[NOT YET SCHEDULED FOR ORAL ARGUMENT]

**No. 15-5018**

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

HOME CARE ASSOCIATION OF AMERICA, et al.,

*Plaintiffs-Appellees,*

v.

DAVID WEIL, et al.

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 14-cv-967 (RJL))

# BRIEF *AMICI CURIAE* FOR AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS, SERVICE EMPLOYEES INTERNATIONAL UNION, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AND NATIONAL DOMESTIC WORKERS' ALLIANCE IN SUPPORT OF APPELLANTS ON REVIEW

Craig Becker
Lynn Rhinehart
American Federation of Labor &
Congress of Industrial Organizations
815 16th Street, NW
Washington, D.C. 20006
(202) 637-5310
cbecker@aflcio.org
*Counsel for AFL-CIO*

Judith A. Scott
Nicole G. Berner
Renee M. Gerni
Service Employees
International Union
1800 Massachusetts Ave., NW
Washington, DC 20036
(202) 730-7383
nicole.berner@seiu.org
*Counsel for SEIU*

Claire Prestel
James & Hoffman, PC
1130 Connecticut Avenue, NW
Suite 950
Washington, DC 20036
(202) 496-0500
cpprestel@jamhoff.com
*Counsel for SEIU*

Elizabeth Kugler
National Domestic Workers Alliance
395 Hudson Street, 4th Floor
New York, NY 10014
(202) 573-7703
elly@domesticworkers.org
*Counsel for NDWA*

William Lurye
Michael Artz
American Federation of State, County and Municipal Employees
1101 17th Street, NW
Suite 900
Washington, DC 20036
(202) 775-5900
blurye@afscme.org
martz@afscme.org
*Counsel for AFSCME*

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES (Cir. R. 28)

### A. Parties and *Amici*

Plaintiffs-appellees are Home Care Association of America; International Franchise Association; and National Association for Home Care & Hospice.

Defendants-appellants are David Weil, Administrator, Wage and Hour Division of the U.S. Department of Labor; Thomas E. Perez, Secretary of Labor; and the U.S. Department of Labor.

There were no *amici* in district court, and no *amici* have yet been granted permission to file briefs in this Court. *Amici* submitting this proposed brief are the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO), the Service Employees International Union (SEIU), the American Federation of State, County and Municipal Employees (AFSCME), and the National Domestic Workers Alliance (NDWA).

### B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

### C. Related Cases

We are not aware of any pending related cases.

**CORPORATE DISCLOSURE STATEMENT**
**(FRAP 26.1 & Cir. R. 26.1)**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for *amici curiae* make the following disclosure: AFL-CIO, SEIU, AFSCME and NDWA have no parent company. No publicly held corporation has a 10% or greater ownership in any of the *amici* parties. The general nature and purpose of *amici* is to advocate for, protect and advance workers' rights.

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## GLOSSARY

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|---|---|
| ADA: | Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2014); 47 U.S.C. § 611 (2014) |
| AFL-CIO: | American Federation of Labor & Congress of Industrial Organizations |
| AFSCME: | American Federation of State, County & Municipal Employees, AFL-CIO |
| BLS: | Bureau of Labor Statistics |
| CMS: | Centers for Medicare and Medicaid Services |
| Cong. Rec.: | Congressional Record |
| DOL: | Department of Labor |
| FLSA: | Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2014). |
| HCBS: | Home and Community-Based Services |
| HSP: | Illinois' Home Services Program |
| NDWA: | National Domestic Workers Alliance |
| NPRM: | Notice of Proposed Rulemaking |
| SEIU: | Service Employees International Union |
| S. Rep.: | Senate Report |

## STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellants.

## INTERESTS OF *AMICI CURIAE*; CIRCUIT RULE 29(d) CERTIFICATION

The American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) is a federation of 56 unions representing 12.5 million workers whose rights under federal law, including the Fair Labor Standards Act (FLSA), depend on courts' respect for Congress' delegation of the critical task of "adapt[ing statutes] to changing patterns of industrial life" to administrative agencies. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

The Service Employees International Union (SEIU) is the largest healthcare union in the United States, representing more than two million working women and men in the United States, Canada and Puerto Rico. SEIU represents more than 500,000 home care workers across the country who will be covered by the Department of Labor (Department or DOL) rule that is the subject of this litigation.

The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) is comprised of 1.6 million workers in both the public and private sectors, including over 125,000 home care workers covered by the Department of Labor rule challenged by this litigation. AFSCME's California home care affiliate, United Domestic Workers of America is the first known labor union founded solely to represent home care workers.

The National Domestic Workers Alliance (NDWA) is dedicated to obtaining respect, recognition and inclusion for domestic workers. The Alliance is comprised of 42 affiliate organizations of over 10,000 nannies, housekeepers, and caregivers in 26 cities and 18 states.

The AFL-CIO, SEIU, AFSCME and NDWA all represent homecare workers whose compensation is the subject of the DOL rule at issue in this case, and *amici* therefore have an interest because their members' pay, and the dignity and respect accorded their work, will be directly affected by the outcome of this appeal. On February 20, 2015, appellees' counsel indicated that appellees would not consent to the filing of this brief.

*Amici* have attempted to the greatest extent possible to join with other interested parties on a single brief. Pursuant to Circuit Rule 29(d), *amici curiae* certify that further consolidation of *amici curiae* briefs was impracticable and this separate brief necessary because only *amici* have represented and continue to represent (as agents for collective bargaining and otherwise) the workers whose pay is the subject of DOL's rule, and only *amici* are able to rebut appellees' claims regarding cuts in services on the basis of our bargaining experiences. The AFL-CIO, SEIU, AFSCME and NDWA coordinated among themselves and with other parties planning to submit *amicus* briefs to ensure that like parties presenting like

arguments (such as the undersigned workers' rights groups) joined together on briefs so that as few briefs as practicable would be submitted to the Court.[1]

## SUMMARY OF ARGUMENT

DOL has thoroughly explained why the district court's decisions are wrong. In this brief, we (1) briefly supplement the Department's legal analysis; (2) explain the impact of the district court's decisions on employees in the homecare workforce so that this Court understands the urgency of this matter; and (3) dispel the notion that the rule will result in severe cuts in services as we believe that specter erroneously and improperly underlies the district court's decisions.

The district court's decisions are contrary to the most fundamental rule of construction of the FLSA—that exemptions are to be narrowly construed— and, thus, the district court's decisions continue to deprive hundreds of thousands of our nation's most vulnerable workers of the most basic, minimum protections contained in federal law, *i.e.*, the right to be paid a minimum wage and overtime rate. As the Supreme Court has made plain: "Any exemption from such humanitarian and remedial legislation must . . . be narrowly construed, giving due

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

This Court should reverse.

## ARGUMENT

### I. The District Court's Decisions Are Wrong.

The district court's decisions invalidating the carefully considered and fully explained rule promulgated by the Department after notice and comment (1) wholly disregard the Supreme Court's holdings in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), and fly in the face of its detailed instructions in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), concerning judicial review of agency rule-making, (2) are inconsistent with the central purpose of the 1974 amendments to the FLSA, and (3) exhibit contempt for officials of the elected executive branch.

#### A. The district court's decisions are inconsistent with Supreme Court precedent.

##### 1. Employees of third parties

In *Coke*, the Supreme Court squarely held that the terms of the companionship exemption are ambiguous and that Congress vested DOL with authority to decide whether workers employed by third-party employers fall within that exemption. The Supreme Court concluded that "the text of the FLSA does not

expressly answer the third-party-employment question." *Coke*, 551 U.S. at 168. The Court continued, "[n]or can one find any clear answer in the statute's legislative history." *Id*. The Court then held:

> [W]hether, or how, the definition should apply to workers paid by third parties raises a set of complex questions. Should the FLSA cover all companionship workers paid by third parties? . . . Should it cover none? [I]t is consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions.

551 U.S. at 167-68.

Ignoring the Supreme Court's clear holdings, the district court ruled that DOL's third-party regulation is inconsistent with express congressional intent. *See* JA 39. Notwithstanding the Supreme Court's statements that the FLSA "does not expressly answer the third-party employment question" and that its legislative history contains no "clear answer" either, *Coke*, 551 U.S. at 168, the district court erroneously and incongruently stated that "[t]he language of the exemption provision is quite clear." JA 37. Further, and again contrary to the Supreme Court's clear statements in *Coke*, the district court ruled that "[t]here is no explicit—or implicit—delegation of authority to the Department to parse groups of employees based on the nature of their employer who otherwise fall within those definitions." *Id.*

The district court's suggestion that the Supreme Court's decision in *Coke* does not preclude disposition of this case at *Chevron* step one is without foundation. The district court asserts that "[t]he Supreme Court . . . only considered the validity and binding nature of the previous, and still current, rule that interpreted the statutory definition of companion employees under Section 213(a)(15)." JA 40. But in considering the validity of the previous rule, the Court definitively held—contrary to the district court—that the statute and its legislative history do not answer the question whether employees of third-party employers fall within the exemption and, further, that Congress vested authority to answer that question in the DOL.

Put plainly, the district court's express rationale ignores the Supreme Court's express contrary holding and logic.

**2. The definition of "companionship services"**

The district court similarly ignored Supreme Court precedent in invalidating DOL's delimitation of the scope of the ambiguous term "companionship services." In *Coke*, the Supreme Court concluded that "the FLSA explicitly leaves gaps, for example, as to the scope and definition of statutory terms such as . . . 'companionship services.' . . . It provided the Department of Labor with the power to fill these gaps." *Coke*, 551 U.S. at 165. The district court acknowledged, "[t]here is, to be sure, ambiguity in the meaning of the term 'companionship

services,' and Congress has explicitly delegated authority to the Department to define the term." JA 56. But then the Court proceeded to substitute its own definition for the reasonable definition properly promulgated by DOL.

The district court pointed to the fact that "companionship services" must be provided to "individual[s] who (because of age or infirmity) are unable to care for themselves," and then asserted that DOL's rule "would write out of the exemption the very 'care' the elderly and disabled need." *Id*. But that analysis is wrong for three reasons.

First, the term "care" is itself ambiguous and the services the DOL has defined as the core of "companionship services"— "the provision of fellowship and protection"— are clearly forms of "care." 29 C.F.R. § 552.6(a) (new rule vacated by *Home Care Assoc. of America*, et al. *v. Weil*, No. 14-cv-967 (D.D.C. Dec. 22, 2014)).[2] Thus, the DOL has in no way written care out of the definition of companionship services. Second, the DOL also does not "write out of the definition" other forms of "care," such as "meal preparation, driving, light housework, managing finances, assistance with physical taking of medication, and arranging medical care." DOL merely provides that such ancillary services cannot exceed 20% of a companion's hours. 29 C.F.R. § 552.6(b). This provision is both

[2] All future references are to the new rule unless otherwise noted.

consistent with the legislative history, *see* Appellants' Br. at 8, and with the dictionary definition of the term "companionship." *See* 76 Fed. Reg. 81192, 93 (2011). Finally, the alternative definition implicitly suggested by the district court, imposing *no* limit on the time spent providing such ancillary services, would read the word "companionship" out of the exemption. The district court would rewrite the exemption to read "any employee employed in domestic service employment to provide care ~~companionship services~~ . . . ."

The district court's opinion does not and cannot "'show that the statute *unambiguously* forecloses' [the DOL's] interpretation" as is required under *Chevron*. *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 262 (D.C. Cir. 2014) (quoting *Village of Barrington v. Surface Tr. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011)).

### B. The district court's third-party decision is inconsistent with the central purpose of the 1974 amendments.

The express purpose of the 1974 amendments to the FLSA was to "expand the coverage of th[e] Act." H.R. Rep. No. 93-232, 93d Cong., 1st Sess. 1 (May 29, 1973). The Committee Reports state that the amendments' purposes were raising the minimum wage and "extending the benefits and protections of the Act," but do not state that there would be any form of *contraction* of coverage. *See, e.g*, H.R. Rep. No. 93-232 at 2, 8 ("It is the committee's intention to extend the Act's

coverage in such a manner as to completely assume the Federal responsibility insofar as it presently practicable . . . .”); S. Rep. No. 93-300 at 1 (“to extend its protections to additional employees”).

It is thus important to understand that *prior* to the 1974 amendments the FLSA already covered domestics, including companions, employed by third-party firms that met the test for enterprise coverage. *See* 29 U.S.C. §§ 206(a), 207(a)(1) (both applying to employees “employed in an enterprise engaged in commerce”), 203(r) and (s) (defining enterprise engaged in commerce), *i.e.*, to most companions employed by third parties.[3] Indeed, the Secretary of Labor had successfully sued several such third-party employers of domestics before the amendments. *See, e.g.*, *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362 (5th Cir. 1973); *Homemakers Home and Health Care Services, Inc. v. Carden*, 1974 U.S. Dist. LEXIS 9150 (M.D.Tenn. April 4, 1974), *aff'd*, 538 F.2d 98 (6th Cir. 1976). *See also* 1972 DOLWH LEXIS 19 at *2-3 (Aug. 20, 1972); Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971). DOL recognized this preexisting coverage immediately after enactment of the 1974 amendments: “Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services [were] subject

[3] In 1974, an enterprise engaged in commerce had to have annual gross sales not less than $250,000. 29 U.S.C. § 203(s)(1) (1974).

to the Act prior to the 1974 Amendments." 39 Fed. Reg. 35385 (1974). Indeed, the Supreme Court recognized this fact in *Coke:* "the FLSA in 1974 already covered some of the third-party-paid workers." 551 U.S. at 167.

While the Supreme Court disagreed with the Second Circuit's conclusion that those facts *definitively* answer the question of whether Congress intended to exempt companions employed by third parties, the Court recognized the facts and held that they raised questions that Congress intended the DOL to answer. *Id*. at 168. The district court simply ignores the historical facts.

### C. The district court's decisions exhibit contempt for officials of the elected executive branch.

The district court's second opinion ends by asserting that the DOL's action "strikes at the heart of the balance of power our Founding Fathers intended to rest in the hands of those who must face the electorate on a regular basis." JA 60. But in *Chevron*, the Supreme Court explained that, "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress . . . intentionally left to be resolved by the agency." *Chevron*, 467 U.S. at 865–66.

Rather than according DOL's considered views the respect commanded by *Chevron*, the district court repeatedly and without foundation questions the motives

and the good faith of the Department, for example, suggesting a "wholesale arrogation of Congress's authority" and an "arrogance to . . . seize unprecedented authority." JA 41, 42. The argument transcripts are also peppered with such characterizations. *See, e.g.*, JA 68 – 69 ("And *Coke* considered private employers were covered . . . Now the agency, for whatever reason, does not like that."); *id.* at 88 ("This sounds more like White House talking points than . . . legal argument."); *id.* at 124, ( "It's as if they [DOL] figured, well, if we can't win on the [third party] exemption, we'll win on the redefinition. . . . If we can't get them with a jab, we'll get them with a hook."); *id.* at 145, ("I know full well what your agency is focusing on. I'm asking you to focus on what Congress focused on."). *Id.* at 155.

It is clear that the district court vehemently disagrees with DOL's policy choices. But the Supreme Court has said that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron*, 467 U.S. at 866. And this Court has said that that is true even when an agency "has 'changed its mind' several times in addressing th[e] issue." *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001). The district court failed to accord DOL the deference commanded by *Chevron* and the respect and fair consideration due a coequal branch of the federal government.

## II. The Homecare Industry Has Evolved Away From the Companionship Services Congress Intended to Exempt and is Plagued by Poverty Wages and High Turnover to the Detriment of Both Workers and Consumers.

### A. Homecare work has changed and a homecare industry has arisen.

The homecare industry has changed dramatically since the companionship exemption was enacted more than 40 years ago and without DOL's new rule, the companionship exemption will exclude from the FLSA's protections many more workers than Congress intended to exempt.

When Congress extended the FLSA's protections in 1974, legislators made clear that they intended to cover employees providing ordinary domestic services and for whom providing care is a career, and employees who are bread-winners responsible for supporting their families. *See* S. Rep. No. 93-690, at 20 (1974). Those characterizations describe our homecare members and most other homecare workers today. Most homecare providers today do much more than simply sit with and watch over consumers: Their principal, if not exclusive, duties are to help with bathing, toileting, dressing, performing housework, and preparing meals. They manage medications. They perform tracheostomy care. They lift and move those who cannot move themselves. As the DOL correctly observed, this work is "far more skilled and professional than that of someone performing 'elder sitting'." JA 186, 190 (Application of the Fair Labor Standards Act to Domestic Service, 78

Fed. Reg. 60454, 60458 (Oct. 1, 2013)). And for most homecare workers, these are not casual jobs, but long-term, family-supporting careers.

Individual workers' stories make concrete the aggregate data cited by the DOL. For example, Artheta Peters has been a homecare worker in Cleveland, Ohio not on a casual basis but for thirteen years, beginning when she was eighteen. Ms. Peters cares for two clients through a homecare agency and works seven days per week and all holidays. Her work includes not only bathing, dressing, and toileting her clients, but also checking their blood pressure, changing catheter bags, and feeding them through tubes. Additionally, she does light housekeeping, runs errands, launders linens and clothes, and prepares food for her clients.[4] These are precisely the types of domestic services Congress intended to cover when it extended the Act's protections in 1974. See S. Rep. No. 93-690, at 20 (1974).

Similarly, Rebecca Sandoval**,** a homecare worker in Medford, Oregon, has been working in homecare for more than seven years and is much more than an "elder sitter." She has assisted clients not only with toileting and feeding but also with breathing treatments, medication monitoring, and the administration of insulin. And Susana Saldana, of Merced, California, performs the physically and psychologically demanding work of caring for her son, who requires twenty-four

[4] The workers who are described in this brief consented to have their stories told here.

hour assistance. Ms. Saldana's family, including her disabled son, depend on the money she is paid for providing him care; it is an essential part of their family income.

In addition to understanding the changes in the nature of homecare work that these women's stories reflect, it is also important to understand how homecare has grown as an industry because it is clear that Congress, well aware that "broad [workforce] coverage is essential to accomplish[ing]" the FLSA's goals, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985), did not intend to exempt a segment of the workforce as significant as homecare is today.

The number of home care providers has more than tripled in the last several decades, and between 2001 and 2011, home health care employment increased 65% and personal care aide employment doubled. *See* JA 190 (Application the FLSA to Domestic Service, referencing Bureau of Labor Statistics (BLS) Occupational Employment Statistics for Personal Care Aides, *available at* http://www.bls.gov/oes/current/oes399021.htm). And this trend is predicted to continue: nearly 1.9 million workers were employed as personal care and home health aides in 2010, and by 2020 the number is projected to be nearly 3.2 million. *See* C. Brett Lockard & Michael Wolf, Occupational Employment Projections to 2020, Monthly Labor Rev. 84, 100 tbl. 2 (2012). Indeed, these occupations are projected to be the fastest growing in the economy over the coming decade. *Id*; *see*

Bianca Frogner & Joanne Spetz, *Entry and Exit of Workers in Long-Term Care*, UCSF Health Workforce Research Center on Long Term Care 8 (Jan. 20, 2015).

### B. Homecare is characterized by low pay and high turnover, to the detriment of both workers and consumers.

Unfortunately, the growing demand for homecare has not resulted in earnings much higher than the poverty level, and many workers still struggle to get by. Wages of homecare providers remain among the lowest in the service sector. *See* JA 190, 191 (Application of FLSA to Domestic Service). In promulgating its rule, DOL cited research showing that approximately 50% of homecare providers rely on public assistance and the average amount of public assistance for them and their families is approximately $10,300. Adding food stamps, "[i]n total, the average direct care worker might receive $15,100 in public assistance and food stamps to provide for her/his family." *Id.* at 277. Analyzing industry data from 2003-2013, the UCSF Health Workforce Research Center on Long-Term Care found that poverty rates are high "especially [for] workers in the home health care services sector and private households." Frogner & Spetz at 17, 23. Congress sought to redress precisely such low wages in 1974 when it extended the Act to cover domestic workers. *See* S. Rep. No. 93-690 at p. 18; 119 Cong. Rec. S24799 (statement of Senator Williams).

Not surprisingly given the homecare industry's low pay, homecare is also characterized by high turnover rates. Studies have found turnover rates in the home care industry ranging from forty-four to almost 100 percent per year. *See* JA 277 (Application of FLSA to Domestic Service). And such high turnover hurts consumers by disrupting their care as multiple providers move in and out of their home in an unpredictable manner. JA 215.

Again, workers' stories bring to life the data about low wages and high turnover. Artheta Peters, for example, is paid only $8/hour, a mere $.50/hour more than she earned when she started working in 2001, and she cares for clients who live half an hour apart but is not compensated for time spent traveling between work sites. Since first becoming a homecare worker, Ms. Peters has periodically left the work for better paying jobs. She believes strongly that fair overtime pay would improve the quality of life for both home care workers and their consumers, by, among other things, preventing homecare workers from being forced to leave the profession to seek better pay.

Similarly, after NDWA member Pauline Sauls worked for several years as a homecare worker in Georgia, assisting people who were recovering from knee replacements and open-heart surgery and also providing support to adults with developmental disabilities, she had to leave the work because although she often

worked twelve-hour days, she was not paid overtime or travel time and was not earning enough to survive.

Susana Saldana's family is stretched thin, even with her homecare pay: the health insurance and other medical costs associated with her son's care make putting food on the table a struggle. Ms. Saldana was counting on the overtime pay provided by DOL's new rule to help pay for dental insurance for her family, so she could provide her son something as basic and important as a teeth cleaning. And although Rebecca Sandoval makes $13.75/hour for some of her work, she is currently paid only $6.88—less than the federal minimum wage—for two of the three categories of care she provides.

## III. Higher Homecare Worker Wages Will Not Lead to Cuts in Services But Rather to Improved Care.

Implicit in the District Court's decisions is an improper and erroneous finding that the DOL's rule will have a drastic negative impact on consumers by reducing available homecare services. As the Judge stated during the preliminary injunction hearing, the rule will have "a discombobulating effect . . . [on] the entire industry and the lives of millions of people who depend on that industry." JA 165. The NPRM, the preamble to the final rule, and the DOL's brief fully set forth the evidence refuting that finding and we offer further evidence here. But there are many reasons to believe that higher pay for homecare workers will improve care

and increase available services, and that has in fact been our members' experience in states around the country where they have negotiated higher wages.

### A. DOL's rule will improve the quality of homecare services and ensure their availability.

Providing homecare workers basic wage and hour protection will attract more providers, and will reduce turnover and prevent worker injuries by alleviating fatigue and stress, thereby preserving the continuity of care and improving its quality. Reducing turnover will also reduce training and administrative costs for homecare agency employers.

An estimated 27 million people will need long-term health services and supports by the year 2050, *see* Frogner & Spetz at 30, and when homecare providers are afforded the same protections as other employees, more qualified individuals will want to do the work and join the profession. As DOL pointed out, FLSA protections will attract more providers and therefore enable "employers to meet the growing demand for home care services without requiring workers to perform services for excessive hours." JA 280. Indeed, the incentive of decent pay is critical because at present workers are leaving the homecare field at higher rates than new workers are joining, with a gap of 9% among personal care attendants. *See* Frogner & Spetz at 6, 13, 25.

Providing minimum wage and overtime protection for homecare providers will also significantly reduce the high turnover rate of workers already in the industry. As DOL explained in promulgating their rule, high turnover hurts consumers by disrupting their care as multiple providers move in and out of their home in an unpredictable manner. JA 215. Better wages, on the other hand, encourage workers to stay in their jobs, which means lower turnover and improved continuity and quality of care. JA 277. And for employers, reduction in turnover will mean reduction of the costs of recruitment and training of qualified replacements—a "key quantifiable benefit of the Final Rule." JA 278.

Outside data confirm DOL's turnover analysis. A recent study concluded that the high turnover rates and worker shortages that plague long-term care "may be tempered" by the "pay[ment of] higher wages," because those wages help attract and retain workers. Frogner & Spetz at 9. To demonstrate this point, the study cited data showing that "nursing homes that pay higher wages and offer more generous benefits" tend to have "lower turnover rates." *Id.*

DOL's rule will also benefit consumers by making it less likely that trusted homecare providers will be sidelined by illness and injury. "Direct care workers have the highest injury rate in the United States, primarily due to work-related musculoskeletal disorders.'' JA 279 (Application of FLSA to Domestic Service). Multiple studies show that long work hours result in increased fatigue, decreased

alertness, and decreased productivity. Long work hours in the health care field ‘‘have adverse effects on patient outcomes and increase health care errors and patient injuries.’’ *Id.* For example, a 2004 National Institute for Occupational Safety and Health report found that 12-hour shifts plus more than 40 hours of work per week results in increases in "health complaints, deterioration in performance, or slower pace of work." *Id*. Another study analyzed thirteen years of data and approximately 100,000 job records finding that "long working hours indirectly precipitate workplace accidents through a causal process, for instance, by inducing fatigue or stress in affected workers." *Id*. If workers are able to earn decent pay working a reasonable number of hours, as under DOL's rule, they will be able to provide better care.

In addition to these reasons for believing that higher pay will expand and improve homecare, rather than hurt it as appellees claimed in the district court, there are several more reasons to doubt appellees' and their supporters' claims that higher pay leads to consumer institutionalization. For example, available data show that institutionalized care is much more expensive than homecare, which means there is significant room to raise homecare wages. *See, e.g.*, Charlene Harrington et al., Do Medicaid Home and Community Based Waiver Services Save Money?,

Home Health Care Services Quarterly, 30:198-213 (2011) (finding that home and community-based care saves Medicaid 50%).[5]

Furthermore, appellees' inevitable-institutionalization narrative ignores the significant (and likely irreversible) public preference for homecare as opposed to institutionalized care, which has been reflected in the steady growth of homecare over the last 20 years will not dissipate upon implementation of DOL's rule. *See, e.g.*, Nat'l Conference of State Legislatures & AARP Public Policy Institute, Aging in Place: A State Survey of Livability Policies & Practices 1 (2011), *available at* http://assets.aarp.org/rgcenter/ppi/liv-com/aging-in-place-2011-full.pdf; Ai-jen Poo, The Age of Dignity 31 (The New Press, 2015).

The strong consumer preference for homecare is honored by the law. Title II of the Americans with Disabilities Act requires states to provide care for individuals with disabilities in the "most integrated setting appropriate," *see* 28

[5] For example, 2006 data for waiver homecare programs versus institutionalized care in Illinois, Oregon, and Washington shows that the average per-participant cost of providing homecare services was significantly less than the average per-participant cost of institutionalized care in each of those states, even with collectively bargained homecare-worker wage rates: In Illinois, the per-participant difference was $34,815 for homecare versus $55,652 for institutionalized care; in Oregon, $34,463 versus $212,965; and in Washington State, $36,505 versus $97,150. *Id.* at 30:209. And that remains true today given that the Medicaid homecare waiver program created by 42 U.S.C. §1396n(c), under which much homecare is funded, actually requires states to demonstrate that providing homecare will be less expensive than institutionalized care. *See* 42 U.S.C. §1396n(c)(2)(D)(2015); 42 C.F.R. §441.302(e), (f).

C.F.R. §35.130(d) (1991), which means the "setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. § 35 app. A (2009). That requirement, which prohibits unjustified institutionalization, *see Olmstead v. L.C.*, 527 U.S. 581 (1999), will continue to apply under DOL's new rule, as the Departments of Justice and Health and Human Services recently emphasized in a letter reminding states that they must continue to comply with their *Olmstead* obligations when implementing DOL's rule.[6]

Finally, appellees claims about the effect of DOL's rule are undermined by the fact that 14 states already provide minimum wage and overtime protections to all or most homecare providers currently exempted from FLSA, and even more provide at least some protections to at least some categories of homecare workers. As DOL noted, in the voluminous public comments submitted by opponents of the rule, none of those opponents pointed "to any reliable data indicating that state minimum wage or overtime laws had led to increased institutionalization or stagnant growth in the home care industry in any state . . . ." JA 215 (Application

[6] *See* Ltr. from Vanita Gupta, Acting Ass't Attorney General, Civil Rights Division, U.S. Dep't of Justice & Jocelyn Samuels, Director, Office for Civil Rights, U.S. Dep't of Health & Human Servs., *available at* http://www.dol.gov/whd/homecare/hhs-doj.htm (citing Ctr. for Medicaid & CHIP Servs., CMS, Informational Bulletin (July 3, 2014), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf).

of the FLSA to Domestic Service, also citing Dorie Seavey & Abby Marquand, Caring in America, A Comprehensive Analysis of the Nation's Fastest Growing Jobs: Home Health and Personal Care Aides, PHI December 2011 ).

### B. Homecare Programs Have Grown In States Where Our Members Have Negotiated Higher Wages.

Given the data discussed above, which show how higher wages improve and expand homecare and undermine appellees' claims to the contrary, it makes sense that our members have seen the homecare programs in which they work thrive and expand to provide more and better services, even as those same members have negotiated higher wage rates in collective bargaining agreements. Our members' concrete experiences have been that better pay and expanded homecare go hand in hand.

In California, for example, the homecare program has grown as workers have won better pay. California homecare workers, some of whom made only $3.75/hour when they first began organizing in the 1980s, *see* Aff. of Kirk Adams ¶5, Jan. 5, 2015, ECF 27-9, negotiated the right to $6.75/hour in 1999, *id*., and can now earn as much as $12.81/hour. Mem. of Agreement, Santa Clara County Public Auth. for In-Home Supportive Servs. & Local 521 SEIU, Mar. 11, 2014–Feb. 1, 2017, at 5 (§6.1), *available at* http://wordpress.uploads.seiumedia.net/54-4ECEEAFA-E85B-IHSS-MOA--6-27-2014-FINAL-with-Signature-Pages.pdf. If

it were true that minimum wage and overtime protections lead inevitably to cuts in services, as appellees and their supporters have claimed, one would expect California's homecare program to have shrunk as a result of these wage increases. But in fact, California's homecare program has grown: In 1999 when SEIU members negotiated their first agreement in California, the state's homecare program had 231,356 participating consumers. Cal. Dep't of Soc. Servs., Pub. Assistance Facts & Figures for Dec. 1999, *at* http://www.cdss.ca.gov/research/res/pdf/Paff/1999/PAFFDec99.pdf. In February 2013, the program had far more, 399,719, *see* Cal. Dep't of Soc. Servs., Pub. Assistance Facts & Figures for Feb. 2013, *at* http://www.cdss.ca.gov/research/res/pdf/Paff/ 2013/PAFFFeb13.pdf, and California's Governor projected an even higher 453,000 average monthly caseload for 2014-2015. *See* Gov.'s Budget Summary 2014-15, 61, *at* http://www.dof.ca.gov/documents/FullBudgetSummary_2014.pdf.

This same outcome—higher wages *and* expanded homecare services—has occurred in other states as well. In Illinois, for example, SEIU members who provide homecare in the state's Home Services Program (HSP) have negotiated a series of wage increases, from $7.00/hour in 2003 to $11.55/hour in 2012 and then $13.00/hour in 2014. *See* SEIU–Personal Assistants Contract & Side Ltr. 2012-2015, at 6 (Art. VII), *available at* https://www2.illinois.gov/cms/Employees

/Personnel/Documents/emp_seiupast.pdf. HSP grew during roughly the same period from 31,071 consumers in FY04 to 33,401 in FY11.[7]

Similarly, in Oregon, homecare workers who earned as little as $5.56/hour when they began organizing in the late 1990s negotiated a wage of $8.73/hour in 2003 (in their first contract), *see generally* SEIU Homecare Workers' Union 2–3, *at* http://www.seiu503.org/files/2011/08/ SEIU_Homecare_Orientation_2010_web-1.pdf, and earned as much as $13/hour in 2013. *See* 2013-2015 Collective Bargaining Agreement Between Home Care Comm'n & SEIU, Local 503, OPEU, at 20 (Art. 14.1), *at* http://www.seiu503.org/wpcontent/blogs.dir/10/files/2014/ 03/SEIU-OHCC-2013-2015-Collective-Bargaining-Agreement-FINAL-SIGNED-COVER-LETTER.pdf. Meanwhile, data on file with SEIU's Oregon local show that the number of consumers served by the state's homecare workers grew from more than 11,000 in 2004 to more than 16,000 in 2013.

In Massachusetts, worker pay increased from $10.84/hour in 2007 to $12.98/hour in 2013. *See* Collective Bargaining Agreement between the Personal Care Attendant Quality Home Care Workforce Council (Workforce Council) &

[7] The consumer data comes from two letters dated May 24, 2007 and Dec. 7, 2011 sent by the State's Department of Central Management Services to SEIU's Illinois homecare local; the letters are on file with *amicus* SEIU.

1199SEIU United Healthcare Workers East July 1, 2012–June 30, 2015, at 7 (Art. 10), *at* http://www.mass.gov/pca/docs/pca-fully-executed-cba-2012.pdf. And the number of consumers served increased during that same period from about 15,900 in FY07, *see* Workforce Council, Performance Review Report 33 (Dec. 2008), *at* http://www.mass.gov/pca/docs/annual-review-report.pdf, to 24,592 consumers in FY13. *See* Workforce Council, 2014 Performance Review Report 24, *at* http://www.mass.gov/ pca/docs/ annual-review-report-2014.pdf.

And in Washington State, homecare workers negotiated wage increases from $7.18/hour in 2001 to between $10.53/hour and $14.34/hour in 2013, *see* Collective Bargaining Agreement, The State of Washington & SEIU Healthcare 775NW July 1, 2013 - June 30, 2015, at A-1, *at* http://www.ofm.wa.gov/labor/ agreements/13-15/nse_hc.pdf, and also secured full workers' compensation coverage, paid time off, and healthcare coverage during that period. Meanwhile, the in-home service programs through which those workers provide care have grown steadily from about 25,000 consumers served in July 2004 to more than 37,000 served in January 2014. *See* Caseload Forecast Council, Long Term Services, Home & Community Servs. – In-Home Servs., *at* http://www.cfc.wa.gov/Monitoring/LTC_HCS_InHome_Services.pdf.

Data from the private homecare sector provides further reason to reject the false link between decent pay and service cuts. Addus Healthcare Inc. pays at least

the federal minimum wage and an overtime premium to its homecare workers in Illinois and Washington State, for example, where it has collective bargaining agreements with SEIU. And Addus' most recent 10-K filing tells the story of a profitable, competitive, and growing company—not one driven to the margins by its fair wage and overtime practices. Addus' gross profit increased from about $64 million in 2012 to more than $67 million in 2013, and Addus acquired two other homecare companies in 2013. Addus Homecare Corp., Annual Report (Form 10-K), 33, 39, (March 17, 2014).

Cumulatively, this evidence from both the public and private sectors shows that higher wages and expanded homecare programs often go hand-in-hand. And indeed it would have been odd, to say the least, for our organizations' homecare members to have negotiated pay raises again and again, and to have voted to approve the collective bargaining agreements containing those raises, if, in fact, those raises led to less work and thus lower pay as appellees' supporters suggested in the district court.

Lastly, although appellees and their supporters argued in the district court that DOL's rule will lead to discontinuity of care because states will respond by capping workers' hours at 40, our members' experiences show that is not necessarily true. In California, our members and consumers worked together with state officials to develop a common sense plan for implementation of the DOL rule

under which workers would have been able, had the rule gone into effect as scheduled, to work as many as 66 hours per week and to be paid overtime. Cal Welf. & Inst. Code § 12300.4 (West 2014). The California resolution shows how the new rule can and will achieve its intended goals—workers can work an adequate number of hours and receive enough pay to be able to support themselves and their families while consumers can get the care they need.

## CONCLUSION

For the above-stated reasons, the district court's decisions should be reversed.

Respectfully submitted,

/s/ *Nicole G. Berner*

Nicole G. Berner

Judith A. Scott
Nicole G. Berner
Renee M. Gerni
SEIU
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 730-7383
nicole.berner@seiu.org
renee.gerni@seiu.org

Claire Prestel
James & Hoffman, PC
1130 Connecticut Avenue, NW
Suite 950
Washington, DC 20036

(202) 496-0500
cpprestel@jamhoff.com

*Counsel for Service Employees International Union*

*/s/ William Lurye*
William Lurye
Michael Artz
AFSCME
1101 17th Street, NW
Suite 900
Washington, DC 20036
(202) 775-5900
blurye@afscme.org
martz@afscme.org

*Counsel for American Federation of State, County and Municipal Employees*

*/s/ Craig Becker*
Craig Becker
Lynn Rhinehart
AFL-CIO
815 16th Street, NW
Washington, D.C. 20006
(202) 637-5310
cbecker@aflcio.org
lrhinehart@aflcio.org

*Counsel for American Federation of Labor & Congress of Industrial Organizations*

*/s/ Elizabeth Kugler*
Elizabeth Kugler
NDWA
395 Hudson Street, 4th Floor
New York, NY 10014

(202) 573-7703
elly@domesticworkers.org

*Counsel for National Domestic Workers Alliance*

*Counsel for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6305 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Nicole G. Berner

NICOLE G. BERNER
SEIU
1800 Massachusetts Avenue, NW
Washington, DC 20036
Tel: 202-730-7383
Email: nicole.berner@seiu.org

*Counsel for Amici Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Nicole G. Berner

NICOLE G. BERNER
SEIU
1800 Massachusetts Avenue, NW
Washington, DC 20036
Tel: 202-730-7383
Email: nicole.berner@seiu.org

*Counsel for Amici Curiae*