**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR IN THE ALTERNATIVE THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

Federal agency action taken under wide-ranging congressionally granted authority, after careful consideration of the various issues related to the action, and in compliance with applicable procedural rules, should easily withstand judicial review. Yet plaintiffs challenge just such action in this case. Their challenge should be rejected.

The Fair Labor Standards Act ("FLSA" or "Act") guarantees, among other things, minimum wage and overtime compensation for workers. *See* 29 U.S.C. §§ 206, 207. When Congress amended the FLSA in 1974, it expressly sought to extend these basic labor protections to domestic service employees – those workers who provide services of a household nature in a private home. While broadening the reach of the Act to include these workers, Congress also included two narrow exemptions for companions, or "elder sitters," and live-in domestic service employees. In creating these exemptions, Congress granted the Secretary of the Department of Labor ("the Secretary" or "the Department") broad general authority to prescribe "rules, regulations, and orders" implementing the 1974 amendments and these exemptions, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, as well as explicit authority to "define and delimit" the scope of the companionship services exemptions.

This delegation includes the authority to determine whether the companionship services or live-in worker exemptions apply to employees of third party employers. In a unanimous decision, *Long Island Care at Home Ltd. v. Coke,* 551 U.S. 158 (2007), the Supreme Court affirmed the Department's substantial authority to promulgate regulations that "work out the details . . . [of] whether to include workers paid by third parties within the scope of the definitions." *Id.* at 167.

In an effort to update the regulations that govern domestic service employees for the first time in nearly 40 years, the Secretary issued rules pursuant to this broad rulemaking authority Congress granted him under the Act. Those rules explain that after considering the purpose and objectives of the 1974 amendments as a whole, reviewing the legislative history, and evaluating the present state of the home care industry, the companionship services and live-in domestic service employee exemptions were not intended to apply to employees of third party employers, that is, any employer other than the individual, family, or household using the services.

These rules were issued pursuant to an extended and vigorous notice-and-comment rulemaking process. During this time, the Department considered and responded to numerous comments, including comments made by each of the plaintiffs in this case, and engaged in a detailed and comprehensive economic analysis. Moreover, the Department then provided the regulated community with an unprecedented 15-month effective date period, in order to provide stakeholders with adequate time to adjust to the new rule.

Notwithstanding the clear statutory authority authorizing the Department's rulemaking, the plaintiffs, the Home Care Association of America, International Franchise Association, National Association for Home Care, filed this action against the Secretary, alleging that the Secretary's newly promulgated third party regulation violates the Administrative Procedure Act, 5 U.S.C. § 706 ("the APA") and is arbitrary and capricious. These claims have no merit. The Secretary exercised his broad rulemaking authority to fill a gap created by the 1974 amendments, acting in accordance with settled administrative law principles. The challenged regulation serves Congress's goal: to extend FLSA coverage to all employees whose "vocation" is domestic service.

The Final Rule, and the third party regulation in particular, reflects the Secretary's deliberate and careful consideration of the issues related to the challenged rulemaking. Indeed, when the Secretary published the rules in proposed form for public comment, the notice discussed at length the legislative history behind the 1974 amendments, the dramatic changes that have taken place within the home care industry, and the Department's considered changes. Further, the Department considered relevant evidence and thousands of comments in promulgating the Final Rule, and has demonstrated the validity of its efforts to address the problematic treatment of certain domestic service workers under the previous regulations, so plaintiffs cannot show that the Departments' decision was arbitrary, capricious, or contrary to law.

Because the challenged regulation represents a permissible construction of the FLSA, the Final Rule is entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. 837 (1984). Thus, plaintiffs fail to meet the high burden of showing entitlement to the relief requested; their motion for summary judgment must fail and the Department's motion to dismiss, or in the alternative, cross-motion for summary judgment should be granted.[1]

## STATUTORY AND REGULATORY BACKGROUND

The FLSA was passed by Congress in 1938 as remedial legislation intended to protect workers from "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being." 29 U.S.C. § 202(a); *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)

[1] Because, for the most part, the parties do not rely on material outside the pleadings in their arguments on these motions, and in accordance with the agreement to waive the filing of an Administrative Record in the July 10, 2014 stipulation, ECF No. 6 at 1, defendants (with plaintiffs' concurrence) agree to file an appendix at the close of briefing containing any record evidence cited to in the parties' briefs; such filing will serve as compliance with Loc. Civ. R. 7(n) in this case, to the extent that rule applies.

to define the "principal congressional purpose in enacting" the FLSA). One of the primary purposes of the FLSA is to protect workers from "substandard wages and oppressive working hours." *Barrentine*, 450 U.S. at 739; *see* 29 U.S.C. § 202(a), (b) (stating Congress' intent to eliminate substandard labor conditions). The FLSA requires, in part, that all covered employees receive minimum wage and overtime compensation, subject to various exemptions. S*ee* 29 U.S.C. §§ 206, 207.

## I. Congress's 1974 Amendments to the FLSA Extending Coverage to Domestic Service Employees

Before 1974, the FLSA's minimum wage and overtime protections only covered domestic service workers if they worked for an agency or business large enough to be subject to the FLSA, or if they were themselves engaged in interstate commerce. *See* Fair Labor Standards Amendments of 1974, Pub. Law 93-259, §§ 7(b)(1), (2), 88 Stat.55, 62 (1974); *see also* 78 Fed. Reg. 60,457. For example, prior to 1974, domestic service employees who worked for a placement agency that met the annual earnings threshold for FLSA enterprise coverage, but were assigned to work in someone's home, were covered by the FLSA. 39 Fed Reg. 35,385. Consequently, all other domestic service workers who worked directly for a private household, such as housekeepers, butlers, nannies, cooks, and chauffeurs were not covered by the FLSA.

In 1974, in an effort to expand the Act's coverage to more workers, Congress amended the FLSA to extend minimum wage and overtime protections to all domestic service workers, including those employed by private households or companies too small to be covered by the Act. *See* Fair Labor Standards Amendments of 1974, Public Law 93-259 Sec. 7, 88 Stat. 55, 62 (1974); *see also* 119 Cong. Rec. at S24800 ("Coverage of domestic employees is a vital step in the direction of insuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act."); Senate Report No. 93-690 at p. 20 ("The goal of the Amendments

embodied in the committee bill is to update the level of the minimum wage and to continue the task initiated in 1961 – and further implemented in 1966 and 1972 – to extend the basic protection of the Fair Labor Standards Act to additional workers and to reduce to the extent practicable at this time the remaining exemptions."). Specifically, Congress extended minimum wage protections, *see* 29 U.S.C. § 206(f), and overtime compensation, *see* 29 U.S.C. § 207(l), to workers "employed in domestic service in a household." *See* FLSA Amendments of 1974, 88 Stat. at 62.

With these 1974 Amendments, Congress sought to "include within the coverage of the Act *all* employees whose vocation is domestic service," but to exclude from coverage people who "are not regular bread-winners or responsible for their families' support." *Id.* (emphasis added); House Report No. 93-913, p. 36 (1974). Congress further indicated that these amendments were intended to "raise the wages of these workers . . . [and] help to raise the status and dignity of this work," *Id*. at pp. 33-34.

Simultaneous with this expansion of coverage for domestic service workers, Congress created an exemption from the minimum wage and overtime compensation requirements for domestic service workers who provided "companionship services for individuals who (because of age or infirmity) are unable to care for themselves"[2] and an exemption from the Act's overtime compensation requirement for domestic service workers who reside in the households in which they provide services, i.e., live-in domestic service workers.[3] 39 Fed. Reg. 35,385; 29

[2] 29 U.S.C. § 213(a)(15) exempts, in pertinent part, "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)."

[3] 29 U.S.C. § 213 (b)(21) exempts "any employee who is employed in domestic service in a household and who resides in such household."

U.S.C. §§ 213(a)(15), 213(b)(21).[4] The companionship services exemption was not intended to exclude "trained personnel such as nurses, whether registered or practical," from the minimum wage and overtime protections of the FLSA. *See* Senate Report No. 93-690, 93rd Cong., 2d Sess., p. 20 (1974). Rather, the exemption was meant to apply to "elder sitters" whose primary responsibility was "to be there and to watch" over an elderly person, or a person with an illness, injury, or disability in the same manner that a babysitter watches over children, "not to do household work." 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973) (statement of Sen. Williams). This new statutory text explicitly granted the Department the authority to define the terms "domestic service employment" and "companionship services." *See* 29 U.S.C. § 213(a)(15), as well as the broad general authority to prescribe "rules, regulations, and orders" implementing the 1974 Amendments. Pub. L. 93-259, § 29(b), 88 Stat. 55.[5]

**A. The Department's 1975 Regulations**

In 1975, exercising this broad statutory authority, the Department promulgated regulations implementing the companionship services and live-in domestic service employee exemptions. *See* 40 Fed. Reg. 7,404 (1975); 29 C.F.R. part 552. The regulations defined "domestic service employment" as "services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed." 29 C.F.R. § 552.3. The regulations defined "companionship services" as "fellowship, care, and protection" which included "household work . . . such as meal preparation, bed making, washing of clothes and

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[4] At the same time, Congress also included an exemption for workers "employed on a casual basis in domestic service employment to provide babysitting services." The "casual babysitter" exemption was not a topic addressed by this rulemaking or litigation. *See* 29 U.S.C. § 213(a)(15).

[5] Generally, the Secretary is responsible for the administration and enforcement of the FLSA. *See* 29 U.S.C. §§ 204(a)-(b), 216(c), 217.

other similar services," and could include general household work not exceeding "20 percent of the total weekly hours worked." 29 C.F.R. § 552.6. Most relevant to this litigation, the so-called "third party regulation" permitted third party employers—employers other than the individuals receiving care or their families or households—to claim both the companionship services and live-in domestic service employee exemptions, stating expressly that companions and live-in domestic service workers "who are employed by an employer or agency other than the family or household using their services are exempt" from the Act's minimum wage and/or overtime requirements. 29 C.F.R. § 552.109. These regulations remained substantially unchanged until the recent rulemaking at issue in this case.[6]

### B. The Department's Final Rule Extending Basic Labor Protections to Companions and Live-In Domestic Service Workers Employed by Third Party Employees.

The home care industry has changed dramatically since the 1970's, when "individuals with significant care needs were served in institutional settings rather than in their homes and [] communities." 78 Fed. Reg. 60,455. Since that time, the demand for long-term, in-house care for persons of all ages has risen, reflecting "the nation's commitment to accommodate the desire

[6] In December 1993, the Department published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register inviting public comments on a proposal to revise 29 C.F.R. § 552.109 to clarify that, in order for the exemptions under 29 U.S.C. §§ 213(a)(15) and 213(b)(21) to apply, employees engaged in companionship services and live-in domestic service who are employed by a third party employer or agency must be "jointly" employed by the individual, family, or household using their services. *See* 78 Fed. Reg. 60,457. In September 1995, the Department published a proposed rule re-opening and extending the comment period on the proposed changes to 29 C.F.R. § 552.109 concerning third party employment, *see* 60 Fed. Reg. 467, 797, but the Department did not finalize this rule.

The Department again attempted to address the tension between Congress's intent in creating the 1975 exemption and the changing nature of the domestic service industry in January 2001, publishing an NPRM to amend the regulations to prohibit employees of third parties from claiming the companionship services or live-in worker exemption. 78 Fed. Reg. 60,458. In April 2001, the Department published a proposed rule re-opening and extending the comment period on the January 2001 proposed rule, but this rulemaking was eventually withdrawn and terminated. *Id.*; *see* 67 Fed. Reg. 16,668.

of individuals to remain in their homes and communities." *Id*. As this industry has expanded, the workers who provide home care have performed increasingly skilled duties; these workers are generally not the "elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974," and are more often professionals, including "certified nursing assistants, home health aides, personal care aides" and professional caregivers. *Id*. But these professionals have been excluded from the minimum wage and/or overtime protections of the FLSA under the companionship services and live-in worker exemptions, resulting in their earnings "remain[ing] among the lowest in the service industry, [which] imped[es] efforts to improve both jobs and care." *Id*. The Department promulgated the Final Rule at issue in this case to realign the scope of the exemptions with Congress's intent when it extended FLSA protections to domestic service employees in 1974. *Id*.

On December 27, 2011, the Department published an NPRM to revise the companionship and live-in worker regulations for two important purposes: (1) to more clearly define the tasks that may be performed by an exempt companion; and (2) to limit the companionship and live-in worker exemptions from the FLSA's minimum wage and overtime protections to workers employed solely by the family or household using the services. Specifically, the Department proposed "to revise Sec. 552.109(a) and (c) to apply the exemptions in Secs. 13(a)(15) and 13(b)(21) of the FLSA only to workers employed by the individual, family or household using the worker's services." 76 Fed. Reg. 81,198. The Department explained that "all workers employed by a third party, whether solely or jointly, are entitled to the minimum wage and overtime protections of the Act."

In the NPRM, the Department stated that it was proposing this rulemaking in light of the "significant changes in the home health care industry over the last 35 years," because both the number of workers providing these services has increased, and these workers "are performing duties and working in circumstances that were not envisioned when the companionship services regulations were promulgated [in 1975]." *Id*. Despite the number of people working as home health aides and personal care aides having doubled between 1998 and 2008—according to the Bureau of Labor Statistics, *see* http://www.bls.gov/oes/current/oes399021.htm—the "earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry." *Id*. Out of a "growing concern about the proper application of the FLSA minimum wage and overtime protections to domestic service employees," 76 Fed. Reg. 81,192, the Department proposed various changes to 29 C.F.R. § 552, including amending § 552.109 to prohibit third party employers - that is, any employer other than the individual, family, or household using the services - from claiming the companionship services or live-in domestic service employee exemptions.

Additionally, in the NPRM, the Department expressly invited public comments for a period of 60 days on, among other issues, "the proposed changes to the third party employment regulation," and specifically sought "feedback from home health care workers, organizations, and employers on the proposed changes to the exemptions for companionship services and live-in domestic service employees." 76 Fed. Reg. 81,198. On February 24, 2012, the Department published a notice to extend the comment period to March 12, 2012, because of requests received to extend the period for filing public comments and the Department's desire to obtain as much information about its proposals as possible. 78 Fed. Reg. 60,458. On March 13, 2012, the Department published another notice, extending the comment period for a second time until

March 21, 2012. *Id*. More than 26,000 comments were received regarding the changes proposed in the NPRM. *See* 78 Fed. Reg. 60,460.

On October 1, 2013, the Secretary published the rules that the plaintiffs challenge in this litigation. *See* 78 Fed. Reg. 60,454, *et seq*. After carefully considering and addressing the comments received, the Secretary stated that, among other things, the Department would be adopting Sec. 552.109, the third party regulation, as proposed, because companions and live-in domestic service workers providing home care services "who are employed by third parties should have the same minimum wage and overtime protections that other domestic service and other workers enjoy." 78 Fed. Reg. 60,482. Under the Final Rule as published, "'[t]hird party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by'" 29 U.S.C. § 213(a)(15) even if the employee is jointly employed by a member of the household using the services; in such a situation, however, the member of the household is still entitled to assert the exemption, if the employee meets the requirements of § 552.6. *See* 78 Fed. Reg. 60,557, quoting 29 C.F.R. § 552.109(a). Additionally, "[t]hird party employers of employees engaged in live-in domestic service employment within the meaning of § 552.102 may not avail themselves of the overtime exemption provided by" 29 U.S.C. § 213(b)(21), even if the employee is jointly employed by a member of the household using the services; in such a situation, however, the household member is still entitled to assert the exemption. *See id*., quoting 28 C.F.R. § 552.109(c).

The Final Rule acknowledged the many comments supporting the changes proposed in the NPRM, and also addressed, in detail, the primary concerns laid out in negative comments.

*See* 78 Fed. Reg. 60,480-83.[7] Additionally, the Department did not merely consider the substance of the rule and the proposed comments; it also conducted an economic analysis of the effects of these changes. *See* 78 Fed. Reg. 60, 498-60, 556.

The Final Rule will become effective January 1, 2015. The Department explained that it had chosen to have a 15-month extended effective date in order to take "into account the complexity of the federal and state systems that are a significant source of funding for home care work and the needs of the diverse parties affected by this Final Rule (including consumers, their families, home care agencies, direct care workers, and local, state and federal Medicaid programs)" and in order to provide these parties with adequate time to adjust. 78 Fed Reg. 60,455-56.

## II. The Present Action

On June 6, 2014, plaintiffs filed their complaint challenging the Final Rule, specifically as it relates to 29 C.F.R. §§ 552.6 (Counts III and IV) and 552.109 (Counts I and II). *See* Compl., ECF No. 1, at ¶¶ 26-39. Plaintiffs also claim the agency failed to comply with the Regulatory Flexibility Act and the Small Business Act (Count V). *See id.* at ¶¶ 40-41. Plaintiffs move for summary judgment, however, only on Counts I and II of their complaint, challenging the Final Rule's third party employer regulation, which limits the companionship services and live-in domestic service employee exemptions to the individual, family, or household employing the worker. The Department seeks dismissal of those Counts or, in the alternative, cross-moves for summary judgment on Counts I and II, arguing that the third party regulation was properly promulgated and well within the Department's authority.

[7] Indeed the Department expressly addressed comments submitted by each of the three plaintiffs in this case—as well as the Navigant survey referenced by the plaintiffs in their memorandum—more than ten times throughout the Preamble and economic analysis. *See, e.g.*, 78 Fed. Reg. 60,498-505, 60,518, 60,523, 60,528-529.

## ARGUMENT

### I. The Third Party Regulation is Well Within the Department's Broad Rulemaking Authority to Interpret the FLSA and its Exemptions.

A challenge to the agency's construction of a statute that it administers is subject to the principles articulated in *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which requires this Court to employ a two-part inquiry. In assessing the validity of an agency's interpretation of a statute, the court must first determine "'whether Congress has directly spoken to the precise question at issue.'" *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 223-24 (D.C. Cir. 2001), quoting *Chevron*, 467 U.S. at 842. If it has, "'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id*., quoting *Chevron*, 467 U.S. at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue," the Court should proceed to the second step of *Chevron* analysis, asking "'whether the agency's answer is based on a permissible construction of the statute.'" *Id*. at 224, quoting *Chevron*, 467 U.S. at 843. In short, plaintiffs' "burden is to show that the statute *unambiguously* supports its interpretation." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Sebelius*, 650 F.3d 685, 690 (D.C. Cir. 2011) (emphasis in original).

#### A. The Department's Third Party Regulation is Entitled to *Chevron* Deference Because it Was Promulgated Pursuant to Broad Congressional Authority and After Notice and Comment Rulemaking.

Under *Chevron*, an agency's reasonable interpretation of a silent or ambiguous statute that Congress has charged it with administering is entitled to deference. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S at 843-44. Such "legislative regulations" must be upheld "unless they are arbitrary, capricious, or manifestly

contrary to the statute." *Id*. at 843. If the legislative delegation to the agency on a particular question is "implicit" rather than "explicit," the agency's interpretation must be upheld if it is "reasonable." *Id.* at 844. A reviewing court cannot reject the agency's interpretation "simply because the agency's chosen resolution seems unwise." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

So, deference is required under *Chevron* where: (1) Congress expressly granted authority to the agency to make rules carrying the force of law; and (2) the agency promulgated such rules pursuant to that authority. *See id*. at 226-27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). *Mead* highlights the importance of notice-and-comment rulemaking as an indication that an agency interpretation has the "force of law" and should be analyzed under *Chevron*'s framework. *Id*. at 230 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). The Supreme Court has expressly held that *Chevron* applies where an agency with express legislative rulemaking authority issues rules after notice and comment. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (explaining that an agency qualifies for *Chevron* deference where the statute delegates powers to execute the statute as well as to prescribe rules and regulations under the statute.); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002) (upholding regulations where Congress made an express delegation to promulgate standards for implementing statute, which agency did after notice-and-comment rulemaking).

Here, the plaintiffs' contend that the Court's inquiry should end at step one of the *Chevron* analysis, based on their claim that the "plain meaning" of the FLSA forecloses the Secretary's challenged regulation. *See* Pls. Mem. 12-13. However, when Congress enacted the 1974 Amendments to FLSA, it did not address whether the companionship services exemption or the live-in domestic service worker exemption would apply to workers employed by third party employers. The FLSA is not only silent on this issue, but also directs the Department to speak on it. This direction was recognized by the Supreme Court in *Coke*, in which the Court explained that "the FLSA explicitly leaves gaps, for example, as to the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services.'" 551 U.S. at 165. Thus, the Secretary exercised her broad and explicit rulemaking authority to fill these gaps by promulgating a Final Rule pursuant to an exceedingly robust notice-and-comment rulemaking process.

The Final Rule easily satisfies the two criteria that *Mead* identified as sufficient for *Chevron* deference. Congress explicitly granted the Secretary broad authority "to prescribe necessary rules, regulations, and orders" with regard to the 1974 Amendments, which includes the provisions governing the scope of the companionship services and live-in worker exemptions. 1974 Amendments § 29(b), 88 Stat. 76. This statutory delegation also gives the Secretary broad authority to promulgate binding legal rules. *See Nat'l Cable*, 545 U.S. at 980-81 (statutory authorization for FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communication Act gave FCC broad authority to promulgate binding legal rules). Moreover, Congress granted the Secretary the specific authority to "define[] and delimit[] by regulations" the terms of the companionship services exemption. 29 U.S.C. § 213(a)(15). Such a provision gives the Secretary broad

authority to promulgate binding legal rules governing the construction of those terms and the application of the exemption. *See Auer v. Robbins*, 519 U.S. 452, 456-58 (1997) (FLSA provision granting the Secretary 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 Secretary broad authority to issue legally binding rules).

Regarding the live-in worker exemption specifically, although Congress did not include specific rulemaking authority in this statutory provision (as it did for the companionship services exemption), the live-in exemption is included in the general Congressional authorization "to prescribe necessary rules, regulations, and orders" with regard to the 1974 Amendments. Indeed, the Department has promulgated and enforced several longstanding regulations concerning live-in workers in addition to the third party regulation. *See, e.g.*, 29 C.F.R. § 552.102, ("Live-in domestic service employees); 29 C.F.R. § 552.110(b) ("Recordkeeping"); 29 C.F.R. § 785.23 ("Employees residing on employer's premises or working at home").

The Final Rule also satisfies the second prerequisite for *Chevron* deference, because the Department promulgated the Final Rule pursuant to its authority to issue rules with the force of law. *See Mead*, 533 U.S. at 226-27. The Department's use of notice-and-comment rulemaking to issue the Final Rule is strong evidence that the Department promulgated that regulation pursuant to its authority to make legally binding rules. *See id.* at 229-30 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). In finding that the 1975 regulations concerning the third party issue triggered *Chevron* deference, the Supreme Court considered that the Department "gave notice, it proposed regulations, it received public

comment, and it issued final regulations in light of that comment." *Coke*, 551 U.S. at 165. The same is true of this Final Rule.

In addition, the plaintiffs' argument that, because "the word avail does not appear anywhere in the FLSA," the Department's regulation restricting third party employers from "avail[ing] themselves" of the minimum wage and overtime exemption in Section 213 falls outside its statutory authority, *see* Pls.' Mem. at 17, lacks merit. Plaintiffs essentially argue that the Final Rule falls outside the Department's delegated authority, because it regulates with respect to third party employers rather than employees of third party employers. This amounts to a strictly semantic distinction, not a material one. *See Coalition for Common Sense in Govt. Procurement v. U.S.*, 821 F. Supp. 2d 275, 287 (D.D.C. 2011) (rejecting a challenge to *Chevron* eligibility based on a semantic argument, because "the distinction is immaterial."). The revised third party regulation is not substantively different from the current regulations permitting *employees* of third party employers to claim the exemptions (and indeed, both the 1975 and newly promulgated regulations are entitled "Third Party Employment"). It is employers who avail themselves of exemptions when paying workers, although, of course, it is the employees to whom the exemptions apply. Employees who are employed by third party employers may not be considered exempt companions or live-in domestic service workers. The regulation is worded as it is for the sake of clarity for the regulated community.[8]

Throughout the NPRM and the Final Rule, it is clear that the Department fully understands and intends for the exemptions to apply to employees, but as a practical matter, it is employers who avail themselves of such exemptions when processing payroll. For example, in

[8] In the Final Rule, the Department stated, "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." 78 Fed Reg. 60,460.

the Final Rule, the Department explained that it "is revising Sec. 552.109, the regulatory provision regarding *domestic service employees employed by third party employers*, or employers other than the individual receiving services or his or her family or household." 78 Fed. Reg. 60,455; *see also* 78 Fed. Reg. 60,548 ("the regulation…prohibits *employees of third party employers* from claiming either exemption."); 78 Fed. Reg. 60,454 ("Congress created an exemption from the minimum wage and overtime compensation requirements *for domestic service workers* who provide companionship services and an exemption from the Act's overtime compensation requirement *for domestic service workers.*"); 78 Fed. Reg. 60,459 ("*Direct care workers who are employed by third party employers*, such as private home care agencies, are the type of professional workers whose vocation merits minimum wage and overtime protections."); 78 Fed. Reg. 60,480 ("In other words, where a *direct care worker is employed by a third party* . . . the third party employer would be required to pay the worker at least the federal minimum wage for all hours worked and overtime pay at one and one-half the employee's regular rate for all hours worked over 40 in a workweek.") (emphases added). Indeed, the plaintiffs' own brief indicates that the plaintiffs are quite aware that the revised third party regulation concerns employees of third party employers. *See* Pls.' Mem. at 12 (It is equally plain that the *employees described in the challenged provisions of the new Rule (sections 552.109(a) and (c))* fall within one or both of the exemptions identified in plaintiffs' Complaint.) (emphasis added). Thus, plaintiffs' argument that the Final Rule does not define or delimit "employees" is belied by the text of 29 C.F.R. §§ 552.109(a) and (c) under the Final Rule as well as the accompanying Preamble discussion, which defines and delimits the employees who may be considered exempt under the companionship services and live-in worker exemptions. *See* 29 U.S.C. §§ 213(a)(15), 213(b)(21).

### B. The Supreme Court Has Directly Affirmed the Department's Broad Grant of Authority to Answer the "Third Party" Question.

The plaintiffs seemingly ignore that the Supreme Court has already affirmatively stated that the Department's broad grant of definitional authority by Congress includes the authority to address the "third party" question. In *Coke*, a domestic service worker who provided companionship services brought a lawsuit against her third party employer, alleging that it failed to pay her the wages to which she was entitled under the FLSA. 551 U.S. at 164. In deciding whether the FLSA's minimum wage and overtime protections applied, the Supreme Court concluded that the Department's 1975 regulation permitting third party employers to claim the companionship services exemption, thus exempting Coke from the FLSA's minimum wage and overtime protections, was valid and binding, in light of the text and history of the FLSA (and despite a conflicting regulatory provision). *Id*. The Court based its holding on the fact that the FLSA explicitly leaves statutory gaps with respect to "the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services'" and provides the Department "with the power to fill these gaps through rules and regulations." *Coke*, 551 U.S. at 165. The Court recognized the complex questions surrounding whether, or how, the FLSA should cover companions employed by third parties, but found that the Department's "thorough knowledge of the subject matter and ability to consult at length with affected parties" could inform the agency's decision. *Id.* at 167-68. The Court explained that Congress "expressly instruct[ed] the agency to work out the details . . . [of] whether to include workers paid by third parties within the scope of the definitions" of those types of workers exempt from the FLSA's minimum wage and overtime protections, and that "Congress intended its broad grant of definitional authority . . . to include the authority to answer" questions like "whether, or how, the

definition should apply to workers paid by third parties." *Coke*, 551 U.S. at 167-68.[9] Finally, the Court concluded that the Department's third party regulation was not merely an interpretive regulation—one not entitled to controlling deference—but was a binding rule, because "the agency use[d] full public notice-and-comment procedures to promulgate a rule" and because the rule "falls within the statutory grant of authority." *Id*. at 173.

Thus, the plaintiffs' assertion that Congress's delegation of authority is extremely narrow, and only authorizes the Department to "'define and delimit' the term 'employee' or any other term used in Section 213(a)(15)," *see* Pls.' Mem. at 13, is wholly inconsistent with the holding in *Coke*, and the broad grant of authority in the 1974 Amendments, which plaintiffs also do not address. *See* 1974 Amendments § 29(b), 88 Stat. 76. It is true that the exemptions apply to "any employee," but Congress broadly delegated to the Department the authority to determine whether the exemption applies to employees of third party employers. *See Coke*, 551 U.S. at 167-68. In fact, in delineating potential questions, the answer to which "Congress intended its broad grant of definitional authority to [the Department] to include," the Supreme Court listed:

- 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?

[9] In *Coke*, the Court also concluded that a conflicting, more general statutory definition of "domestic service employment" did not invalidate Section 552.109, because that regulation was the more specific regulation with respect to the third party employment question. *See Coke*, 551 U.S. at 168-71.

*Coke*, 551 U.S. at 167. Accordingly, the third party regulation in question falls squarely within the broad grant of definitional authority given to the Department, as recognized by the Supreme Court in *Coke*, and the plaintiffs fail to raise any legitimate argument undermining that conclusion.[10] Indeed, plaintiffs' arguments fail for the same reason that Coke's arguments failed: the Supreme Court deferred to the Department's rulemaking authority because it was granted by Congress, and the agency promulgated a rule pursuant to notice and comment rulemaking, so Coke could not meet the high burden of showing that the agency's regulation should be overturned. *Coke*, 511 U.S. at 165-68.

Thus, plaintiffs' cursory arguments that the Department exceeded its statutory authority are without merit, *see infra*.

### C. The Third Party Regulation Reflects a Permissible Construction of the FLSA.

Because Congress made no explicit decision with respect to the availability of the companionship services and live-in workers exemptions for third party employers, *see Coke*, 551 U.S. at 168, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see also Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012) (explaining that under *Chevron* deference, an agency's construction of a statute prevails "if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best"). This standard is

[10] Plaintiffs make much of the fact that the Department submitted a brief defending its 1975 regulation during the *Coke* litigation. In defending its properly promulgated 1975 regulation, the Department argued that the third party regulation, as written in 1975, reflected a defensible interpretation of the statute. Of course, as the Supreme Court, and other courts have recognized, there is often more than one defensible interpretation of a statute, *see, e.g., United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2001), and those interpretations are precisely the sort of details that Congress "entrusted the agency to work out." *Coke*, 551 U.S. at 165.

highly deferential to the agency and permits a court to uphold agency action so long as it "reflects a reasonable interpretation of the law." *Holly Farms Corp. v. Nat'l Labor Relations Bd.*, 517 U.S. 392, 409 (1996). Indeed, this Court "'need not conclude that the agency construction was the only one it permissibly could have adopted.'" *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (quoting *Chevron*, 467 U.S. at 843 n. 11); *see also Northpoint Technology v. FCC*, 414 F.3d 61, 69 (D.C. Cir. 2005). Nor does this Court need to conclude that it is "'the best interpretation of the statute,'" *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999) (quoting *Atl. Mut. Ins. Co. v. Comm'r of Internal Revenue*, 523 U.S. 382, 389 (1998)), nor even that it is the "most natural one." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991). Rather, the agency's view is deemed to be reasonable so long as it is not "flatly contradicted" by plain language. *Dep't of Treasury v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990).

The Final Rule easily meets this standard, because it is consistent with Congress's intent in extending the Act's minimum wage and overtime protections in the 1974 amendments. As explained in detail in the Final Rule, by excluding workers employed by third-party covered enterprises from FLSA coverage, the Department's 1975 regulations created an inequity that increased over time. *See* 78 Fed. Reg. 60,481. Prior to 1974, domestic service employees who worked for a placement agency that met the annual earnings threshold for FLSA enterprise coverage, but were assigned to work in someone's home, were covered by the FLSA. *See* 39 Fed. Reg. 35,385. However, the Department's 1975 regulations, by allowing those third party employer enterprises to claim the exemption, denied those employees the Act's minimum wage and overtime protections. *See* 78 Fed. Reg. 60,481. The Department explained that the Final Rule reverses this "roll back," as it is apparent from the legislative history that the 1974 amendments were intended to expand coverage to include more workers, and were not intended

to roll back coverage for employees of third parties who already had been covered by the FLSA (as employees of covered enterprises). *Id.* The Department further explained that as the home care workforce has grown, the impact of the Department's roll back, which is inconsistent with the 1974 amendments, has become even more magnified. *Id.* The Department emphasized that today few direct care workers are the "elder sitters" envisioned by Congress when enacting the exemption, but that rather, workers employed by third parties are the sorts of domestic service employees Congress specifically intended the FLSA to cover: their work is a vocation. *Id.* Thus, in concluding that the Department would enact the third party regulation as proposed, the Department posited that employees providing home care services who are employed by third parties should have the same minimum wage and overtime protections that other domestic service and other workers enjoy. *Id.* at 60,482. In view of this, the Department's revised third party regulation is, at minimum, a permissible construction of the statue.

In contrast, plaintiffs bear a daunting burden in showing that the Department's regulatory interpretation of the statute is not entitled to deference. It is not enough for plaintiffs to argue that their interpretation is a "plausible" one, *Reno v. Koray*, 515 U.S. 50, 62 (1995), or that their view is "consistent with accepted canons of construction." *Pauley*, 501 U.S. at 702. Rather, Plaintiffs must show that their reading of the statute is the "inevitable one," *Regions Hosp. v. Shalala*, 522 U.S. 450, 460 (1998), because Congress "unambiguously manifest[ed] its intent" as to that reading, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995), such that the statutory language "cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990). Plaintiffs cannot meet this burden.

As discussed above, the Supreme Court in *Coke* found that the text of the FLSA did not expressly answer the third party-employment question, *see Coke*, 551 U.S. at 167, so the

plaintiffs' argument that the phrase "any employee" reveals the clear intent of Congress with respect to this question must fail. In fact, in the Final Rule, the Department explains that previously it "erroneously focused on the phrase 'any employee,' instead of focusing on the purpose and objective behind the 1974 amendments, which was to expand minimum wage and overtime protections to workers employed in private households that did not otherwise meet the FLSA coverage requirements." 78 Fed. Reg. 60,482. The Supreme Court has "stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quotation marks omitted). Accordingly, especially in light of the Supreme Court's conclusion that the text of the FLSA does not expressly answer the third party employment question, the statutory phrase "any employee" cannot, standing alone, answer the question definitively.

Plaintiffs' argument contending that the legislative history of the FLSA conflicts with the Final Rule is unavailing. The Department explicitly promulgated this rule to bring the companionship services and live-in workers exemptions more in line with Congressional intent. *See* 78 Fed. Reg. 60,457-58. In the Preamble to the Final Rule, the Department undertakes an exhaustive review of the legislative history. The Department explains that "the legislative history makes clear that in passing the 1974 amendments to the Act, Congress intended to extend FLSA coverage to all employees whose 'vocation' was domestic service, but to exempt from coverage casual babysitters and companions who were not regular breadwinners or responsible for their families' support. *See* House Report No. 93-913, p. 36." 78 Fed. Reg. 60,481. The Department expressly addressed the floor debate that took place when the 1974 amendments were being considered, and noted that the "focus of the floor debate concerned the extension of

coverage to categories of domestic workers who were not already covered by the FLSA, specifically, those employed by an individual or small company rather than by a covered enterprise." *Id.*, *see* 119 Cong. Rec. at S24800; Senate Report No. 93-690 at p. 20.

Regarding live-in workers specifically, although the Senate Report accompanying the 1974 Amendments only briefly addresses the live-in worker exemption, it is nonetheless instructive. The report describes the live-in workers exemption as relevant to "cases in which the domestic service employee resides *on the employer's* premises" and also cross-references the Department's regulation at 29 C.F.R. 785.23, which is entitled "Employees residing *on employer's* premises." Senate Report No. 93-690 at pp. 20-21 (emphases added). This seems to contemplate that Congress intended the live-in worker provision to apply to domestic service employees working in the home of their employer, not to those workers employed by a third party. The Senate Report also references 29 U.S.C. § 203(m), referred to as the "3(m) credit," which "credits the *employer* with the reasonable value of board and lodging" to deduct from an employee's wages. Senate Report No. 93-690 at 21 (emphasis added). Referencing this section also seems to indicate that in cases of live-in domestic service employees, Congress's intent was that the employer would be the household/homeowner and not an outside third party. Thus, the legislative history does not conflict with the Department's new third party regulation, limiting the live-in worker exemption to employees of the household in which such employees work.

That Congress did not explicitly limit third party employers from availing themselves of the companionship services or live-in worker exemptions is not evidence of Congressional intent, particularly in light of Congress's delegation of authority to the agency to determine questions relating to third party employers. *See Cummings v. Dep't. of the Navy*, 279 F.3d at 10510, 1055 (D.C. Cir. 2002) ("Congressional enactments are better evidence of legislative

intent than is congressional silence."), citing *Burns v. United States*, 501 U.S. 129, 136 (1991) ("[A]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."). For the same reasons, Congress's failure to amend the FLSA to extend its protection to employees of third party employers, despite re-enacting the FLSA, is not evidence of Congressional intent either. *See id.* Moreover, plaintiffs' reliance on *Coke* is misplaced. They argue that the Supreme Court rejected the substance of Coke's arguments regarding legislative history; however, it did so because these arguments could not overcome the high level of deference the Supreme Court showed to the Department's duly promulgated regulation – the Court specifically pointed out in this regard that Congress "expressly instructs the agency to work out the details of those broad definitions [of domestic service employment and companionship services]. And whether to include workers paid by third parties within the scope of the definitions is one of those details." *Id.* at 167. Plaintiffs' selective quotation of legislative history here fails to carry its high burden of showing that Congress "unambiguously manifest[ed] its intent," *Babbitt*, 515 U.S. at 703, to exempt third party employers from the FLSA's minimum wage and overtime protections, thereby leaving it to the agency to promulgate rules interpreting the ambiguity or filling in the legislative gaps.

Further, the plaintiffs erroneously imply that the Department is not permitted to change its regulation. After undertaking notice and comment rulemaking, the Department determined that the dramatic changes in the healthcare industry necessitated reconsidering the decades-old prior regulations. *See* 78 Fed. Reg. 60,482 (explaining that "[a]fter considering the purpose and objectives of the amendments as a whole, reviewing the legislative history, and evaluating the state of the home care industry" the Department believes that the companionship services and

live-in worker exemption should be limited to family and household employers). The Supreme Court in *Coke* acknowledged then that the Department "may have interpreted these regulations differently at different times in their history." 551 U.S. at 170. Notably, the Department did not merely informally change its interpretation or enforcement policy; it promulgated a new rule after notice-and-comment rulemaking. [11] The reasons it advanced for this rule—the changes in the home health care industry during the last forty years, and concerns for workers who were denied protections which make them some of the lowest paid workers in their field—"are exactly the sorts of changes in fact and circumstance which notice and comment rulemaking is meant to inform." *See Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997).

Indeed, the Supreme Court has "recognize[d] that regulatory agencies do not establish rules of conduct to last forever, . . . and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (internal citations and quotation marks omitted). Moreover, the APA does not require a court to look harder at an agency's "rescission or modification" of an existing rule than it does at an initial agency action. *See id.* at 41. The majority in *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502 (2009), reiterated that agencies may change positions without being subject to a "heightened standard," 556 U.S. at 514, explaining that the APA "makes no distinction . . . between initial agency action

[11] Relying on *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009), the plaintiffs seem to argue that the Department is subject to a "heightened" showing because it changed its position. This is incorrect. Pls. Mem. 10, 18, 20. As an initial matter, *Fox* did not concern notice and comment rulemaking. Moreover, the Court in that case ruled in favor of the agency, and the Court concluded that not every agency action representing a change in policy need be justified by reasons more substantial than those required to adopt a policy in the first instance. In any event, because the Department acted well within its authority, engaged in comprehensive notice and comment rulemaking, and presented a detailed explanation for its position in the Final Rule, the Department's actions would pass any heightened level of scrutiny.

and subsequent agency action undoing or revising that action." *Id.* at 515. Rather, as long as the agency acknowledges its shift from prior policy, the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.*at 515 (emphasis in original).

Even in cases where an agency has changed its policy based upon new factual findings that contradict the facts underlying the prior policy, or reliance interests are present, the burden on the agency is only to provide a "reasoned explanation" for the basis of its new policy. *Id.* at 515-16. In fact, "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." *See Bechtel v. F.C.C.*, 957 F.2d 873, 881 (D.C. Cir. 1992); *see also American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (rulemaking may be required on the basis of a radical change in the factual premises underlying a previous position). As the Supreme Court held in *Coke* with respect to the 1975 regulations: "[A]s long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation . . . makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." 551 U.S. at 170-71.

## II. Plaintiffs' Claim that the Third Party Regulation Is Arbitrary and Capricious is Meritless

Plaintiffs also claim that the new rule is arbitrary and capricious, because the Department failed to provide an adequate justification for promulgating a new regulation. This is a very difficult claim for plaintiffs to establish. "The 'arbitrary and capricious' standard deems the

agency action presumptively valid provided the action meets a minimum rationality standard." *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1233 (D.C. Cir. 2014). Under this standard, if the Department "acted within its delegated statutory authority, considered all of the relevant factors, and demonstrated a reasonable connection between the facts on the record and its decision, [the Court] will uphold its determination." *Ethyl Corp v. E.P.A.*, 51 F.3d 1053, 1064 (D.C. Cir. 1995). In fact, "a court need not find that the agency's decision is "the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings." *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402, 422 (1983). A court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (quotation marks omitted). The Court's review, therefore, is "highly deferential to the agency." *Ouachita Riverkeeper, Inc. v. Bostick*, 938 F. Supp. 2d 32, 39 (D.D.C. 2013).

Plaintiffs, as the party challenging the agency's action as arbitrary and capricious, bear the burden of proof. *See Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 722 (D.C. Cir. 2009). Given the applicable highly deferential standard, plaintiffs must overcome a substantial burden to prevail on their argument that the challenged regulation is arbitrary, capricious, and not a reasonable construction of the FLSA. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

### A. The Department Undertook an Extensive Notice and Comment Rulemaking Process and Considered All Relevant Factors.

Plaintiffs do not meet this difficult standard, to begin, by misstating the Department's justification for its promulgation of the Final Rule. As explained in detail in the Final Rule, the Department promulgated the Final Rule to bring it more in line with Congress's intent in

expanding FLSA protections in 1974, in light of a home health care industry that has drastically grown and evolved over the last several decades. *See* 78 Fed. Reg. 60,459. Responding to the sub-par working conditions and low pay for the growing field of skilled professionals who work as companions or live-in providers, the Department promulgated the Final Rule, and the third party regulation in particular, to ensure that trained professionals of the type Congress intended to protect under the FLSA were not excluded from its coverage by outdated regulations.[12] *Id*. The Department stated in the Final Rule that it believes that the lack of FLSA protections harms workers, who depend on wages for their livelihood, as well as the individuals receiving services and their families, who depend on a professional, trained workforce to provide high-quality services. *Id.* The Department concluded that because the 1975 regulations address third party employment in a manner that, given the changes to the home care services industry, the home care services workforce, and the scope of home care services provided, no longer aligns with Congress's intent when it extended FLSA protections to domestic service employees, the Department would be modifying the regulation.

This type of reasoned and detailed explanation for the regulatory change, as well as the thorough consideration of comments in the Final Rule from academics studying this issue, advocates for the individuals who need home care services, home care agencies that currently claim the exemptions, labor unions, associations representing direct care workers, and

[12] As explained in the Final Rule, there has been a growing demand for long-term home care 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. 78 Fed. Reg. 60,455. As more individuals receive services at home rather than in nursing homes or other institutions, workers who provide home care services perform increasingly skilled duties. Id. Despite this professionalization of home care work, many workers employed by individuals and third-parties have been excluded from the minimum wage and overtime protections of the FLSA, impeding efforts to improve both jobs and care. Id.

representatives of the disability community, *see* 78 Fed. Reg. 60,481-83, demonstrate that the Department evaluated all of the relevant factors and that there is a reasonable connection between the facts obtained during the rulemaking and its decision. Indeed, the process by which the Department promulgated the regulation allowed the Department to carefully consider all relevant factors. The Department expressly invited public comments for a period of 60 days on, among other issues, the proposed changes to the third party employment regulation, and specifically sought feedback from home health care workers, organizations, and employers on proposed changes to the exemptions for companionship services and live-in domestic service employees. The Department then extended the period for public comments twice, to give stakeholders the maximum opportunity to participate in the rulemaking.

Plaintiffs' claim that the Department ignored evidence of an alleged adverse impact of the Final Rule itself ignores the thorough discussion of the Final Rule's implications in its Preamble. 78 Fed. Reg. 60,459, 60,480-83. In addition to responding to many substantive comments, the Department included a chart detailing state regulation in each of the 50 states.[13] 78 Fed. Reg. 60,466-69, 60,482-83, 60,499, 60,510-11. The Department also engaged in a comprehensive data and economic analysis, utilizing multiple potential projections, to determine the potential impact the Final Rule would have on consumers as well as providers. 78 Fed. Reg. 60,513-551.

[13] Contrary to the plaintiffs' assertions, *see* Pls. Mem. at 21, n. 20, the Department properly characterized Michigan law, expressly noting that "[o]ne suggested alternative was to maintain the exemption from overtime compensation for third party employers of live-in workers, consistent with the laws in at least three states (*Michigan*, Nevada, and Washington)." 78 Fed. Reg. 60,507; *see* 78 Fed. Reg. 60,512. Moreover, the Department's statement concerning Michigan's experience, to which plaintiffs' refer, was a quote from a public commenter. *See* 78 Fed. Reg. 60,508.

As such, in promulgating the Final Rule, the Department "acted within its delegated statutory authority, considered all of the relevant factors, and demonstrated a reasonable connection between the facts on the record and its decision"; thus the Court should uphold the Department's determination. *Ethyl Corp.*, 51 F.3d at 1064. The Department's third party regulation is not arbitrary and capricious and plaintiffs' motion must be denied on this point.[14]

Finally, the plaintiffs' citation to cases involving informal agency changes in policy—not involving notice-and-comment rulemaking, as occurred here—are inapposite. *See* Pls.' Mem.at 21; *c.f. Bechtel*, 957 F.2d 881.

**B. The Plaintiffs' Public Policy Arguments are Misplaced.**

Plaintiffs also cite policy arguments concerning the Final Rule's effect on the home health care industry, and institutionalization rates in particular. As an initial matter, there is no support for plaintiffs' assertion that that the "shift away from institutionalization has been made possible to a significant extent by the cost controls resulting from the FLSA overtime exemptions." Pls. Mem. at 19-20. In fact, prior to the 1974 Amendments, there were no "cost controls" whatsoever for domestic service workers, as they were not covered by the Act, and there were high rates of institutionalization.[15]

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[14] The Supreme Court in *Coke* found a much briefer explanation to be adequate. Referring to the 1975 regulations, the Court explained that "[t]here is also no significant legal problem with the DOL's explanation that its final interpretation is more consistent with FLSA language. No one seems to have objected to this explanation at the time, and it still remains a reasonable, albeit brief, explanation." *Coke*, 551 U.S. at 161.

[15] As explained in the Final Rule, this shift away from institutionalization 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. *See* 78 Fed. Reg. 60,458. The growing demand for long-term home care services is also due to the significant increase in the percentage of elderly people in the United States. *Id.* 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

The Final Rule contains the Department's most recent survey of the relevant data, which explicitly addresses concerns about institutionalization. As the Department explains in the Final Rule, there has been a shift in the home care industry and a strong preference for home and community based services among seniors and individuals with disabilities. The Department was cognizant of these preferences during the rulemaking, recognizing 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. 60,459. The Department emphasized that it had carefully considered the effects of the rule and does not believe, as some commenters suggested, that the rule will interfere with the growth of home- and community-based caregiving programs and thereby lead to increased institutionalization. *Id*. The Department also dedicated a discrete section of the Preamble to address institutionalization concerns in detail and affirm the Department's strong support of the American with Disabilities Act's integration requirements. *See* 78 Fed. Reg. 60,485-87.

In addition, the plaintiffs state that the "great majority" of home care services are "private pay" and that "most Medicaid programs do not reimburse for overtime." *See* Pls. Mem. at 20, n. 17. These statements are not supported by the in-depth economic analysis in the Final Rule. For example, the economic analysis explains, in detail, that "[p]rivate pay agencies comprise a small fraction of the total market." 78 Fed. Reg. 60,514. In addition, Medicaid can, in fact, pay for overtime. For example, California, which employs hundreds of thousands of home care workers, recently announced a budget agreement that would permit Medicaid-funded home care workers to work up to 61 hours per week. *See, e.g.,*

http://www.caads.org/pdf/pdf/ihss_2014_06_17_overtime_fact_sheet_by_disability_rights_ca.pd

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disabilities in the most integrated setting appropriate, further solidified our country's commitment to decreasing institutionalization and has also influenced this important trend. *Id.*

f. Additionally, the U.S. Department of Health and Human Services recently released an Interpretive Bulletin explaining how Medicaid can cover overtime costs under the Final Rule. http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf.

Furthermore, the Preamble explains that many states require the payment of minimum wage and often overtime to home care workers, and the detrimental effects on the home care industry some commenters predict have not occurred in those states. 78 Fed. Reg. 60,459. Rather, the Department stated that ensuring minimum wage and overtime compensation will not only benefit home 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 60,459-60. Specifically, the Department explained that 15 states already provide minimum wage and overtime protections to all or most third party-employed home care workers. *See* 78 Fed. Reg. 60,482-83. Several of these states have instituted these protections in the years since *Coke* was decided. *See id.* at 60,483. After issuing its NPRM, the Department reviewed the effects, if any, that these state-level protections had on the industry, and found 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." *Id*. The Final Rule contains a chart of all State law efforts to extend protections to these employees. 78 Fed. Reg. 60,510-11.

## CONCLUSION

For the foregoing reasons, the Court should dismiss Counts I and II of plaintiffs' complaint or, alternatively, grant summary judgment in favor of defendants on those counts, and deny plaintiffs' motion for summary judgment on those same counts.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 22, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

*/s/ Julie S. Saltman*
JULIE S. SALTMAN