

DAVID WEIL, Administrator of the Wage and Hour Division, U.S. Department of Labor; THOMAS E. PEREZ, Secretary of Labor; U.S. DEPARTMENT OF LABOR,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (No. 14-cv-967) (Hon. Richard J. Leon)

BRIEF FOR APPELLANTS

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INTRODUCTION

In 1974, Congress amended the Fair Labor Standards Act (FLSA) to extend the Act's minimum wage and overtime pay requirements to domestic service employees. Congress exempted "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). Congress also exempted from the overtime pay requirement domestic service employees who live in the household. *Id*. § 213(b)(21).

Congress granted the Department of Labor authority to implement the 1974 amendments through legislative rules. In addition to the specific authority to "define[] and delimit[]" the term "companionship services," 29 U.S.C. § 213(a)(15), Congress granted the Department the broad general authority "to prescribe necessary rules, regulations, and orders with regard to the [1974 amendments]." Pub. L. No. 93-259, § 29(b), 88 Stat. 76.

The Department issued implementing regulations in 1975. Those regulations set out the types of activities and duties that may be regarded as companionship services. 40 Fed. Reg. 7404, 7405 (Feb. 20, 1975) (29 C.F.R. § 552.6) (companionship-services regulation). In addition, the 1975 regulations provided that the exemptions for companionship services and live-in domestic

service employees could be claimed not only by an individual (or family member) who hired a worker directly, but also by "third-party employers" such as home care agencies that assign members of their workforce to particular homes. 75 Fed. Reg. 7404, 7407 (Feb. 10, 1975) (29 C.F.R. § 552.109) (third-party employment regulation). Prior to the 1974 amendments, the employees of such third-party employers received FLSA coverage if their employer had more than $250,000 in gross annual sales.

In regulations issued in 2013 after notice and comment rulemaking, the Department amended its 1975 regulations in light of the transformation of the home care industry that had occurred in the decades since those regulations were issued. When Congress enacted the 1974 amendments, the accompanying House and Senate committee reports made clear that the exemptions were not intended to apply to workers who have domestic service as their vocation or who would depend on FLSA coverage for their livelihood. The Senate floor manager of the 1974 amendments explained that a "companion" might be "a neighbor" who "comes in and sits with" "an aged father, an aged mother, an infirm father, an infirm mother." 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973) (Sen. Williams). In the ensuing decades, however, the home care industry has been transformed into a multi-billion dollar industry with a professional workforce. These employees, who have been treated as exempt from FLSA coverage as a

result of the 1975 regulations, are among the lowest paid in the service industry. Accordingly, in 2013, the Department amended its third-party employer regulation, 29 C.F.R. § 552.109, to provide that third-party employers may not avail themselves of the exemptions for companionship services or live-in domestic service employees. In addition, the Department amended its companionship-services regulation, 29 C.F.R. § 552.6, to narrow the types of activities and duties that may be regarded as companionship services.

The district court held that the amended regulations are contrary to the FLSA's plain text and invalidated the regulations at step 1 of the *Chevron* analysis. These rulings rest on a fundamental misunderstanding of the Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). There, the Supreme Court upheld the 1975 regulation governing third-party employment as a reasonable exercise of the authority that Congress delegated to the Department of Labor. In so ruling, the Court concluded that "the text of the FLSA does not expressly answer the third-party-employment question." *Id*. at 168. Instead, "[t]he statutory language refers broadly to 'domestic service employment' and to 'companionship services'" and "expressly instructs the agency to work out the details of those broad definitions." *Id*. at 167. The Court concluded that "whether to include workers paid by third parties within the scope of the definitions is one of those details." *Ibid*. The Court explained that "whether, or how, the definition

should apply to workers paid by third parties raises a set of complex questions," and that "[s]atisfactory answers to such questions may well 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." *Id*. at 167-168. The Court concluded that it is "consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions." *Id*. at 168.

The final rule issued in 2013 includes a comprehensive analysis of the economic impact of the regulatory changes on a wide array of constituencies, including consumers, workers, employers, and the public programs (such as Medicare and Medicaid) that pay for the lion's share of home care services. *See* 78 Fed. Reg. 60454 (Oct. 1, 2013). Based on that analysis, the Department rejected industry claims that the amended regulations would harm consumers by reducing access to home care services or the quality of care. Instead, the Department found that FLSA coverage will benefit not only the workers "but also 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 60459-60.

These determinations have ample support in the administrative record, including data from the 15 states that already provide minimum wage and overtime protections to all or most home care workers employed by third parties, as well as

comments from consumer representatives. The amended regulations thus must be upheld as a reasonable exercise of the Department's authority "'to fill any gap left, implicitly or explicitly, by Congress.'" *Coke*, 551 U.S. at 165 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

STATEMENT OF JURISDICTION

Plaintiffs challenged two regulations implementing the Fair Labor Standards Act. The district court had jurisdiction under 28 U.S.C. § 1331. By order issued on December 22, 2014, the court vacated 29 C.F.R. § 552.109 (the third-party employment regulation). JA44. By order issued on January 14, 2015, the court vacated 29 C.F.R. § 552.6 (the companionship-services regulation). JA61. The government filed a timely notice of appeal on January 22, 2015. JA65.

The two independent bases for this Court's appellate jurisdiction were discussed in the government's motion to expedite this appeal, which this Court granted. First, this Court has jurisdiction under 28 U.S.C. § 1291 because the district court's rulings disposed of all claims in this case. Although the district court failed to act on the government's unopposed motion for entry of judgment in a separate document, the requirement of a separate document is not jurisdictional

and should not be applied to delay appeal from a decision that is "tantamount to a final judgment." *Bailey v. Potter*, 478 F.3d 409, 411-412 (D.C. Cir. 2007).[1]

Second, this Court also has jurisdiction under 28 U.S.C. § 1292(a)(2) because the district court made clear that its orders are injunctions. *See*, *e.g.*, JA183 (indicating that the district court was not inclined to grant a "stay" of its decision because "it is my decision that actually maintains the status quo").

STATEMENT OF THE ISSUE

Whether the third-party employment regulation, 29 C.F.R. § 552.109, and the companionship-services regulation, 29 C.F.R. § 552.6, are reasonable exercises of the rulemaking authority that Congress delegated to the Department of Labor in the Fair Labor Standards Act.

STATUTES AND REGULATIONS

Pertinent provisions of the Fair Labor Standards Act and implementing regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

The Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq*., generally requires covered employers to pay a minimum hourly wage and, for hours of work

[1] After this Court granted expedition, the district court denied motion for entry of final judgment as moot. *See* JA9 (1/29/15 minute order).

exceeding 40 in a work week, overtime compensation at a rate of one and one-half times an employee's regular rate of pay. 29 U.S.C. §§ 206(a), 207(a)(1). Before 1974, domestic service employees were not covered by these provisions unless the workers were "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a)(1) (1970). At that time, an employer qualified as an "enterprise" if (*inter alia*) it had more than $250,000 in gross annual sales. *See* 29 U.S.C. § 203(s)(1) (1970).

The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, extended the FLSA's minimum wage and overtime requirements to domestic service employees, 29 U.S.C. §§ 206(f), 207(l), but exempted "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). Congress also exempted from the Act's overtime requirements any domestic service employee who lives in the household. 29 U.S.C. § 213(b)(21).

Congress granted the Department of Labor authority to implement the 1974 amendments through legislative rules. In addition to the specific authority to "define[] and delimit[]" the term "companionship services," 29 U.S.C. § 213(a)(15), which Congress did not otherwise define, Congress granted the

Department authority "to prescribe necessary rules, regulations, and orders with regard to the [1974 amendments]." Pub. L. No. 93-259, § 29(b), 88 Stat. 76.

The House and Senate committee reports accompanying the 1974 amendments described Congress's expectations with regard to the Act's coverage of domestic service employees and its exemption for companionship services. The committee reports explained that domestic service "includes services performed by cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use." Senate Report No. 93-690, p. 20 (1974) (Senate Report); House Report No. 93-913, pp. 35-36 (1974) (House Report). In identical passages, the reports further explained:

> It is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service. However, the exemption reflects the intent of the committee to exclude from coverage . . . companions for individuals who are unable because of age and infirmity to care for themselves. But it is not intended that trained personnel such as nurses, whether registered or practical, shall be excluded. People who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support. The fact that persons performing . . . services as companions do some incidental household work does not keep them from being . . . companions for purposes of this exclusion.

Senate Report, p. 20; House Report, p. 36.

The House and Senate reports explained that, in extending the FLSA's protections to domestic service employees generally, Congress sought to foster "an effective and dignified domestic workforce" by requiring "a living wage and

respectable working conditions." Senate Report, pp. 20-21; *see also* House Report, pp. 33-34 (similar). Because the companionship-services exemption was not intended to apply to individuals who are domestic service workers as their "vocation" or who are "regular bread-winners or responsible for their families' support," Senate Report at 20; House Report at 36, the exemption would not undermine that overarching objective.

Senator Williams, Chairman of the Senate Subcommittee on Labor and the Senate floor manager of the 1974 amendments to the FLSA, explained that a "companion" as used in the exemption is someone whose responsibility is "to be there and to watch an older person," "not to do household work." 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973). As an example, he referred to "a neighbor" who "comes in and sits with" "an aged father, an aged mother, an infirm father, an infirm mother." *Ibid*. Although being a "companion" might also involve "making lunch for the infirm person," "[t]his would be incidental to the main purpose of the employment." *Ibid*. Senator Burdock, responding to this description, declared: "In other words, elder sitters." *Ibid*. Senator Williams replied: "Exactly." *Ibid*.

B. Regulatory History

1. The 1975 regulations

The Department of Labor first implemented the 1974 amendments through regulations issued in 1975. The Department set out the types of activities and duties that may be regarded as "companionship services." 40 Fed. Reg. 7404, 7405 (Feb. 20, 1975) (29 C.F.R. § 552.6). In addition, the Department addressed the question whether the exemption could be claimed not only by an individual (or family member) who hired a worker directly, but also by third-party employers such as home care agencies that assign members of their workforce to particular homes. As proposed in 1974, the regulation would have placed outside the exemption (and hence left subject to FLSA wage and hour rules) individuals employed by third-party employers whom the Act had covered prior to 1974. *See* 74 Fed Reg. 35382, 35385 (Oct. 1, 1974) (29 C.F.R. § 552.109, as proposed). However, in the final regulations, the Department of Labor reversed that proposal and provided that the exemption includes individuals "who are employed by an employer or agency other than the family or household using their services." 75 Fed. Reg. at 7407 (29 C.F.R. § 552.109). The Department stated that "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Id*. at 7405.

2. The 2001 proposed regulations

In 2001, the Department of Labor issued a notice of proposed rulemaking to revise these regulations. *See* 66 Fed. Reg. 5841 (Jan. 19, 2001).[2] The Department explained that, "[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." *Ibid*. The Department had "reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted" the companionship-services exemption. *Ibid*. Therefore, the Department proposed to amend the regulation that "sets out the duties that a companion must be employed to perform in order to qualify for the exemption," and to "deny the companionship services exemption if the worker is employed by someone other than a member of the family in whose home he or she works." *Ibid*. The Department likewise proposed to "deny the exemption for live-in domestics, who are exempt from the FLSA's overtime requirements pursuant to section 13(b)(21), if they are employed

[2] The third-party employment regulation was also the subject of earlier notices of proposed rulemaking. *See* 58 Fed. Reg. 69310 (Dec. 30, 1993); 60 Fed. Reg. 46798 (Sept. 8, 1995) (discussed in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 163, 170 (2007)).

by someone other than a member of the family in whose home they reside and work." *Ibid*.

In the 2001 notice of proposed rulemaking, the Department stated that it did not expect these changes to "produce a significant economic or budgetary impact on affected entities." 66 Fed. Reg. at 5486. "As a result, the Department concluded that a full economic impact and cost/benefit analysis was not required" under Executive Order 12866, which requires agencies to conduct such an analysis for regulatory action that is expected to be "economically significant" as that term is defined in the Executive Order. *Ibid*. During the comment period, however, the assumption that the changes would have "little economic impact on affected entities" was called into question, including in comments by the Department of Health & Human Services (HHS) and the Small Business Association. *See* 67 Fed. Reg. 16668 (Apr. 8, 2002). Citing these comments, the Department of Labor issued a one-page notice in 2002 indicating that it was withdrawing the proposed regulations, *ibid*., which left the 1975 regulations in place.

2. The Supreme Court's 2007 decision in *Coke*

In *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), the Supreme Court upheld the 1975 regulation governing third-party employment as a reasonable exercise of the rulemaking authority that Congress delegated to the Department of Labor. The Supreme Court concluded that "the text of the FLSA

does not expressly answer the third-party-employment question." *Id*. at 168. Instead, "[t]he statutory language refers broadly to 'domestic service employment' and to 'companionship services'" and "expressly instructs the agency to work out the details of those broad definitions." The Court concluded that "whether to include workers paid by third parties within the scope of the definitions is one of those details." *Id*. at 167. It reasoned that "whether, or how, the definition should apply to workers paid by third parties raises a set of complex questions," and that "[s]atisfactory answers to such questions may well 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." *Id*. at 167-168. The Court held that it is "consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions." *Id*. at 168. Recognizing that the third-party employment question raises difficult policy issues and that "the Department has clearly struggled with" the issue, the Supreme Court upheld the 1975 rule as a reasonable exercise of the Department's authority "'to fill any gap left, implicitly or explicitly, by Congress.'" *Id*. at 165 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

C. The Current Regulations

The regulations at issue here are the product of notice and comment rulemaking that began in late 2011. *See* 76 Fed. Reg. 81190 (Dec. 27, 2011). The final regulations issued in October 2013 revised the third-party employment regulation and companionship-services regulation in ways that are similar to the proposals that the Department of Labor made in 2001. *See* 78 Fed. Reg. 60454 (Oct. 1, 2013). Unlike the 2001 proposed rulemaking, the 2013 final rule included a comprehensive analysis of the economic impact of the regulatory changes. *See, e.g.*, *id*. at 60497-60556.

Third-party employment. As amended, the regulation provides that third-party employers may not avail themselves of the exemptions for companionship services or live-in domestic service employees. *See* 78 Fed. Reg. at 60557 (29 C.F.R. § 552.109). Accordingly, the home care businesses that plaintiffs represent must abide by the same FLSA wage and hour rules that protect employees generally.

First, these businesses must pay their employees a minimum hourly wage, as virtually all of them already do. *See* 78 Fed. Reg. at 60456 (current wage data suggests that few affected workers, if any, are currently paid less than the federal minimum wage per hour).

Second, these businesses must comply with longstanding rules for calculating an employee's hours worked, which were unchanged by the final rule.

See 78 Fed. Reg. at 60490. Among other things, these rules require compensation for the time that employees spend traveling from job site to job site on their employer's behalf. *See id*. at 60492. A study conducted by plaintiff National Association of Home Care & Hospice found that home care nurses, aides, and therapists travel nearly 5 billion miles each year. JA502 (PHI Report at 44). Although many home care agencies already pay their workers for time spent traveling between clients, many do not. A survey conducted on behalf of plaintiff International Franchise Association found that 50 percent of the responding home care employers pay for such travel time. *See* 78 Fed. Reg. at 60493. The home care provider A-1 Health Care, Inc. acknowledged that "over half of its employees spend an average of three hours per day traveling between clients for which they are not currently paid." *Ibid*. The National Employment Law Project (NELP) explained that "failure to pay for travel time suppresses workers' already low earnings and not infrequently drives their real hourly wages below the minimum wage." *Id*. at 60493-93.

Third, for hours of work exceeding 40 in a work week, these businesses must pay overtime compensation at a rate of one and one-half times an employee's regular rate of pay. Although limited data exist on the amount of overtime that the affected population works, *see* 78 Fed. Reg. at 60528, the survey conducted on behalf of plaintiff IFA found that, in states without applicable overtime

requirements, 18 percent of the responding employers pay overtime premiums for hours worked in excess of 40 hours per week. *See id*. at 60504 n.50.

Fourth, the businesses that plaintiffs represent must comply with the FLSA's longstanding record-keeping requirements. *See* 29 C.F.R. part 516.

Activities that constitute companionship services. The Department also revised the regulation that sets out the types of activities and duties that may be regarded as "companionship services." As amended, the regulation provides that 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. 29 C.F.R. § 552.6(a) (further describing fellowship and protection). The term "companionship services" also includes the provision of care, defined using the industry-preferred terms of Activities of Daily Living (ADLs) and Incidental Activities of Daily Living (IADLS), although such work may not exceed 20 percent of the total weekly hours worked and must be provided in conjunction with fellowship and protection in order for the exemption to apply. *Id*. § 552.6(b). ADLs and IADLs include dressing, grooming, feeding, bathing, toileting, transferring, meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care. *See ibid*. The term "companionship services" does not include work performed primarily for the benefit of other

members of the household, *id*. § 552.6(c), or medically related services (as further described in the regulation), *id*. § 552.6(d).

The Department of Labor set an effective date for the final regulations of January 1, 2015, which allowed a 15-month period before compliance was required. *See* 78 Fed. Reg. at 60494. The Department also indicated that it would work closely with stakeholders to provide additional guidance and technical assistance during the period before the rule becomes effective, in order to ensure a successful transition. *See id.* at 60495.[3]

As in the 2001 proposed rulemaking, the Department of Labor cited the "dramatic expansion and transformation" of the home care industry as the principal basis for revising its 1975 regulations. 78 Fed. Reg. at 60455. The Department explained that, "[i]n the 1970s, many individuals with significant care needs were served in institutional settings rather than in their homes and their communities." *Ibid*. "Since that time, there has been a growing demand for long-term home care

[3] In a subsequent policy statement, the Department of Labor announced that, for the first six months in which the regulations are effective (through January 30, 2015), it will not bring enforcement actions against an employer as to violations of FLSA obligations resulting from the amended regulations, and that, for the following six months (through December 31, 2015), the Department will exercise prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which States and other entities have made good faith efforts to bring their home care programs into compliance with the FLSA since promulgation of the final regulations. 79 Fed. Reg. 60974 (Oct. 9, 2015). This policy statement does not affect the ability of workers to enforce the regulations. *See* 29 U.S.C. § 216(b) (private right of action).

for persons of all ages, largely due to the rising cost of traditional institutional care and, in response to the disability civil rights movement, the availability of federal funding assistance for home care, reflecting the nation's commitment to accommodate the desire of individuals to remain in their homes and communities." *Ibid*. "As more individuals receive services at home rather than in nursing homes or other institutions, workers who provide home care services, referred to as 'direct care workers' in this Final Rule but employed under titles including certified nursing assistants, home health aides, personal care aides, and caregivers, perform increasingly skilled duties." *Ibid*. "Today, direct care workers are for the most part not the elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974, but are instead professional caregivers." *Ibid*.

In contrast to the 2001 proposed rulemaking, the final rule issued in 2013 included a detailed analysis of the economic impact of the regulatory changes. *See, e.g.*, 78 Fed. Reg. at 60497-60556. Among other concerns, the Department addressed industry claims that the regulatory changes would, as plaintiffs allege here, "have a deeply destabilizing impact on the entire home care industry"; "adversely affect access to home care services for millions of the elderly and infirm"; "lead to increased institutionalization of those needing care"; require consumers to "accept care from multiple caregivers instead of one trusted

individual"; "increase staff turnover to the detriment of consumers"; and "increase the cost of privately paid home care[.]" Complaint ¶ 4.[4]

For example, the Department examined data from the 15 states that already provide minimum wage and overtime protections to all or most home care workers employed by third parties. *See*, *e.g.*, 78 Fed. Reg. at 60842-43, 60503-04.[5] The Department noted that "[t]he 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." *Id*. at 60483. The Department found that "[f]irms operating in overtime and non-overtime states already have very similar characteristics," including "a similar percentage of consumers receiving 24-hour care." *Id*. at 60503. Because "both the demand for and supply of home care workers appear to be inelastic in the largest component of this market, in which public payers

[4] The Department received more than 26,000 comments on the proposed regulations, *see* 78 Fed. Reg. at 60460, including comments from plaintiffs. Comments were received from a broad array of constituencies, including direct care workers, consumers of home care services, small business owners and employers, worker advocacy groups and unions, employer and industry advocacy groups, law firms, Members of Congress, state government agencies, federal government agencies, professional associations, the disability community, and other interested members of the public. *See ibid*.

[5] These states are Colorado, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. *See* 78 Fed. Reg. at 60843. In addition, Maine extends minimum wage and overtime protections to all companions employed by for-profit agencies. *See ibid.*

reimburse for home care," "the equilibrium quantity of home care services is not very responsive to changes in price." *Id*. at 60456; *see also id*. at 60517 (noting that, "[i]n 2009, Medicare and Medicaid accounted for 73 percent of home care services revenue, followed by 14 percent from private insurance coverage, 4 percent from consumers paying out-of-pocket, and the remaining 8 percent contributed by a mix of other sources").

The Department explained that "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." 78 Fed. Reg. at 60483. "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.'" *Ibid*. "[A]s summarized by AARP, there is no strong correlation between states that have minimum wage and overtime protections with expenditures on [home and community-based services] versus institutionalized care." *Ibid.*

The Department also considered and rejected industry claims that the amended regulations would harm consumers by encouraging the use of multiple workers and thereby denying consumers continuity of care. "As the National Association of Area Agencies on Aging points out in its comment, 'providing

fundamental labor protections of minimum wage and overtime will help reduce turnover, improve continuity of care and help lower costs.'" 78 Fed. Reg. at 60468. The Department explained that the home care industry "is currently marked by high turnover, which can be very disruptive to consumers." *Id*. at 60483. The turnover rate has been estimated to range from 44 to 65 percent per year, and some studies have found turnover rates to be much higher—up to 95 percent and, in some cases, 100 percent annually. *See id*. at 60543. "Increased pay for the same amount of work and overtime compensation likely would aid in employee retention and attracting new hires." *Ibid*. (citing studies). The Department explained that the amended regulations "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." *Id*. at 60483. The Department also noted that, as a general matter, "continuity of care does not necessarily require a single direct care worker, but rather can involve a small group of direct care workers intimately familiar with the consumer and his or her needs." 78 Fed. Reg. at 60503. "In this way care will not be disrupted if one of those direct care workers is no longer willing or able to provide the needed services." *Ibid*. In addition, "with an industry turnover rate apparently exceeding 40 percent, it is likely that many consumers already receive care from more than

one worker or a combination of direct care workers and family members when other workers are unavailable." *Ibid*.

Summarizing, the Department "recognize[d] that this Final Rule will have an impact on individuals and families who rely on direct care workers for crucial assistance with day-to-day living and community participation." *Id*. at 60459. "Throughout the rulemaking process, the Department has carefully considered the effects of the rule on consumers and has taken into account the perspective of elderly people and people with illnesses, injuries, and disabilities, as well as workers, employers, public agencies, and others." *Ibid*. "In particular," the Department "does not believe, as some commenters have suggested, that the rule will interfere with the growth of home- and community-based caregiving programs and thereby lead to increased institutionalization." *Ibid*. "To the contrary, the Department believes that ensuring minimum wage and overtime compensation will not only benefit direct care workers but also 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 60459-60. The Department also noted that, "as described in detail throughout this preamble, the Department has modified the proposed regulations in response to comments to make the rule easier for the regulated community to understand and apply." *Id*. at 60460.

D. District Court Proceedings

This lawsuit under the Administrative Procedure Act (APA) was filed in June 2014, eight months after the final regulations were issued. Plaintiffs are trade associations representing businesses that employ workers affected by the regulations. Plaintiffs alleged that the third-party employer regulation and companionship-services regulation are arbitrary and capricious, an abuse of discretion, and/or contrary to law.

On cross-motions for partial summary judgment, the district court declared the third-party employment regulation invalid by order issued on December 22, 2014. *See* JA44. The court ruled that the regulation is contrary to the FLSA's plain text, and invalidated the regulation at step 1 of the *Chevron* analysis. The court declared that "[t]here is no explicit—or implicit—delegation of authority to the Department to parse groups of employees based on the nature of their employer" if the employees otherwise would be covered by the exemptions for companionship services or live-in domestic employees. JA37. The court opined that "[t]he 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." *Ibid*. (court's emphasis). The district court rejected the government's argument that the Supreme Court reached the opposite conclusion in *Coke*. *See* JA40-41.

On December 24, plaintiffs filed an emergency motion to enjoin enforcement of the companionship-services regulation, which had not previously been the subject of briefing. The district court issued a temporary restraining order on December 31, *see* JA45, and scheduled a preliminary injunction hearing for January 9. The day before the hearing, the court announced that it was consolidating the preliminary injunction hearing with its consideration of the merits. *See* JA46.

On January 14, the district court issued an order that declared the companionship-services regulation invalid. *See* JA61. As with the third-party employment regulation, the court ruled that the companionship-services regulation is contrary to the FLSA's plain text and invalidated the regulation at *Chevron* step 1. The court recognized that Congress explicitly delegated authority to the Department of Labor to define and delimit the term "companionship services." JA56. Nonetheless, the court opined that companionship "must include, in a meaningful way, the provision of care" and that "[l]imiting that care to only 20 percent of a worker's total hours defies logic, and Congressional intent." JA57 (footnote omitted). Additionally, although the court declared the regulation invalid in its entirety, the court did not discuss the parts of the regulation that exclude medically related services and work performed primarily for the benefit of other members of the household.

SUMMARY OF ARGUMENT

In 1974, Congress extended the FLSA's minimum wage and overtime pay requirements to domestic service employees generally, but included exemptions for "companionship services" and live-in domestic service employees. Congress delegated authority to the Department of Labor to define and delimit the term "companionship services" and also authorized the Department to prescribe necessary rules and regulations with regard to the 1974 amendments. In 2013, after notice and comment rulemaking, the Department amended its 1975 implementing regulations in light of the transformation of the home care industry that had occurred over the ensuing decades. The amended regulations are reasonable exercises of the authority that Congress delegated to the agency and thus should be upheld.

I. Under the 2013 final rule, the FLSA's exemptions for companionship services and live-in domestic service employees may be claimed by an individual (or family member) who hires a worker directly, but may not be claimed by third-party employers such as home care agencies that assign members of their workforce to particular homes. Thus, the home care businesses that plaintiffs represent must abide by the same FLSA wage and hour rules that protect employees generally. Although the district court declared that the amended regulation is inconsistent with the FLSA's plain text, that ruling is foreclosed by

the Supreme Court's contrary reasoning in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). There, the Supreme Court held that the FLSA's text does not resolve the question of third-party employment, which, the Court explained, is an interstitial matter for the Department of Labor to decide through rulemaking. The Department's 2013 final rule is based on its comprehensive analysis of the extensive administrative record, and the district court could not properly substitute its (mistaken) assumptions about the economic impact of the rule for the findings made by the Department on the basis of that evidence.

II. Because the third-party employment regulation is valid, plaintiffs lack standing to challenge the companionship-services regulation. The companionship-services regulation sets out the types of activities and duties that are "companionship services" for purposes of the companionship-services exemption. Plaintiffs represent third-party employers, which may not avail themselves of that exemption regardless of how "companionship services" are defined. In any event, the amended companionship-services regulation is a reasonable exercise of the Department's delegated authority. The district court's order invalidating that regulation as contrary to the FLSA's plain text rests on the same mistaken premises as its order invalidating the third-party employment regulation.

STANDARD OF REVIEW

The district court's orders granting summary judgment for plaintiffs are subject to de novo review in this Court. *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 262 (D.C. Cir. 2014).

ARGUMENT

I. The Third-Party Employment Regulation Is A Reasonable Exercise Of The Authority That Congress Delegated To The Department Of Labor

In promulgating the final rule, and thereby extending to home care workers the basic wage protections that most American workers already enjoy, the Department acted pursuant to explicit delegations of statutory authority and on the basis of its thorough consideration of the information in the administrative record. The amended third-party employment regulation is a reasonable exercise of the Department's delegated authority and therefore should be sustained.

A. The Supreme Court in *Coke* Held that the Department of Labor Has Authority To Decide Whether Domestic Service Workers Employed by Third Parties Should Be Exempt from the FLSA's Protections

1. Under the final rule, the exemptions for companionship services and live-in domestic service employees can be claimed by an individual (or family member) who hires a worker directly, but not by third-party employers such as home care agencies that assign members of their workforce to particular homes. *See* 78 Fed. Reg. at 60557 (29 C.F.R. § 552.109). The district court declared that the third-party employment regulation is contrary to the FLSA's plain text and

declared the regulation invalid at step 1 of the *Chevron* analysis. The court opined that "[t]here is no explicit—or implicit—delegation of authority to the Department to parse groups of employees based on the nature of their employer." JA37.

The Supreme Court, however, reached the opposite conclusion in *Coke*. The Court held that "the text of the FLSA does *not* expressly answer the third-party-employment question." 551 U.S. at 168 (emphasis added). The Court concluded that, instead, the FLSA "expressly instructs the agency to work out the details of [its] broad definitions," and "whether to include workers paid by third parties within the scope of the definitions is one of those details." *Id*. at 167.

As the Supreme Court observed, Congress delegated broad authority to the Department of Labor to implement the 1974 amendments through legislative rules. The power "'to prescribe necessary rules, regulations, and orders with regard to the" 1974 amendments "provides the Department with the power to fill [statutory] gaps through rules and regulations." *Coke*, 551 U.S. at 165 (quoting Pub. L. No. 93-259, § 29(b), 88 Stat. 76). Furthermore, Congress also granted the Department of Labor authority to "define[] and delimit[]" the term "companionship services," which is an additional source of authority to issue legislative rules. *See Auer v. Robbins*, 519 U.S. 452, 457-458 (1997) (FLSA provision granting the Department of Labor authority to "define[] and delimit[]" the Act's exemption for employees

employed in an executive, administrative, or professional capacity, 29 U.S.C. § 213(a)(1), gives the Department broad authority to issue legally binding rules).

The Supreme Court explained in *Coke* that when the 1974 amendments were enacted, the FLSA's minimum wage and overtime requirements already applied to some, but not all, companionship workers paid by third parties. *See* 551 U.S. at 167. "The result is that whether, or how, the definition should apply to workers paid by third parties raises a set of complex questions":

> Should 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, or those hired by a son or daughter to help an aged or infirm mother living in a distant city? Should it cover *none*? 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?

Ibid. (Court's emphases). The Court explained that "[s]atisfactory answers to such questions may well 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." *Id*. at 167-168. Accordingly, the Court held that it is "consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions." *Id*. at 168.

In light of the Supreme Court's reasoning in *Coke*, it was not open to the district court to hold that the FLSA's text resolves the question of third-party

employment. The Supreme Court held that the FLSA's text does *not* answer that question, which is a matter for the agency to decide based on considerations of policy. "The subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out." *Coke*, 551 U.S. at 165.

2. The district court provided no legitimate basis for disregarding the reasoning of *Coke*. The court noted that the validity of the current regulations was not before the Supreme Court. *See* JA40. That observation misses the point of the Supreme Court's reasoning. The Supreme Court held that the FLSA "expressly instructs the agency to work out the details of [its] broad definitions," and "whether to include workers paid by third parties within the scope of the definitions is one of those details." 551 U.S. at 167. And the Court explicitly recognized the agency's discretion to determine that "*none*" of these workers is exempt from the FLSA's protections. *Ibid*. (Supreme Court's emphasis).

The district court also emphasized that, in the modern home care industry, approximately 90% of home health aides and personal care aides work for third-party employers, and suggested that Congress alone can address the transformation of the home care industry that this statistic reflects. JA41. But the Supreme Court in *Coke* was well aware of the dominant role played by third-party employers in

the modern home care industry, and the Court made clear that the Department of Labor has authority to amend its third-party employment regulation in light of the home care industry's transformation. Indeed, the petitioner home care agency itself recognized in *Coke* that, if the policy arguments for changing the 1975 rule "have force, the Department is free to engage in new rulemaking proceedings to consider them."[6]

Accepting that argument, the Supreme Court emphasized that "[s]atisfactory answers" to the question whether the FLSA should cover all, some, or none of the workers paid by third parties "may well 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 167-68. The Court declared that "it is consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions." *Id*. at 168.

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[6] Brief for Petitioners, *Long Island Care at Home, Ltd. v. Coke*, No. 06-593 (S. Ct.), 2007 WL 549107, at *45; *see also* Reply Brief for Petitioners, *Long Island Care at Home, Ltd. v. Coke*, No. 06-593 (S. Ct.), 2007 WL 1046713, at *19 ("Respondent is now effectively asking the Court to reweigh the possible pros and cons, substituting its own judgment for that of the agency, an invitation that is directly contrary to the principles of *Chevron*"); Amicus Brief for the United States Supporting Petitioners, *Long Island Care at Home, Ltd. v. Coke*, No. 06-593 (S. Ct.), 2007 WL 579234, at *11, *12 (explaining that "Congress delegated to the Department of Labor *** the authority to promulgate legislative rules, which carry the force of law," and that the third-party employment regulation is an exercise of that authority) (citation omitted)

3. Despite the clear holding of *Coke*, the district court opined that "Congressional Inaction" had eliminated the Department's discretion to revise its 1975 regulations. JA41. The district court emphasized that Congress had amended certain FLSA exemptions "over the years in other ways" but had "*not* altered the exemptions at issue here." *Ibid*. (court's emphasis) (citing a 1999 provision that concerned fire protection activities and a 1996 provision that concerned computer professionals and credit for tips). The Supreme Court, however, clearly did not believe that such amendments to other FLSA exemptions had frozen the 1975 regulations in place, and any such inference is implausible.

The district court also stressed that, "[f]ollowing the *Coke* decision, Congress contemplated adjusting the statutory language of the companionship exemption at least three times, but never did so." JA42. The court noted that "[s]ix bills were introduced—three in the House of Representatives, three in the Senate—over the course of three Congressional sessions, where supporters were in the majority party of each, yet there was never sufficient support to get any of them to the floor of either house of Congress." *Ibid.* In the district court's view, "[t]his unequivocally represents a lack of Congressional intent to withdraw this exemption from third-party employers." *Ibid*. (footnote omitted).

But congressional inaction "is a notoriously poor indication of congressional intent." *Schweiker v. Chilicky*, 487 U.S. 412, 440 (1988). That principle applies

with particular force in this context because *Coke* made plain that the Department of Labor had discretion to amend the regulations, making action by Congress potentially unnecessary. Indeed, the very purpose of the delegation of legislative rulemaking authority is to allow the expert agency to resolve the third-party employment question in light of its assessment of the home care market and in consultation with affected constituencies. *See Coke*, 551 U.S. at 165 ("[t]he subject matter of the regulation in question concerns a matter in respect to which the agency is expert," which "Congress entrusted the agency to work out"). That Congress chose to leave this responsibility with the agency is entirely understandable.

4. The district court also found it significant that the third-party employment regulation is not framed as a definition, *see* JA40, and found it "notabl[e]" that Congress did not expressly authorize Labor to define and delimit the term "live-in" domestic service employee. JA36. These observations are irrelevant because the Department's authority is not limited to defining statutory terms. As the Supreme Court emphasized in *Coke*, 551 U.S. at 165, the Department has broad authority "to prescribe necessary rules, regulations, and orders with regard to" the 1974 amendments. That authority encompasses the exemption for live-in domestic service employees. *See*, *e.g.*, 40 Fed. Reg. 7404, 7405, 7406 (Feb. 20, 1975) (29 C.F.R. § 552.102) (regulation governing live-in domestic service employees).

B. The District Court Impermissibly Substituted Its Assumptions About the Home Care Market for the Findings Made by the Agency on the Basis of the Administrative Record

1. Although the district court did not purport to analyze the challenged regulations under *Chevron* step 2, its rulings were animated by mistaken assumptions about the policy concerns that underlie the 1974 amendments, the considerations that the Department of Labor addressed in the recent rulemaking, and the impact of the final rule on the home care market.

The district court believed that the Department of Labor was concerned solely with the welfare of the nearly two million workers who will receive FLSA coverage under the final rule, whereas Congress was concerned solely with controlling the cost of companionship services for consumers.[7] The court proclaimed that "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." JA181 (1/14/15 Tr. 13). It declared that "[w]hile the Department of

[7] For example, when government counsel made reference to the affected workers, the district court declared (JA155 (1/9/15 Tr. 22)):

> You're looking at the opposite side of the coin. I'm focusing on the side of the coin of the millions and millions of families that Congress was specifically concerned about their ability, those families, to provide home care services for their elderly or infirm family members. You keep talking about the other side of the coin. I know full well what your agency was focusing on. I'm asking you to focus on what Congress focused on.

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." JA182 (1/14/15 Tr. 14).[8]

2. These pronouncements reflect a series of mistaken premises. The first is that Congress had a single-minded concern to control the cost of companionship services, without regard to the impact on workers. When Congress extended the FLSA's protections to domestic service employees, Congress sought to foster "an effective and dignified domestic workforce" by requiring "a living wage and respectable working conditions." Senate Report, pp. 20-21; *see also* House Report, pp. 33-34 (similar). The House and Senate committees made clear that the exemptions in the 1974 amendments were consistent with that overarching objective because the exemptions were not intended to cover "employees whose vocation is domestic service." Senate Report, p.20; House Report, p.36. To the contrary, the House and Senate committees stressed that "[p]eople who will be

[8] Although the district court made these pronouncements in addressing the companionship-services regulation, the court emphasized that the practical consequences of the third-party employment regulation are the same. *See, e.g.* JA161-62 (1/9/15 Tr. 28-29) (declaring that its order vacating the third-party employment regulation would be a "Pyrrhic victory" for the home care service provider industry unless the court also vacated the companionship-services regulation, because the overwhelming majority of the industry's workers would not otherwise be exempt from the FLSA's protections).

employed in the excluded categories are not regular bread-winners or responsible for their families' support." *Ibid*. Given these express congressional reassurances that the exemptions would not cover employees for whom domestic service is a vocation, it is simply incorrect to conclude that Congress had no concern for the welfare of these workers.

Moreover, even a cursory review of the final rule (JA186-289) shows that the Department of Labor considered the rule's impact on consumers. Based on its comprehensive analysis of the evidence, the Department found that the lack of FLSA protection harms not only the affected workers, "who depend on wages for their livelihood and that of their families," but also "the individuals receiving services and their families, who depend on a professional, trained workforce to provide high-quality services." 78 Fed. Reg. at 60455.

The Department explained that, since it published its regulations implementing the 1974 amendments to the FLSA, the home care industry has undergone dramatic transformation." 78 Fed. Reg. at 60458. "In the 1970s, individuals who had significant care needs went into institutional settings." *Ibid*. "Over time, however, our nation has come to recognize the importance of providing services in private homes and other community-based settings and of supporting individuals in remaining in their homes and communities." *Ibid*. The Department explained that this "shift is in part a result of the rising cost of

traditional institutional care, and has been made possible in significant part by the availability of government funding assistance for home care under Medicare and Medicaid." *Ibid*. The growing demand for long-term home care services is also due to demographic changes, *i.e.*, the significant increase in the percentage of elderly persons in the United States. *Ibid*. Moreover, the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that it is a violation of the Americans with Disabilities Act for public entities to fail to provide services to persons with disabilities in the most integrated setting appropriate, "further solidified our country's commitment to decreasing institutionalization and has also influenced this important trend." *Ibid*.

The Department found, however, that "the growth in demand for home care and the professionalization of the home care workforce have not resulted in growth in earnings for direct care workers." 78 Fed. Reg. at 60458. "The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry." *Ibid*. Indeed, research cited in the final rule found that approximately 50 percent of personal care aides rely on public assistance (such as food stamps or Medicaid). *See id*. at 60545. Although nearly all home care workers receive a minimum hourly wage, *see id*. at 60456, "failure to pay for travel time suppresses workers' already low earnings and not infrequently drives their real hourly wages below the minimum wage," *id*. at 60493. And as the

Department explained, studies have found that the low income of these workers impedes efforts to improve both the circumstances of the workers and the quality of the services they provide. *See id*. at 60548. Covering these workers under the FLSA is thus "an important step in ensuring that the home care industry attracts and retains qualified workers that the sector will need in the future." *Ibid.*

Summarizing its determinations, the Department "recognize[d] that this Final Rule will have an impact on individuals and families who rely on direct care workers for crucial assistance with day-to-day living and community participation." 78 Fed. Reg. at 60459. The Department explained that "[t]hroughout the rulemaking process, the Department has carefully considered the effects of the rule on consumers and has taken into account the perspective of elderly people and people with illnesses, injuries, and disabilities, as well as workers, employers, public agencies, and others." *Ibid*. "In particular," the Department "does not believe, as some commenters have suggested, that the rule will interfere with the growth of home- and community-based caregiving programs and thereby lead to increased institutionalization." *Ibid*. "To the contrary, the Department believes that ensuring minimum wage and overtime compensation will not only benefit direct care workers but also 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 60459-60.

The Department's findings have ample support in the administrative record, including data from the 15 states that already provide minimum wage and overtime protections to all or most home care workers employed by third parties. *See*, *e.g.*, 78 Fed. Reg. at 60842-43, 60503-04. As the Department observed, "[t]he 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." *Id*. at 60483. "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." *Ibid*. "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.'" *Ibid*. "[A]s summarized by AARP, there is no strong correlation between states that have minimum wage and overtime protections with expenditures on [home and community-based services] versus institutionalized care." *Ibid*. The Department found that firms operating in overtime and non-overtime states already have very similar characteristics, including a similar percentage of consumers receiving 24-hour care. *See id*. at 60503.

The Department also considered and rejected industry claims that the amended regulations would harm consumers by encouraging the use of multiple workers and thereby denying consumers continuity of care. "As the National Association of Area Agencies on Aging points out in its comment, 'providing fundamental labor protections of minimum wage and overtime will help reduce turnover, improve continuity of care and help lower costs.'" 78 Fed. Reg. at 60468. The Department explained that the home care industry "is currently marked by high turnover, which can be very disruptive to consumers." *Id*. at 60483. The Department concluded that the amended regulations "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." *Id*. at 60483. Moreover, the Department noted that as a general matter, "continuity of care does not necessarily require a single direct care worker, but rather can involve a small group of direct care workers intimately familiar with the consumer and his or her needs." *Id*. at 60503. In this way, the Department explained, care will not be disrupted if one of those workers is no longer willing or able to provide the needed services. *See ibid*. In addition, "with an industry turnover rate apparently exceeding 40 percent, it is likely that many consumers already receive care from more than one worker or a combination of

direct care workers and family members when other workers are unavailable." *Ibid*.

3. The district court made no reference to the Department's findings or to the record on which they are based. The court could not properly substitute its assumptions about the economic impact of the rule for the determinations made by the Department of Labor on the basis of the administrative record.

As the Supreme Court explained in *Coke*, the "'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" 551 U.S. at 165 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). When, as here, "an agency fills such a 'gap' reasonably, and in accordance with other applicable (*e.g.*, procedural) requirements, the courts accept the result as legally binding." *Ibid*. (quoting *Chevron*, 467 U.S. at 834-44, and citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)); ; *see also National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-82 (2005); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987).

As discussed above, even the petitioner home care agency in *Coke* recognized that, if the policy arguments in favor of changing the third-party

employment regulation have force, "the Department is free to engage in new rulemaking proceedings to consider them."[9] The Department has since done exactly that, and its amended regulation should be upheld as a reasonable exercise of its delegated authority.

II. The Companionship-Services Regulation Is A Reasonable Exercise Of The Authority That Congress Delegated To The Department Of Labor

The FLSA exempts "companionship services" as that term is "defined and delimited by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(15). Since 1975, the Department of Labor has set out by regulation the types of activities and duties that may be regarded as companionship services. *See* 40 Fed. Reg. 7404, 7405 (Feb. 20, 1975) (29 C.F.R. § 552.6) (companionship-services regulation). In the 2013 final rule, the Department amended that regulation. If the Court reaches the issue, it should uphold the amended regulation as a reasonable exercise of the authority delegated to the Department of Labor by Congress.

A. Because the Third-Party Employment Regulation Is Valid, Plaintiffs Lack Standing To Challenge The Companionship-Services Regulation

The Court should not reach the issue, however, because the validity of the third-party employment regulation means that plaintiffs lack standing to challenge the companionship-services regulation. The businesses that plaintiffs represent are

[9] Brief for Petitioners, *Long Island Care at Home, Ltd. v. Coke*, No. 06-593 (S. Ct.), 2007 WL 549107, at *45

all third-party employers. Therefore, they may not claim the companionship-services exemption, regardless of how the term "companionship services" is defined.

Although the government did not challenge plaintiffs' standing below, plaintiffs conceded that they lack standing to challenge the companionship-services regulation if the third-party employment regulation is valid.[10] The district court likewise recognized the standing problem in its opinion. *See* JA53. Accordingly, this Court should not address the merits of plaintiffs' challenge to the companionship-services regulation. In any event, as explained below, the district court erred in invalidating that regulation.

B. The Ruling Vacating Paragraph (b) of the Companionship-Services Regulation Rests on the Same Mistaken Premises as the Ruling Invalidating the Third-Party Employment Regulation

The district court's analysis of the companionship-services regulation reflects the same incorrect premises as its analysis of the third-party employment regulation. The district court mistakenly believed that the validity of the companionship-services regulation is dictated by the FLSA's plain text. The Supreme Court, however, made clear that the contours of the companionship-

[10] *See* R.23-1 at 9 ("until Plaintiffs established their right to avail themselves of the statutory exemption, *i.e.*, until this Court correctly vacated Section 552.109, Plaintiffs lacked standing to seek injunctive relief against Section 552.6, which by the terms of Section 552.109 did not apply to Plaintiffs' third-party employer members") (plaintiffs' emphasis).

services exemption is not determined by the statutory text but entails "the formulation of policy." *Coke*, 551 U.S. at 165 (citations omitted).

Congress provided that the term "companionship services" shall be "defined and delimited" by the Department of Labor. 29 U.S.C. § 213(a)(15). The Supreme Court in *Coke* emphasized that the FLSA "refers broadly to 'domestic service employment' and to 'companionship services'" and "expressly instructs the agency to work out the details of those broad definitions." 551 U.S. at 167. And as discussed above (pp._-_, *supra*), the Department's resolution of the policy considerations addressed at length in the rulemaking is a reasonable exercise of its authority "to fill any gap left, implicitly or explicitly, by Congress." *Ibid*.

Under the 2013 final rule, "companionship services" are defined as "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." 29 C.F.R. § 552.6(a). "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," and "[t]he 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 persons safety and well-being." *Ibid*.

In addition, "companionship services" include care such as dressing, grooming, feeding, bathing, toileting, transferring, meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care, if such work does not exceed 20 percent of the total weekly hours worked and is provided in conjunction with fellowship and protection. 29 C.F.R. § 552.6(b).[11]

The district court took issue with paragraph (b) of the amended regulation, opining that "[l]imiting that care to only 20 percent of a worker's total hours defies logic, and Congressional intent." JA57. But contrary to the district court's understanding, the FLSA does not exempt all "care" that an elderly person or person with a disability might need. Indeed, plaintiffs do not contend that the exemption includes medical care that such a person might need. The FLSA exempts "companionship services." The statute vests the Department of Labor with responsibility to delineate the scope of that exemption, and the Department reasonably determined that the provision of fellowship and protection should be the core responsibilities of a companion.

It does not matter that many workers in the modern home care industry devote more than 20 percent of their time to tasks that, under the amended

[11] The regulation describes types of care as "activities of daily living" (ADLs) and "instrumental activities of daily living" (IADLs), which are terms used by the industry.

regulation, are not "companionship services." *See* JA57 & n.6 (district court opinion). The Department explained that the 20 percent limitation is not meant as a description of the activities in which workers in the home care industry currently engage. *See* 78 Fed. Reg. at 60467-48. To the contrary, the Department amended its regulations in light of the major transformation of the home care industry that has occurred over the decades since its 1975 regulations were issued.

The Department explained that, "as services for elderly people and people with illnesses, injuries, or disabilities who require assistance in caring for themselves (referred to in this Final Rule as consumers) have increasingly been provided in individuals' homes rather than in nursing homes or other institutions, the duties performed in homes have changed as well." 78 Fed. Reg. at 60458. "Most direct care workers are employed to do more than simply sit with and watch over the individuals for whom they work." *Ibid*. "They assist consumers with activities of daily living and instrumental activities of daily living, such as bathing, dressing, housework, or preparing meals." *Ibid*. "They often also provide medical care, such as managing the consumer's medications or performing tracheostomy care, that was previously almost exclusively provided in hospitals, nursing homes, or other institutional settings and by trained nurses." *Ibid*. "This work is far more skilled and professional than that of someone performing 'elder sitting.'" *Ibid*. "Although some direct care workers today still perform the services Congress

contemplated, i.e., sit with and watch over individuals in their homes, most do much more." *Ibid*.

The amended companionship-services regulation ensures that fellowship and protection are the core duties to which the companionship-services exemption applies, and that other activities are incidental to that work. *See* 78 Fed. Reg. at 40466. The approach taken by the Department, which mirrors one of the proposals that the Department made in 2001, *see* 66 Fed. Reg. 5481, 5484 (Jan. 19, 2001), is consistent with Congress's expectation that a companion covered by the exemption would be someone whose primary responsibility is "to be there and to watch an older person." 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973) (Sen. Williams). Although being a companion might also involve "making lunch for the infirm person," "[t]his would be incidental to the main purpose of the employment." *Ibid*.

The district court apparently believed that workers whose primary responsibilities include cooking, bathing, and driving should not earn the minimum wage and overtime that Congress extended to other domestic service workers such as cooks, nannies, and chauffeurs. But the contrary judgment reached by the Department after comprehensive notice and comment rulemaking is a reasonable exercise of the authority delegated to it by Congress, and the district court had no

basis to substitute its view for that of the agency charged with responsibility to implement the statute's broad provisions.

C. The District Court Improperly Invalidated Provisions of the Companionship-Services Regulation that its Opinion Did Not Address

The current companionship-services regulation also provides that "companionship services" do not include work performed primarily for the benefit of other members of the household. 29 C.F.R. § 552.6(c). Nor do companionship services include medically related services, *i.e.*, services that typically require and are performed by trained personnel such as registered nurses, licensed practical nurses, or certified nursing assistants. *Id*. § 552.6(d).

The district court purported to invalidate the companionship-services regulation in its entirety, based on the FLSA's plain text. JA56, 60 (opinion); JA62 (order). However, the complaint did not allege that paragraph (c) of the regulation (which concerns work primarily performed for the benefit of other household members) or paragraph (d) of the regulation (which concerns medically related services) are contrary to the FLSA's text. Indeed, in their district court reply brief, plaintiffs confirmed that "Congressional intent not to exempt services performed by 'trained personnel such as nurses'" is "not the issue Plaintiffs are challenging in this case." R.28 at 4. Although the district court quoted paragraphs

(c) and (d) of the regulation in its opinion, *see* JA52 n.3, the court did not provide any reason for vacating those provisions, and the order cannot stand.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains ____ words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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