

ORAL ARGUMENT SCHEDULED FOR MAY 7, 2015

15-5018

**United States Court of Appeals
for the District of Columbia Circuit**

HOME CARE ASSOCIATION OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

DAVID WEIL, sued in his official capacity,
Administrator, Wage & Hour Division, et al.,

Defendants-Appellants.

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

**CORRECTED BRIEF FOR STATES OF NEW YORK, CONNECTICUT,
ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MINNESOTA AND
NEW MEXICO AS AMICI CURIAE IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI STATES AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
POINT I - THE DOL ISSUED THE HOME CARE RULE TO ADDRESS THE FUNDAMENTAL TRANSFORMATION OF THE HOME HEALTH- CARE INDUSTRY	4
A. The Growth and Transformation of the Home- Care Industry Give the DOL Grounds to Exclude Most of the Industry’s Workers from the Narrow Exemptions for Domestic Service Workers.....	4
B. Because the DOL’s Prior Regulations Were Adopted Before the Rise of Professionalized Home-Care, They Failed to Implement Congressional Intent to Protect Workers Who Engage in Caregiving as a Profession to Support Families.....	8
1. DOL Relied on Its Judgment that Home-Care Workers Perform Important and Demanding Work, Comparable to the Work Performed In Nursing Homes and Hospitals.....	8
2. DOL Relied on Its Judgment that High Turnover and Increasing Shortages of Home- Care Workers Could Put State Citizens at Risk.	13

TABLE OF CONTENTS (cont'd)

	Page
POINT II - THE DOL CONCLUDED BASED ON AVAILABLE DATA THAT EXTENDING WAGE-AND-HOUR PROTECTIONS TO HOME-CARE WORKERS WILL NOT VASTLY INFLATE STATE MEDICAID COSTS.....	17
A. The DOL Took into Account Potential Cost Savings From Increasing Home-Care Worker Wages.	19
B. Many States Have Operated Medicaid Home-Care Programs While Extending Wage-and-Hour Protections to Home-Care Workers.	21
C. Potential State Implementation Problems Are Not Raised in This Case and Provide No Basis for Invalidating the Rule.....	23
CONCLUSION	26

TABLE OF AUTHORITIES

Laws	Page(s)
29 U.S.C. § 213.....	4, 5
29 C.F.R.	
pt. 552	1, 5
§ 552.109.....	5
40 Fed. Reg. 7404 (Feb. 20, 1975)	5
78 Fed. Reg. 60,454 (Oct. 1, 2013)	1, 3, 5-12, 14, 16, 18-22, 24
79 Fed. Reg. 60,974 (Oct. 9, 2014)	25
 Miscellaneous Authorities	
Bipartisan Policy Center, <i>America’s Long-Term Care Crisis: Challenges in Financing and Delivery</i> 7 (Apr. 2014), available at http://bipartisanpolicy.org/wp-content/uploads/2014/03/BPC-Long-Term-Care-Initiative.pdf	16
Bureau of Labor Statistics, <i>Fastest Growing Occupations</i> , available at http://www.bls.gov/emp/ep_table_103.htm	17
Charlene Harrington, Terence Ng & Martin J. Kitchner, <i>Do Medicaid home and community based service waivers save money?</i> , 30 Home Health Care Servs. Q. 198 (2011).....	20
Dorie Seavey, <i>The Cost of Frontline Turnover in Long-Term Care</i> 18 (Oct. 2004), available at http://phinational.org/research-reports/cost-frontline-turnover-long-term-care	15, 19
H.R. Report No. 93-193 (1974)	7

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N.Y. State Dep't of Labor, Labor Statistics: Fastest Growing Professions, available at http://www.labor.ny.gov/stats/faster.shtm	12
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Paraprofessional Healthcare Institute, <i>Home Care at a Crossroads: Minnesota's Impending Long-Term Care Gap</i> (Oct. 2012), available at http://phinational.org/sites/phinational.org/files/research-report/phicaregapmn-2012oct.pdf	12
Paraprofessional Healthcare Institute, <i>Homecare Aides at a Glance</i> (Feb. 2014), available at http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf	10-12
Paraprofessional Healthcare Institute, <i>Medicaid Redesign Watch: Wage Parity for Home Care Aides</i> (Feb. 2014), available at http://phinational.org/sites/phinational.org/files/research-report/medicaid-redesign-watch-1.pdf	13
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TABLE OF AUTHORITIES (cont'd)

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Peggie R. Smith, <i>Who Will Care for the Elderly?: The Future of Home Care</i> , 61 Buff. L. Rev. 323, 325 (April 2013)	15, 16
S. Report No. 93-690 (1974)	2, 7
SEIU Overview of Homecare Bargaining, available at http://www.seiu503.org/2013/12/overview-of-homecare-collective-bargaining/	22
U.S. Government Accountability Office, <i>Fair Labor Standards Act: Extending Protections to Home Care Workers</i> (Dec. 2014).....	17
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INTEREST OF AMICI STATES AND SUMMARY OF ARGUMENT

This case concerns the validity of the United States Department of Labor's (DOL) new Home Care Rule,¹ which interprets the federal Fair Labor Standards Act (FLSA) to provide basic wage-and-hour protections to millions of home-care workers who were not covered under the DOL's prior interpretation of the statute. The Rule did so by construing the statutory exemptions for "companionship services" and live-in domestic service to apply: (a) only to persons employed directly by an individual or household and not to persons employed by third-party employers, such as agencies in the business of offering home-care services, and (b) only to persons who provide the type of limited, non-professional companionship services Congress envisioned in enacting the "companionship services" exemption.

As a result, the DOL acted to cure an inequity that Congress did not intend. The Rule ensures that caregiving work that would be protected by the FLSA if performed in a nursing home or other facility

¹ See Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (amending 29 C.F.R. pt. 552).

is similarly protected if performed in a client's home. These limiting interpretations of the statutory exemptions are consistent with the FLSA's text and purpose, as more fully explained by the Brief of Appellant DOL. Amici States have a particular interest in making two points. First, the FLSA's broad definition of employee was designed to achieve the statute's remedial purpose to aid the lowest paid of the nation's working population. Specifically, the "companionship services" exemption at issue here was understood as a narrow category excluding "elder sitters," and the like, and was not intended to cover employees whose vocation is home-care and who are "regular bread-winners or responsible for their families' support."²

The DOL's statutory interpretation extends federal wage-and-hour protections to workers in what has become a substantial industry that plays an increasingly important role in the economy. As the DOL found, providing basic protections serves the purposes of the FLSA by

² S. Report No. 93-690, at 20 (1974).

promoting both the well-being of home-care workers and the resulting well-being of the people home-care workers serve.³

Second, amici States have an interest in the new Rule because Medicaid pays for the services of a substantial number of home-care workers. The DOL found that the Rule will not impose new and unmanageable costs on state Medicaid programs, and States are working with the DOL to comply with the Rule within the limitations of their budgets. No implementation issues are raised in this litigation. The sole issue raised in this case is whether DOL has regulatory authority to issue the Home Care Rule. Amici States support the DOL on that question.

³ 78 Fed. Reg. at 60,459.

ARGUMENT

POINT I

THE DOL ISSUED THE HOME CARE RULE TO ADDRESS THE FUNDAMENTAL TRANSFORMATION OF THE HOME HEALTH-CARE INDUSTRY

The DOL's Home Care Rule updates the agency's regulations to interpret the FLSA in light of fundamental changes in the home-care industry. The Rule advances the congressional goal of expanding FLSA protections in light of the growth and transformation of the home-care industry over time.

A. The Growth and Transformation of the Home-Care Industry Give the DOL Grounds to Exclude Most of the Industry's Workers from the Narrow Exemptions for Domestic Service Workers.

FLSA protects the vast majority of both public and private sector workers in the United States unless a specific statutory exception applies.⁴ In 1974, Congress extended FLSA protections to "domestic service workers," but carved out narrow exemptions for: (1) domestic service workers who provide "companionship services for individuals who (because of age or infirmity) are unable to care for themselves" and

⁴ See 29 U.S.C. § 213

(2) for live-in domestic services workers who reside in the household where the worker provides services.⁵ Congress explicitly granted the DOL authority to issue regulations implementing both exemptions, and in 1975, the DOL issued regulations implementing the 1974 amendments.⁶

DOL's 1975 regulations exclude the majority of home-care workers from FLSA protections.⁷ The regulations allowed third-party employers (such as home-care agencies) to claim the statutory exemptions if they employed and paid the worker and not the individual or family receiving companionship or domestic services.⁸ As the DOL found in its rulemaking, its 1975 regulations, which have remained substantially unchanged for over four decades, no longer effectuate Congress's intent to expand FLSA coverage in light of the intervening development and vast expansion of the home-care industry.⁹

⁵ *See id.* § 213(a)(15) & (b)(21).

⁶ *See id.* § 213(a)(15); 40 Fed. Reg. 7404 (Feb. 20, 1975); 29 C.F.R. pt. 552.

⁷ 78 Fed. Reg. at 60,455.

⁸ 29 C.F.R. § 552.109.

⁹ 78 Fed. Reg. at 60,455.

In the 1970s, the scope of home-care was limited.¹⁰ Most individuals who needed long-term care received care in nursing homes or other residential facilities. Since that time, however, the provision of home-care has dramatically expanded. Today, there is a thriving home-care industry comprised of thousands of home-care agencies and millions of workers.¹¹ Home-care workers perform increasingly skilled functions that at the time of the 1974 amendments were mainly provided in nursing homes.¹² In addition, home-care has become increasingly professionalized, and home-care is now a vocation.¹³ The majority of workers rely on home-care jobs to support their families, not as a form of sporadic and occasional work.¹⁴

Because the DOL's 1975 regulations no longer reflect the realities of the home-care industry, they create a sweeping exemption from

¹⁰ *Id.*

¹¹ *Id.* at 60,458

¹² *Id.* at 60,455.

¹³ *Id.* at 60,455, 60,482.

¹⁴ *See id.* at 60,482, 60,522.

FLSA protections that Congress did not intend.¹⁵ Congress created the “companionship services” exemption for casual “elder sitters,” not workers engaged in caregiving as their primary, permanent job.¹⁶ Likewise, when the DOL initially permitted third-party employers to claim FLSA exemptions under the 1974 amendments, the agency was not aware of how the third-party rule would operate as the home-care industry involved.¹⁷ Currently, many home-care workers are employed through third-party agencies—not because the workers are seeking only temporary, intermittent work—but because third-party agencies play a key role in the industry, employing workers whose full-time vocation is home-care.¹⁸ By revising its regulations to clarify and narrow the class of workers excluded from FLSA protections, the DOL addressed the dramatic transformation and growth of the home-care industry to ensure that “companionship services” and live-in worker exemptions are

¹⁵ *Id.* at 60,455, 60,459.

¹⁶ *See* S. Report No. 93-690, at 20; H.R. Report No. 93-193, at 36 (1974).

¹⁷ *See* 78 Fed. Reg. at 60,482.

¹⁸ *See id.* at 60,455, 60,482.

applied narrowly, as Congress intended in enacting the 1974 amendments.¹⁹

B. Because the DOL's Prior Regulations Were Adopted Before the Rise of Professionalized Home-Care, They Failed to Implement Congressional Intent to Protect Workers Who Engage in Caregiving as a Profession to Support Families.

As DOL explained in its rulemaking, the continued application of its outdated regulations to home-care workers today imposes harms that Congress did not intend in enacting narrow FLSA exemptions for a small number of domestic-service workers.²⁰

1. DOL Relied on Its Judgment that Home-Care Workers Perform Important and Demanding Work, Comparable to the Work Performed In Nursing Homes and Hospitals.

First, contrary to Congress's intent to exclude only casual and intermittent elder-sitting work, home-care workers today are professional caregivers who perform work previously provided only in nursing homes and other care facilities. In addition to helping clients

¹⁹ *Id.* at 60,455 & 60,481-82.

²⁰ 78 Fed. Reg. 60,455, 60,459.

with tasks like dressing and bathing, many home-care workers are entrusted with caring for individuals with dementia or cognitive impairments.²¹ Some home-care workers are also responsible for medically-related tasks like cleaning and dressing wounds, administering medication, and using equipment like ventilators or feeding tubes.²² Because home-care workers perform these critical functions, millions of elderly, ill, and disabled citizens are able to remain in the comfort and security of their homes.

Despite the professionalized nature of their work, as DOL found, home-care has historically been poorly compensated.²³ While there is no longer any significant difference between the work performed by home-care workers and the work of aides and staff in nursing homes (or other long-term care facilities), home-care receives less labor protection.²⁴ Home-care workers lack the same basic FLSA protections

²¹ *See* 78 Fed. Reg. at 60,465, 60,477.

²² *See id.* at 60,519.

²³ *Id.* at 60,522.

²⁴ *See id.* at 60,455, 60,458.

as their nursing home counterparts, and home-care workers face significantly greater economic insecurity.²⁵

The median hourly wage for home-care workers nationwide is approximately \$9.34 an hour.²⁶ While the median is higher than federal minimum-wage, the lack of pay for travel time and travel costs can drive home-care workers' real hourly wages below the federal minimum wage. In addition many home-care workers work lengthy shifts without receiving overtime pay. As a result, the median annual salary for home-care workers is only \$17,000 per year.²⁷ Home-care workers also typically receive few benefits, no paid time off, and have the highest injury rate of any profession.²⁸

These working conditions cause millions of home-care workers and their families to live in poverty, a result that Congress never contemplated in enacting the narrow domestic-service exemptions to

²⁵ *Id.*

²⁶ See Paraprofessional Healthcare Institute (PHI), *Homecare Aides at a Glance 2* (Feb. 2014), available at <http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf>; 78 Fed. Reg. at 60,522.

²⁷ *See id.*

²⁸ *See* 78 Fed. Reg. at 60,457, 60,547.

FLSA. One quarter of all home-care workers live below the poverty line, and over half live under 200% of the poverty line, a threshold for severe and chronic economic insecurity.²⁹

The low compensation for home-care workers also disproportionately burdens minority workers and their families. Of the 2 million home-care workers in the United States, 91% are female, 56% are women of color, 24% are immigrants, and 21% are single parents.³⁰ Unlike casual elder-sitters, home-care workers rely on their jobs to support their families—the very type of domestic-services worker Congress intended to protect under the FLSA. DOL noted in its rulemaking that the exclusion of home-care workers from basic FLSA protections results in economic insecurity for home-care workers, contrary to the aims of the FLSA.³¹

To meet basic needs for themselves and their families, over half of home-care workers rely on taxpayer-funded public assistance, such as

²⁹ See PHI, *Home Care Aides at a Glance*, *supra*, at 2.

³⁰ See *id.*; 78 Fed. Reg. at 60,519.

³¹ See 78 Fed. Reg. at 60,472, 60,481-82, 60,545.

food stamps, housing assistance and child-care subsidies.³² Home-care workers serve many Medicaid recipients, see *infra* Point II, but because their compensation is so low, many workers themselves rely on Medicaid to obtain necessary medical care for themselves and their children.³³

The economic hardship of home-care workers and their families affects a substantial segment of the economy. In some States and nationwide, home-care is one of the fastest growing professions.³⁴ Likewise, in some areas, home-care workers constitute a significant portion of low-wage workers. In New York City, for example, one out of

³² See PHI, *Home Care Aides at a Glance* at 2; 78 Fed. Reg. at 60,545.

³³ See PHI, *Home Care Aides at a Glance*, *supra*, at 2.

³⁴ See, e.g., *id.* at 1; N.Y. State Dep't of Labor, Labor Statistics: Fastest Growing Professions, *available at* <http://www.labor.ny.gov/stats/faster.shtm> (identifying personal and home care aides and home health aides as among fastest growing professions in New York); PHI, *Home Care at a Crossroads: Minnesota's Impending Long-Term Care Gap* 5-6 (Oct. 2012) (identifying home-care workers as among the fastest growing professions in Minnesota, expected to account for one in every ten new jobs expected in the State during the next decade), *available at* <http://phinational.org/sites/phinational.org/files/research-report/phicaregapmn-2012oct.pdf>.

every seven low-wage workers is a home-care worker.³⁵ There are profound social and financial costs when such a large class of workers lacks basic economic security and must rely on public-assistance as a wage subsidy. There is no evidence in the legislative history that remotely suggests that Congress intended these costs when it directed DOL to implement the FLSA's domestic-service workers exemptions.

2. DOL Relied on Its Judgment that High Turn-over and Increasing Shortages of Home-Care Workers Could Put State Citizens at Risk.

In addition to its impact on workers, the Home Rule Care also addresses how the DOL's 1975 regulations distort the labor market for home-care services—potentially harming the consumers of home-care. By denying basic wage-and-hour protections based on the location where care-work is performed, the DOL's prior regulatory exemption created an unequal labor market—leaving home-care workers under-compensated for their services. Workers naturally will choose jobs with better compensation and working conditions. As a result, home-care is

³⁵ See PHI, *Medicaid Redesign Watch: Wage Parity for Home Care Aides* 1 (Feb. 2014), available at <http://phinational.org/sites/phinational.org/files/research-report/medicaid-redesign-watch-1.pdf>.

not an attractive long-term job for qualified workers who can achieve greater economic security working in a nursing home or other service position.

The DOL noted that low wages and lack of labor protections drive high turnover rates for home-care workers and lead to worker shortages—problems that will only increase in the future as the demand for home-care services increases.³⁶

a. Turnover.

The annual turnover rate for home-care workers ranges from 44-95%—a far higher rate than for almost any other profession.³⁷ Turnover is potentially harmful for many reasons. Losing a trusted caregiver is disruptive for the recipients of home-care and their families. Turnover can also be medically harmful because continuity of care is a widely acknowledged goal for optimizing long-term care outcomes. Caregivers

³⁶ 78 Fed. Reg. at 60,543-45.

³⁷ *Id.*

who are familiar with a client's medical history and individual needs improve quality of care.³⁸

b. Worker Shortages.

In addition to high turnover rates, the low compensation of home-care workers leads to severe worker shortages. In a 2007 survey, 97% of responding States reported either a "serious" or "very serious" shortage of qualified home-care workers.³⁹ DOL explained in its rulemaking that demand for in-home care will only increase in the future. Demographic trends, including a tidal wave of aging baby boomers, create an increasing need for long-term care. Currently, approximately 13% of Americans are age sixty-five and over.⁴⁰ By 2030, that percentage will

³⁸ Dorie Seavey, *The Cost of Frontline Turnover in Long-Term Care* 18 (Oct. 2004), available at <http://phinational.org/research-reports/cost-frontline-turnover-long-term-care>.

³⁹ PHI, *The 2007 National Survey of State Initiatives on the Direct-Care Workforce: Key Findings* 2 (Dec. 2009), available at <http://phinational.org/research-reports/2007-national-survey-state-initiatives-direct-care-workforce-key-findings>.

⁴⁰ Peggie R. Smith, *Who Will Care for the Elderly?: The Future of Home Care*, 61 Buff. L. Rev. 323, 325 (April 2013).

climb to 20% (representing 72 million Americans).⁴¹ At the same time, fewer individuals have children and more women have entered the workforce, reducing the pool of available family caregivers.⁴² In conjunction with these demographic trends, there is a growing social consensus and preference for home-based rather than institutional care.⁴³

The number of Americans requiring long-term care (at home or in a nursing home) is projected to more than double to over 27 million by 2050.⁴⁴ As a result, remedying current worker shortages is not enough. A dramatically increased supply of qualified home-care workers is

⁴¹ See *id.*; see also 78 Fed. Reg. at 60,513.

⁴² See PHI, *Occupational Projections for Direct Care Workers 2008-2018*, 4 (Feb. 2010), available at [http://www.phinational.org/sites/phinational.org/files/clearinghouse/PHI%20FactSheet1Update_singles%20\(2\).pdf](http://www.phinational.org/sites/phinational.org/files/clearinghouse/PHI%20FactSheet1Update_singles%20(2).pdf).

⁴³ See 78 Fed. Reg. 60,455.

⁴⁴ See Bipartisan Policy Center, *America's Long-Term Care Crisis: Challenges in Financing and Delivery* 7 (Apr. 2014), available at <http://bipartisanpolicy.org/wp-content/uploads/2014/03/BPC-Long-Term-Care-Initiative.pdf>

needed to meet projected needs. Within the next decade alone, over one million new home-care workers are needed to meet demand.⁴⁵

Because the Home Care Rule narrows a FLSA regulatory exemption that no longer matches labor-market realities, DOL had regulatory authority to issue the Rule.

POINT II

THE DOL CONCLUDED BASED ON AVAILABLE DATA THAT EXTENDING WAGE-AND-HOUR PROTECTIONS TO HOME-CARE WORKERS WILL NOT VASTLY INFLATE STATE MEDICAID COSTS

In issuing the Home Care Rule, the DOL considered the fiscal impact on state Medicaid programs and concluded—based on available data—that the Rule will not impose new and unmanageable Medicaid costs. Medicaid is the single largest source of home-care funding in the nation.⁴⁶ While some home-care services are mandated under Medicaid,

⁴⁵ See Bureau of Labor Statistics, Fastest Growing Occupations, available at http://www.bls.gov/emp/ep_table_103.htm (personal care aides and home health aides).

⁴⁶ See U.S. Government Accountability Office, *Fair Labor Standards Act: Extending Protections to Home Care Workers* 4 (Dec. 2014).

the vast majority is provided under optional state waiver or demonstration programs. States currently support home-care under Medicaid for over 3.2 million individuals (70% receiving home-care under elective state waiver programs).⁴⁷

The DOL concluded that the Home Care Rule does not impose an unwarranted financial burden on States for several reasons. First, the DOL determined that the Rule will produce significant cost savings associated with improving home-care workers' economic conditions.⁴⁸ Second, the DOL noted that many States, including those with the nation's largest Medicaid home-care programs, already require minimum-wage and overtime for home-care workers.⁴⁹

⁴⁷ See Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid Home and Community-Based Services Programs: 2011 Data Update 5* (Dec. 2014), available at <http://files.kff.org/attachment/report-medicaid-home-and-community-based-services-programs-2011-data-update>.

⁴⁸ See 78 Fed. Reg. at 60,456, 60,459-60, 60,539-48, 554-56.

⁴⁹ See *id.* at 60,459, 60,482-83, 60,509-11, 60,524.

A. The DOL Took into Account Potential Cost Savings From Increasing Home-Care Worker Wages.

In assessing the fiscal impact of the Home Care Rule, the DOL took into account the existing costs to state Medicaid systems from low worker wages and lack of overtime protections.⁵⁰ Available data indicates that those costs are significant. Each time a home-care worker leaves, the cost to States can be as high as \$5,000. The total cost of turnover for publicly-funded home-care is estimated to be in the billions of dollars.⁵¹ In addition, while difficult to quantify, improving labor conditions for home-care workers should also improve quality of care, thereby reducing long-term Medicaid expenditures for States.⁵²

The DOL further determined that the Home Care Rule will help conserve state Medicaid funds for another reason: while the wages of home-care workers factor into total state Medicaid costs, home-care workers may also enable States to realize long term Medicaid savings. It is generally more expensive for States to provide long-term care in

⁵⁰ *Id.* at 60,456, 60,459-60, 60,543-60, 60,544, 60,545-47.

⁵¹ Seavey, *The Cost of Frontline Turnover*, *supra*, at 6 & 9 .

⁵² See 78 Fed. Reg. at 60,459-60, 60548.

nursing homes and other residential facilities rather than through home-care.⁵³ States currently save more than \$50 billion annually by providing Medicaid services through home-care rather than institutional treatment.⁵⁴ For this reason, many state Medicaid programs are increasingly relying on home-care to reduce long-term Medicaid costs. Current and future Medicaid savings through the expansion of home-care, however, rely upon a stable and growing workforce of qualified home-care workers—labor market conditions that the Home Care Rule helps support.

Moreover, as DOL noted in its rulemaking, potential cost savings for States from the Rule are not limited to Medicaid dollars alone. State taxpayers currently support the low wages of home-care workers through a broad array of taxpayer-funded public benefits. The DOL estimated that the average annual cost of providing public assistance to a family consisting of a home-care worker and two children is \$10,300,

⁵³ See 78 Fed. Reg. at 60,502 n.42, 60,513 & n.61.

⁵⁴ Charlene Harrington, Terence Ng & Martin J. Kitchner, *Do Medicaid home and community based service waivers save money?*, 30 Home Health Care Servs. Q. 198, 208-09 (2011).

and could be as high as \$15,100 in some States.⁵⁵ While public assistance is funded through other means than Medicaid, the DOL concluded that a complete assessment of the economic impact of the Home Care Rule must take into account the total savings to state taxpayers and total impact to state budgets as a whole.

B. Many States Have Operated Medicaid Home-Care Programs While Extending Wage-and-Hour Protections to Home-Care Workers.

Moreover, even if the Home Care Rule does affect state Medicaid programs by raising wage costs, States have substantial flexibility to design, administer and implement their own Medicaid programs. That flexibility extends to cost controls. Almost all States, for example, already impose cost-containment tools (such as expenditure and service hour caps) in providing home-care services under different Medicaid programs.⁵⁶

Using those tools, many States have been able to operate successful Medicaid home-care programs while guaranteeing Medicaid-

⁵⁵ See 78 Fed. Reg. at 60,545.

⁵⁶ Kaiser Comm'n, *supra*, at 12.

funded home-care workers minimum-wage and overtime protections. As DOL noted in its rulemaking, fifteen States already provide minimum-wage and overtime protections to most or all of the home-care workers covered by the Home Care Rule under state law.⁵⁷ Those States include New York, California, and Pennsylvania, which operate some of the largest Medicaid-funded home-care programs in the Nation.⁵⁸ Eight States also authorize collective bargaining for home-care workers to allow workers to unionize and negotiate enhanced labor protections.⁵⁹ States can control Medicaid costs under the Home Care Rule by exercising the full range of statutory and regulatory options available under Medicaid—including by controlling worker overtime and travel time, adopting new scheduling and hours-tracking requirements, and

⁵⁷ See 78 Fed. Reg. at 60,482-83 & 60,509-12 (table of state laws and regulations).

⁵⁸ See Kaiser Comm'n, *supra*, at Tables 1A-D & 2A-D.

⁵⁹ States that authorize collective bargaining with home-care workers include California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Oregon, Vermont, and Washington. See SEIU Overview of Homecare Bargaining, *available at* <http://www.seiu503.org/2013/12/overview-of-homecare-collective-bargaining/>.

implementing other state-specific cost-containment measures.⁶⁰ The Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS), which oversees state Medicaid Programs, has specifically advised that States may consider these, and other, options in deciding how to implement to Home Care Rule.⁶¹

C. Potential State Implementation Problems Are Not Raised in This Case and Provide No Basis for Invalidating the Rule.

Amici States recognize that each State is differently situated. The Home Care Rule will be a bigger change for some state Medicaid programs, and some States may need more time to make appropriate changes. To date, States have engaged fully with DOL in discussions about how to comply with the rule, including the financial implications

⁶⁰ Amici States have a strong interest in ensuring that cost-containment measures do not unnecessarily disrupt services for current home-care recipients or otherwise inappropriately limit or change programs that recipients rely upon.

⁶¹ See CMS, Informational Bulletin: Self-Direction Program Options for Medicaid Payments in the Implementation of FLSA Regulation Changes, at 2-3 (July 3, 2014), available at <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf>.

of the rule, and amici States are working to comply with the rule within the parameters of their budgets.

Throughout the rulemaking process, DOL has been sensitive to state concerns about potential impact on state Medicaid programs—in particular the lead time that States will need to come into good faith compliance with the Home Care Rule. DOL accordingly delayed the effective date of the Rule to January 1, 2015 in light of the “complexity” involved in making adjustments to State Medicaid programs.⁶² After the National Association of Medicaid Directors (NAMD), a bipartisan organization representing state Medicaid directors in all fifty States and the District of Columbia, requested additional time for state compliance,⁶³ DOL announced a phased-in enforcement policy—confirming that the Department will not bring enforcement actions under the new Rule for six months after January 1, 2015 and would thereafter for the next six months “exercise prosecutorial discretion in

⁶² 78 Fed. Reg. at 60,455-56.

⁶³ See NAMD Letter (Apr. 23, 2014), *available at* http://medicaiddirectors.org/sites/medicaiddirectors.org/files/public/namd_ltr_to_dol_flsa_rule_140423.pdf

determining whether to bring enforcement actions with particular consideration given to the extent which States . . . have made good faith efforts to bring their home care programs into compliance” with the Rule.⁶⁴

As with all regulations, the DOL has the authority to monitor the implementation of the rule. The only issue before the Court in this case is the validity of the Home Care Rule as an exercise of the DOL’s regulatory authority to implement FLSA, and amici States support the DOL’s regulatory authority to adopt the Home Care Rule.

⁶⁴ Application of FLSA to Domestic Service; Announcement of Time-Limited Non-Enforcement Policy, 79 Fed. Reg. 60,974 (Oct. 9, 2014).

CONCLUSION

The Home Care Rule is a valid exercise of the Labor Secretary's authority to construe the FLSA, and accordingly the judgment of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,988 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Oren L. Zeve

Oren L. Zeve