No.

IN THE
SUPREME COURT OF THE UNITED STATES

HOME CARE ASSOCIATION OF AMERICA, *et al,*

Petitioners,

v.

DAVID WEIL, *et al*,

Respondents.

On Petition For Writ of Certiorari To The
U.S. Court of Appeals for the District of Columbia
Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents important questions left open by this Court's opinion in *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158 (2007), which upheld the exemption of third-party home care employees from the overtime provisions of the Fair Labor Standards Act (FLSA). The Department of Labor has now issued a rule that for the first time denies third-party employers their right to "avail themselves" of the statutory home care exemptions, presenting the following questions of great public importance to millions of home care providers and elderly and disabled home care consumers:

1. Whether this Court intended in *Coke* to allow the Department to deprive all third-party home care employers (who employ more than 90% of all home care employees) of their statutory right to avail themselves of exemptions to overtime under the FLSA.

2. Whether the D.C. Circuit erred in finding that Congress intended to exclude employees of third party employers from the home care exemptions, thereby conflicting with *Coke's* contrary reading of Congressional intent and creating a conflict in the circuits.

3. Whether the Department's new rule should be found to be unreasonable due to the agency's failure to meaningfully address the relevant factors of unaffordability and lack of adequate state funding of the increased costs of home health care under the new rule.

LIST OF PARTIES TO PROCEEDINGS IN THE COURTS BELOW AND CORPORATE DISCLOSURE STATEMENT

The Petitioners in this case are the Home Care Association of America, the International Franchise Association, and the National Association For Home Care and Hospice, which are all national trade associations. Petitioners are not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6.

Respondents in this case are David Weil, Thomas E. Perez, and the United States Department of Labor.

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OPINIONS BELOW

The ruling of the D.C. Circuit as to which the writ is being sought is reported as *Home Care Association of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015) (App. 1a). The Orders of the district court which were reversed by the D.C. Circuit are reported with the same caption at 76 F. Supp. 3d 138 (D.D.C. 2014) (App. 27a) and 78 F. Supp. 3d 123 (D.D.C. 2015) (App. 48a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The D.C. Circuit's order was issued on August 21, 2015. (App. 1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Section 207 of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207, reads in pertinent part as follows:

"[N]o employer shall employ any of his employees…for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regula rate at which he is employed."

Section 213 of the FLSA, 29 U.S.C. 213, reads in pertinent part as follows:

"(a) The provisions of Section 206…and section 207 of this title shall not apply with respect to – * * *

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or 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 by regulations of the Secretary).

(b) The provisions of section 207 of this title shall not apply with respect to * * *

(21) any employee who is employed in domestic service in a household and who resides in such household;...."

29 U.S.C. 202, note, codifying Sec. 29(b) of the 1974 Amendments to the FLA, Pub. L. No. 93-259, states:

"(b) Notwithstanding subsection (a)[effective date], on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act."

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, reads in pertinent part as follows:

"[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;...."

The challenged rule codified at 29 C.F.R. Part 552 is provided in the appendix to this Petition. (App. 64a).

STATEMENT OF THE CASE

At issue in this Petition is a Department rule that dramatically departs from the plain language and Congressional intent underlying statutory exemptions from the minimum wage and overtime requirements of the FLSA that have been in place since 1974. The exemptions have been a critical factor in maintaining the affordability of home care for millions of elderly and disabled individuals across the country. The district court vacated the Department's new rule upon finding that the Department had "gutted" the statutory exemptions in disregard of Congressional intent. (App. 27a, 43a). As further explained below, the district court action was plainly correct and the court of appeals was wrong to uphold the new rule. The Petition presents issues of substantial importance to the entire home care industry and to the separation of powers between the executive and legislative branches of government.

A. The Department's Challenged Rule

The Department's new rule is entitled "Application of the Fair Labor Standards Act to Domestic Service," 78 Fed. Reg. 60,454 (Oct. 1, 2013). (App. 64a). The new rule states that "[t]hird party employers of employees engaged in companionship services within the meaning of Section 552.6 may not avail themselves of the minimum wage and overtime exemption provided by Section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the service." Section 552.109(a). The new rule further declares that

"[t]hird party employers of employees engaged in live-in domestic service employment within the meaning of Section 552.102 may not avail themselves of the overtime exemption provided by Section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of he family or household using the services." Section 552.109(c).

The statutory exemptions referred to in the new rule were added to the FLSA in the 1974 Amendments.[1] Section 13(a)(15) exempts from the minimum wage and overtime compensation requirements of the Act "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)." Section 13(b)(21) of the Act further exempts from the overtime compensation requirements of the Act "any employee who is employed in domestic service in a household and who resides in such household."

Neither of the statutory provisions cited in the new rule contains any language authorizing the Department to exclude a class of employers from "availing themselves" of any exemption applicable to their employees. To the contrary, both exemptions apply by their plain language to "any" employee performing the specified home care duties. This is the first instance in the history of the Act in which the executive branch has unilaterally excluded a class of employers from availing themselves of *any*

[1] Pub. L. No. 93-259, 88 Stat. 55.

Congressionally mandated exemption to the Act's overtime provisions, other than those employers already excluded by Congress in the Act itself.[2]

Under the FLSA, the obligation of employers to pay covered employees overtime for hours worked over 40 in a week derives exclusively from Section 207 of Title 29; and the obligation of any employer to pay overtime under Section 207 is *cancelled* by Section 213 of Title 29, with respect to "any employee" identified in one of the several dozen exemption provisions of that Section. As stated at the outset of Section 213(a) with respect to any such exempt employee, "the provisions of … section 207 of this title *shall not apply*." (emphasis added). An identical provision appears at the outset of Section 213(b) which again nullifies the provisions of Section 207 as to any employer whose employees are exempted by any provision of Section 213(b).[3]

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[2] Congress has expressly limited the classes of employers whose employees are deemed to be exempt in several other provisions of the Act. *See, e.g.*, 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is amusement or recreational establishment, organized camp, or religious or non-profit education conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air"); 29 U.S.C. 207(i) ("any employee of a retail or service establishment").

[3] The provisions of Section 213(a) also cancel the minimum wage requirements of Section 206 of the Act along with the overtime provisions of Section 207. Section 213(b) only nullifies the overtime requirements of Section 207 and does not affect minimum wages. Only the overtime provisions are pertinent to this case, because "few affected workers, if any, have an hourly rate less than the minimum wage." 78 Fed. Reg. at 60456.

In conflict with the D.C. Circuit, the Tenth Circuit has declared that "Congress created the companionship services exemption in order to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them." *Welding v. Bios Corp.*, 353 F. 3d 1214, 1217 (10th Cir. 2004). *See also McCune v. Oregon Senior Servs. Div.*, 894 F. 2d 1107, 1108-09 (9th Cir. 1990) ("[C]ritical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. * * * [M]any private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization."); *accord Sayler v. Ohio Bureau of Workers' Comp.*, 83 F. 3d 784, 787 (6th Cir. 1996); *Cook v. Diana Hays and Options, Inc.*, 212 F. Appx. 295, 296-7 (5th Cir. 2006).

Numerous statements in the Congressional Record, including the statement of Sen. Johnston cited by this Court in *Coke*, confirm this Congressional intent. *See* 119 Cong. Rec. 24,798 (statement of Sen. Johnston), cited at 551 U.S. at 167. See also 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick); *Id.* at 24,801 (statement of Sen. Burdick).[4] None of these

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[4] During the Senate debate on the 1974 amendments, Senator Dominick approvingly read into the record the following definition of "private household worker:" "The term 'private household workers" includes all workers … in or about a private residence … employed by … a household ***service***

statements, or any others in the legislative history, purport to restrict the issue of affordability solely to caregiving provided by family members as opposed to third party employers.

Neither the Senate Report nor the House Report cited in the appeals court's opinion indicates that Congress intended to exclude from the exemption any caregivers merely because they are employed by third party employers.[5] Also, neither Committee Report purports to exclude individuals who perform companionship services as their "vocation;" such a reference appears only with regard to *non*-exempt domestic service workers. Senate Report at 20; House Report at 36. By contrast, the exemption of babysitters, listed in the same section of the statute, is expressly restricted to those babysitting employees who are "employed on a casual basis." 29 U.S.C. 213(a)(15). As noted by the district court, no such restriction appears in the companionship portion of the exemption. (App. 41a).

Based upon its contemporaneous understanding of legislative intent, the Department issued regulations in 1975 to implement the 1974 FLSA Amendments. 40 Fed. Reg. 7404 (Feb. 20, 1975), codified at 29 C.F.R. Part 552. For the past 40 years, until the new rule, the 1975 regulations exempted all companion caregivers "who are

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business whose services have been requested by a member of the household occupying that residence. 119 Cong. Rec. at 24,796 (emphasis added).

[5] *See* S. Rep. No. 93-690 (1974); H.R. Rep. No. 93-913 (1974).

employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. at 7407 (the previous Section 552.109). The Department declared in 1975, and has reiterated since, that "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Id.* at 7405. *See also* Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005); *see also Long Island Care at Home Ltd. v. Coke*, Brief for the United States as *Amicus Curiae*, Docket No. 06-593 (U.S. 2007).

In 2007, this Court granted certiorari to consider a challenge to the Department's 1975 rules in the case of *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). In that decision, the Court rejected the challenge and upheld the Department's 1975 rule, thereby reaffirming the exempt status of employees of third party employers.[6]

In the *Coke* case, this Court was not asked to review, and did not consider, the question presented by the present Petition. Specifically, the Court did not consider whether the Department is authorized to issue a rule that prevents employers from "availing themselves" of the Act's statutory exemptions of their employees.

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[6] As the Court held: "The question before us is whether, in light of the statute's text and history,…the Department's [1975] regulation is valid and binding. [citation to *Chevron* omitted] We conclude that it is." *Id.* at 158.

Also in the *Coke* decision, the Court specifically held that the FLSA's legislative history did not support the Department's current claim that Congress somehow intended to limit the companionship exemption by excluding those employees who are employed by third parties. Both Evelyn Coke and the Second Circuit Court of Appeals made almost exactly the same arguments regarding the legislative history of the 1974 Amendments that the D.C. Circuit has now relied on in support of the new rule.[7] But this Court *rejected* Coke's (and now the D.C. Circuit's) reading of legislative history, flatly stating: "We do not find these arguments convincing." *Id.*, 127 S. Ct. at 2346.

The *Coke* Court did state that the statutory language at issue "instructs the agency to work out the details" of the broad definitions of employees covered by the exemption. The Court added: "And whether to include workers paid by third parties within the scope of the definitions is one of those details." But because it was not confronted with a rule that purported to exclude third parties

[7] Respondent Coke's Supreme Court filings pointed to the supposed overall purpose of the 1974 Amendments to extend FLSA coverage, and that the FLSA previously covered companionship workers employed by third party employers large enough to qualify as "enterprises." *Id.* at 2346-7. Coke likewise highlighted statements made by some members of Congress distinguishing between "professional domestics" and mere family members or neighbors, as well as language in a different statute (the Social Security Act) which defines "domestic service employment" differently from the FLSA. In addition, numerous amicus briefs asserted that the industry had greatly expanded and been transformed in ways that Congress did not intend.

altogether from "availing themselves" of the statutory exemption, the *Coke* Court neither considered nor authorized such a rule as is presented in the present case.[8]

As noted by the district court, Congress has amended the FLSA on numerous occasions since the promulgation of the Department's 1975 rules recognizing the exemption of companionship and/or live-in employees of third party employers. *See, e.g.*, Act of Dec. 9, 1999, Pub. L. No. 106-151, § 1, 113 Stat. 1731; Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 2105(a), 110 Stat. 1755, 1929. (App. 43a-44a). Congress has chosen not to amend the home care exemptions during that time period and has otherwise expressed no disagreement with the Department's previous longstanding interpretation of either the companionship or live-in statutory exemptions.

In addition, since the *Coke* ruling in 2007, Congress has specifically considered and rejected legislation seeking to overrule this Court's decision by excluding third party employers from the FLSA home care exemptions. *See* "The Fair Home Health Care Act of 2007, H.R. 3582 and S. 2062 (110th Cong. 2007); "The Direct Care Job Quality Improvement Act of 2011," H.R. 2341 and S. 1273 (112th Cong. 2011); and "The Direct Care Workforce Empowerment Act of 2013," H.R. 5902 and S. 3696

[8] The Court posed, but did not answer, a series of questions about the possible scope of the companionship exemption. 511 U.S. at 167. The only question that the Court answered was whether the Department rightly included third party employees within the coverage of the exemption in the current rule. The Court answered that question in the affirmative. *Id.*

(113th Cong. 2013). As pointed out by the district court, none of these bills had sufficient Congressional support to reach a vote on the floor of either house. (App. 44a).

Notwithstanding the above described judicial and legislative endorsement of the 1975 rules as being consistent with the 1974 FLSA amendments, the Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on December 27, 2011, 76 Fed. Reg. 81190 (Dec. 27, 2011), proposing to fundamentally change the longstanding exemption rules. Following public comment on the proposed exclusion of third party employers, the Department published its final rule in October 2013, with an effective date of January 1, 2015. The new rule relied on essentially the same grounds that this Court had so recently rejected in *Coke*, *i.e.*, the erroneous claim that Congress did not intend to exempt employees of such third party employers from the coverage of the Act. *Id*. at 60455, 60482. (App. 73a-74a).

The rule was (and is) opposed not only by the home care industry, but also by representatives of millions of disabled consumers of home care services who believe (correctly) that the new rule will make such services less affordable to those in need. State Medicaid directors also informed the Department that funds are not available to accommodate the increased costs associated with the new rule, further jeopardizing home care services for those unable to afford them. These and other comments provided detailed and specific evidence establishing that the most likely result of the proposed rule would be

increased institutionalization of elderly and infirm individuals, and/or more expensive, lower quality home care, exactly the opposite of what Congress intended when it passed the statutory exemptions.

B. Proceedings Before the District Court and Court of Appeals

As noted above, the new rule was originally scheduled to go into effect on January 1, 2015. Petitioners filed a complaint against the new rule in June 2014, challenging both the third party employer exclusion of Section 552.109 and the definitional exclusion of most "care" functions from the definition of companionship in Section 552.6.

In October 2014, while cross-motions for summary judgment were pending before the district court, the Department issued an announcement in the Federal Register that, due to serious concerns expressed by Medicaid Directors and others regarding the lack of readiness to implement the new rule, the Department would not seek to enforce the rule for six months beyond the rule's effective date. But the Department refused to delay the effective date of the new Rule, leaving employers exposed to private litigation. 79 Fed. Reg. 60,974-75 (App. 33a, n.6).

The district court proceeded to rule on the third party employer issue on December 22, 2014, granting Plaintiffs' motion and vacating Section 552.109 of the new Rule. (App. 45a). The district court agreed with the Petitioners that once the Department filled the "definitional gaps" in the statute as to the employee services covered by the

exemptions, the plain language and legislative history of the FLSA amendments prohibited the Department from excluding employers from "availing themselves" of the exemptions. (*Id.*).

The district court further held that this Court's *Coke* decision had found the Department's longstanding third-party employment rule to be "valid and binding" and that the Court had not considered the question presented by the present case:

> The Supreme Court did not consider the question with which I am presented by this new rule: whether the Department is authorized to craft a rule which prevents employers from "availing themselves" of the Act's statutory exemptions of their employees in a manner inconsistent with the plain language of Section 213? To the extent the Supreme Court analyzed the statutory language of the exemption (rather than how different regulations interacted with one another), the Court focused on the Department's authority to define statutory terms, which is not the method by which the Department promulgated the new third-party employer regulation here.

(*Id*. at App. 42a). For each of the foregoing reasons, as more fully set forth in the court's opinion, the district court found that the Department's exclusion of employers from availing themselves of the Act's

statutory exemption of their employees violated the plain language and legislative intent underlying both of the statutory exemptions, and vacated Section 552.109 of the Rule.

Following issuance of the district court's ruling on the third party employer issue, Petitioners filed an emergency motion to enjoin enforcement of the redefinition of companionship services contained in Section 552.6 of the new Rule. Section 552.6 was still scheduled to go into effect on January 1, 2015 and had not yet been addressed by the court. The district court issued a temporary restraining order against implementing Section 552.6 on December 31, 2014 and, following further briefing and argument, granted summary judgment vacating the companionship redefinition as well on January 14, 2015. (App.48a).

On appeal by the Department, the D.C. Circuit reversed. (App. 1a). The appeals court held that the Petitioners' (and the district court's) contention that the FLSA does not delegate to the Department the authority to exclude a class of employers from access to the Act's exemptions is "foreclosed by the Supreme Court's decision in *Coke*." (*Id*. at 12a). According to the D.C. Circuit, this Court rejected "arguments that the statutory text compels a result in either direction," leaving the Department "with the power to fill … gaps through rules and regulations…." (*Id*. at 13a). Giving deference to the Department at *Chevron* Step II, the appeals court found that the Department's exclusion of third party employers from availing themselves of the exemption of their employees was not arbitrary or capricious and

should therefore be upheld. (*Id.* at 18a-19a). In reaching this conclusion, the court of appeals relied on findings of Congressional intent that this Court expressly rejected in the *Coke* case. (*Id.*)[9]

On September 18, 2015, The D.C. Circuit refused to stay its mandate pending the filing of this Petition. The Chief Justice denied an application for emergency stay on October 6, 2015. Docket No. 15A326.

REASONS FOR GRANTING THE WRIT

This Court has already found that the question of the exempt status of home care workers under the FLSA presents an issue of great public importance, having granted certiorari in order to uphold the exemption of such workers in the *Coke* case. 551 U.S. at 158. The Department's new rule not only achieves the opposite result from that upheld by *Coke*, but does so by trampling on the statutory rights of employers to avail themselves of the FLSA exemptions mandated by Congress, all to the detriment of millions of elderly and disabled

[9] Based upon its findings upholding the Department's exclusion of third party employers from availing themselves of the statutory exemptions, the D.C. Circuit found that the Petitioners lacked standing to challenge the Department's changes to the definition of companionship services in Section 552.6. The appeals court therefore reversed the district court's order vacating that additional section of the new rule without reaching its merits. (App.25a-26a). Petitioners continue to challenge the legality of the changes to section 552.6, and upon this Court's review and reversal of the appeals court's findings on the third-party issue, Petitioners seek a remand to the D.C. Circuit for consideration on the merits of the district court's order vacating the changes to Section 552.6.

home care consumers. These are certainly issues of great public importance that merit review by this Court.

In the 77-year history of the FLSA, the Department has never before been allowed to unilaterally exclude an entire class of employers from "availing themselves" of an exemption of their employees mandated by Congress. That is what has occurred here. This Court's review is required to prevent the Executive Branch from usurping Congress's authority to exempt third party employers from paying overtime to home care workers, where Congress has chosen by its plain language to give higher priority to maintaining the affordability of home care.

In addition, contrary to the D.C. Circuit, the statutory exemption of "any" employees performing companionship or live-in home care precludes a rule that excludes all employees of third-party employers. This Court did not address such a rule in *Coke*, but to the extent that the D.C. Circuit has relied on *dicta* in the Court's opinion to support the Department's new rule here, the Court should grant review in order to clarify or overrule such *dicta*, in order to correct the appeals court's misreading of the plain language of the Act.

As further discussed below, even if the D.C. Circuit were correct that the Department's new rule is not foreclosed by the plain language of the FLSA, review and reversal by this Court would still be called for under *Chevron Step II*, because the new

rule fails this Court's tests of reasonableness under its holdings in *State Farm* and *Michigan v. EPA*.[10]

First, the Department, supported by the D.C. Circuit, improperly declared that Congress intended by its 1974 amendments not just to leave a "gap" in the definition of covered home care workers, but also to *compel* the exclusion of third-party employees from the exemptions. (App. 18a-19a). This erroneous assessment of Congress's intent conflicts directly with *Coke* and creates a conflict with findings of the Tenth, Ninth, Sixth, and Fifth circuits, all of which have held that Congress was primarily concerned with maintaining the affordability of home health care, not with excluding employees of third party employers from providing such care.

Second, the D.C. Circuit and the Department failed to give adequate consideration to the relevant factor of the cost of the new rule, as required most recently by this Court in *Michigan v. EPA*. In particular, the Department and the court of appeals failed adequately to address the unavailability of government funding sources (primarily Medicaid) to handle the increased costs resulting from the new rule. Without adequate government funding sources, the Department's reversal of 40 years of policy exempting third-party employees from overtime will inevitably cause elderly and disabled consumers of home health to lose access to such services. Absent review and reversal by this Court, the new rule will have a severely disruptive impact on the home care

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[10] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983); *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

industry and the millions of consumers who rely on the FLSA exemptions to afford home care services.

I. This Court's Review Is Required To Resolve Conflicts Between The D.C. Circuit's Decision And This Court's Ruling in *Coke*, Which Will Otherwise Result In Unprecedented Expansion Of Executive Power To Rewrite The FLSA.

Congress declared at the outset of Section 213 that the exemption provisions of the FLSA cancel any obligation of employers to pay overtime under Section 207. The appeals court never addressed this plain language, claiming erroneously that this Court's *Coke* decision "foreclosed" any reliance by Petitioners on the plain language test of *Chevron* Step I. But the only "plain language" issue in *Coke* was whether the Department was permitted to define employees of third-party employers as being covered by the exemption, which the *Coke* Court approved. The Department's new rule achieves the opposite result, not by redefining exempt employees, but by an entirely different means: denying *employers* the exercise of their statutory rights to access FLSA exemptions.[11]

This Court has previously held that agencies are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomm. Corp. v. Am. Tel.*

[11] As noted above, this is the first case in which any court has allowed the Department unilaterally to prevent any class of employers from availing themselves of access to any statutory exemption that otherwise applies to their employees.

& Tel. Co., 512 U.S. 218, 231 n.4 (1994). In conflict with *MCI,* the appeals court ignored the unlawful method adopted by the Department to achieve its announced objective of narrowing the coverage of the home care exemptions. This was clear error.[12]

Congress has never delegated to the Department the authority to deny employers their rights to avail themselves of statutory exemptions that apply to their employees. Specifically with regard to the home care industry, Congress has never authorized the Department to exclude more than 90 percent of employers in the home care industry from availing themselves of exemptions covering "any" of their home care employees. For that reason, *Chevron* Step I applies to this case, as the district court correctly held.

To hold otherwise, as the D.C. Circuit has done, renders limitless the ability of the Department to rewrite the FLSA's exemptions. What, for example, is to prevent the Department from declaring that selected categories of employers can no longer "avail themselves" of the "white collar" exemptions (section 213(a)(1)) such as presently cover all executive, administrative, professional, and other employees who meet the salary and job duties tests? What is to prevent the Department from excluding any class of employers from availing

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[12] The district court got it right: "[T]he [*Coke*] Court focused on the Department's authority to define statutory terms, which is not the method by which the Department promulgated the new third-party employer regulation here. * * * [The *Coke* decision] does not grant the Department judicial cover for what can only be characterized as a wholesale arrogation of Congress's authority in this area." (App. 43a).

themselves of the dozens of exemptions carefully crafted by Congress? The point is that regardless of whether the Department is or is not entitled to use its definitional authority to narrow the categories of *employees* who are eligible for exemption under the FLSA home care exemptions, the Department cannot be permitted to arbitrarily exclude an entire classification of *employers* from availing themselves of access to exemptions that by their terms apply to their employees.

Both the Department and the D.C. Circuit relied heavily on this Court's *dicta* in *Coke*, in which the opinion asked a series of questions that Congress left open in the statutory exemption of companionship services. (App. 16a). But the *Coke* Court's discussion of the "gaps" in the statutory language, in the limited circumstances of that case, does not bear the weight ascribed to it by the appeals court (and the Department).

Thus, in upholding the previous rule, the Court declared that the statutory language "instructs the agency to work out the details" of the broad definitions of employees covered by the exemption. 551 U.S. at 167. The Court added: "And whether to include workers paid by third parties within the scope of the definitions is one of those details." *Id*. The Court further asked a series of rhetorical questions as to what options the Department could consider in defining the scope of covered employees. *Id.*[13] The Court nevertheless

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[13] The Court asked: "Should the FLSA cover *all* companionship workers paid by third parties? … Should it cover *some* such

remained focused on upholding the exemption of employees under the statute; the Court did not consider or authorize the Department to exclude *employers* from availing themselves of their statutory rights to exemptions that otherwise apply to their employees.[14]

To the extent that the *Coke dicta* is found to support the D.C. Circuit's opinion, then this Court should grant review in order to reconsider and/or overrule that *dicta*, which was unnecessary to the Court's holding. Taken to its extreme, as the D.C. Circuit has done, it is inconsistent with the plain language of the Act, exempting "any employees" performing the exempt job duties, to find that Congress intended to give the Department the discretion to declare that the FLSA should cover "none" of the more than 90% of home care employees who work for third-party employees.

The appeals court further erred in declaring that the Department was not required to "define or delimit" the types of employees covered by the terms of Section 213(a)(15) or 213(b)(21) in order to exclude

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companionship workers…? Should it cover *none*?" *Id.* at 167-68, quoted by the appeals court at App. 16a.

[14] For the same reason, the appeals court erred in asserting that this Court in *Coke* considered and rejected Petitioners' *Chevron* Step I argument, based on the Court's failure to adopt the reasoning of an *amicus* brief filed by one of the present Petitioners in that case. (App. 12a). No party to the *Coke* case argued one way or the other about the Department's authority to exclude third party employers from availing themselves of the statutory exemption, because no such rule had been enacted or even suggested by the Department at that time.

third party employers from availing themselves of access to the exemptions, citing the general rulemaking authority provided by Section 29(b) of the Act. (App. 16a). Here again, the appeals court's opinion conflicts with the language of the Court's *Coke* opinion, which expressly referred to the Department's "definitional authority" as the basis for its holding. 551 U.S. at 167.

In any event, this Court has previously refused to allow the Department to use its general rulemaking authority to override the express statutory provisions of the laws the Department enforces. Thus, in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002), the Court rejected the Department's claim that its general rulemaking authority to carry out the purposes of the Family and Medical Leave Act somehow authorized the Department to issue a rule penalizing employers in a manner inconsistent with the statute. *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (forbidding an agency from exercising its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law."). As this Court has recently held, "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014).[15]

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[15] For similar reasons, there is no legal support for the Department's denial of third party access to the statutory exemption of live-in caregivers under Section 213(b)(21). The D.C. Circuit's reliance on Section 29 as the sole basis for violating the plain language of this FLSA exemption again conflicts with this Court's holding in *Ragsdale*.

The D.C. Circuit compounded its conflict with this Court's holdings by rejecting application of the Congressional reenactment doctrine as "persuasive evidence" of legislative intent. (App. 16a-17a). *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), quoting *NLRB v. Bell Aerospace v. NLRB*, 416 U.S.267, 274-75 (1974). *See also Sebelius v. Auburn Regional Med. Ctr.,* 133 S. Ct. 817, 827 (2013). Contrary to the appeals court's opinion, this Court in *Coke* did not need to address (and so did not address) Congressional acquiescence to the Department's previous home care rule, in order to hold that the previous rule was valid and binding.[16]

Ultimately, only this Court can definitively explain what it meant to hold in *Coke* and whether it intended to "foreclose" consideration of the plain language of the FLSA in judicial review of the Department's new and completely different rule. Given the importance of this issue to millions of disabled home care recipients and the industry as a whole, the Court should grant the present Petition in order to resolve this unanswered question.

[16] The D.C. Circuit placed undue reliance on this Court's holding in *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187). (App. 17a). That decision dealt only with a failed legislative proposal that was not combined with decades of Congressional acquiescence to a longstanding agency interpretation.

II. The D.C. Circuit's Mistaken Findings In Support Of The New Rule Under *Chevron* Step II Directly Conflict With This Court's *Coke* Decision And With Other Circuit Courts of Appeal.

Even if the D.C. Circuit were correct in its holding that the Department's new rule does not exceed the agency's statutory authority under the plain language of the FLSA, review and reversal by this Court would still be called for in order to resolve the conflicts created by the appeals court's *Chevron* Step II analysis. In finding the Department's Rule to be "reasonable" under the Act, the D.C. Circuit (like the Department) relied heavily on findings of Congressional intent that this Court rejected in *Coke*. (App. 18a-19a). The appeals court's findings also conflict with the holdings of several different circuits on this issue.

Thus, according to the appeals court, it was "reasonable" for the Department to find that "the 1974 Amendments intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service;" exempting only "casual employees who are not regular bread-winners or responsible for their families' support." (App. 19a-20a, quoting from the Department's new rule at 78 Fed. Reg. at 60,454 and 60,481).[17]

[17] The Department actually cited the legislative history of the 1974 Amendments 25 times in the Final Rule, indicating throughout that its erroneous view of Congressional intent was the principal motivating factor in promulgating the new Rule.

This Court squarely rejected in *Coke* the same interpretation of Congressional intent when it was advanced by the Second Circuit and by Evelyn Coke.[18] In response to these same arguments in the *Coke* case, this Court properly declared: "We do not find these arguments convincing." 551 U.S. at 167. The Court observed that the FLSA did not cover all third-party-paid workers in 1974, prior to the Amendments. The Court further cited Senator Johnston's expression of concern that failing to exempt companionship workers "might make such services so expensive that some people would be forced to leave the work force in order to take care of aged or infirm parents." *Id.*, citing 119 Cong. Rec. 24798.[19]

The D.C. Circuit's opinion similarly creates a conflict within the circuits as to Congress' intent in the home care exemptions. As noted above, the Tenth Circuit has held that "Congress created the companionship services exemption in order to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own

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[18] *See Coke v. Long Island Care At Home, LTD*, 376 F.3d 118, 133 (2d Cir. 2004), *rev'd,* 551 U.S. at 167. Respondent Coke similarly claimed that the 1974 Amendments sought to extend FLSA coverage to third-party employees, and she relied on the same legislative comments highlighted by the D.C. Circuit. *See* Supreme Court Brief of Respondent at 5, cited by this Court at 511 U.S. at 167.

[19] As further noted by the district court (App. 41a), Congress's omission of the word "casual" as a modifier of companionship services immediately after applying that term to limit exempt babysitters belies the claim in the appeals court's opinion that Congress intended to limit the companionship exemption only to "casual elder sitters." (App. 19a).

private homes as opposed to institutionalizing them." *Welding v. Bios Corp.*, 353 F. 3d 1214, 1217 (10th Cir. 2004). As the Ninth Circuit likewise held in *McCune v. Oregon Senior Servs. Div.*, 894 F. 2d 1107, 1108-09 (9th Cir. 1990): "[C]ritical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. * * * [T]he only alternative for these individuals may be institutionalization." *See also Sayler v. Ohio Bureau of Workers' Comp.*, 83 F. 3d 784, 787 (6th Cir. 1996); *Cook v. Diana Hays and Options, Inc.*, 212 F. Appx., 295, 296-7 (5th Cir. 2006).

Thus, in focusing on the supposed desire of Congress to expand coverage of domestic workers who were not engaged in home health care, the D.C. Circuit improperly gave short shrift to the core reason why Congress exempted home health care workers from such coverage in the first place, *i.e.*, affordability. It is undeniable that the new rule will increase the cost of home health care coverage and that many elderly and disabled workers will not be able to afford home health care services under the new rule.[20]

Also contrary to the appeals court ruling, this Court was made aware of changes to the home care industry that allegedly occurred between 1974 and

[20] In this regard, the D.C. Circuit ignored the briefs of multiple *amici* representing the disabled community, who spoke from personal experience of their need to keep the overtime exemption in place in order to retain access to vital home care services. *See Amici* Brief to the D.C. Circuit filed by ADAPT and Council for Independent Living, Circuit Docket No. 15-5018.

the Court's 2007 decision in *Coke*. Yet unlike the D.C. Circuit, this Court properly found that Congress was primarily interested in exempting home care workers from overtime so as to maintain affordability of this vital service for elderly and disabled consumers. In the absence of any material change to companionship job duties since the Court's decision in *Coke*, no rational basis exists for the radical and expensive changes to home care that are compelled by the Department's new rule.

The D.C. Circuit's opinion also again conflicted with this Court's previous holdings that the Congressional reenactment doctrine is "persuasive evidence" of legislative intent. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), quoting *NLRB v. Bell Aerospace v. NLRB*, 416 U.S.267, 274-75 (1974). *See also Sebelius v. Auburn Regional Med. Ctr.,* 133 S. Ct. 817, 827 (2013). As noted above, the Department's 1975 regulation applying the home care exemptions to third-party employees was a "long standing, contemporaneous construction of a statute" (*Id.*), that Congress chose to leave in place while repeatedly re-enacting Section 213 over the past four decades. *See* citations above. Under such circumstances, it is the settled law of this Court that Congressional acquiescence is "persuasive evidence that the [previous] interpretation is the one intended by Congress." *Commodity Futures*, at 846.

The D.C. Circuit only addressed the Congressional reenactment doctrine (improperly) in connection with the appeals court's analysis of *Chevron Step I*, discussed above. (App. 16a). The

D.C. Circuit failed entirely to consider the doctrine in connection with its *Chevron Step II* holding that the Department "reasonably" believed Congress affirmatively intended to exclude third-party employees in the manner accomplished by the new rule. (App. 18a-19a). A substantial question exists, therefore, as to whether Congress's failure to overturn the Department's previous rule both *before and after* the *Coke* decision should be deemed to be persuasive evidence that Congress did *not* intend to exclude third-party employers from availing themselves of the statutory exemptions, contrary to the findings of the Department and the D.C. Circuit.

In addition to improperly relying on the foregoing impermissible interpretation of Congressional intent, the D.C. Circuit and the Department also failed to meaningfully consider an important aspect of the problem: the lack of affordability of the new rule, particularly for those businesses and consumers relying on inadequate funding under state Medicaid programs to pay the increased costs imposed by the new rule, noted above. *See Michigan v. EPA*, 135 S. Ct. at 2706 (overturning a rule under *Chevron Step II* for failure of the agency to consider the "relevant factor" of cost).

Here, the Department was made aware of the fact that many states do not have Medicaid funds available to fund the increased costs that are sure to result from the new rule. So was the D.C. Circuit. *See Amici* Brief to the D.C. Circuit by Kansas and Other State Agencies, Docket No. 15-5018 ("[T]he Department's new regulations expose States to an

unfunded liability for overtime wages under the FLSA;" and further noting: "In Kansas alone, almost 11,000 individuals rely upon a Medicaid-funded program to provide the care they need to live independently. The new regulations, however, threaten the operational viability of this program, both in letter and spirit."). The Department gave no meaningful consideration to the problem, and the D.C. Circuit ignored it altogether.

Instead, the appeals court accepted the Department's claim that limited experience under recent state laws justified the belief that increased rates of institutionalization will not result from the new rule's increased costs to consumers. The Department incorrectly exaggerated the number of state laws that currently treat third party caregivers as exempt from overtime.[21] The appeals court then faulted the Petitioners for failing to identify harm from statistical data that does not yet exist due to the small sample size. (App. 24a).

Contrary to the appeals court, it is unreasonable to believe that Congress went to the trouble of passing the companionship and live-in exemptions with the intent to have the Department eviscerate them by excluding more than 90 percent

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[21] It is simply untrue that fifteen states currently "provide minimum wage and overtime protections to all or most third party-employed home care workers". (App. 24a). Also contrary to the appeals court (*id.*), opponents of the rule testified to specific adverse impacts of the very few state laws that have removed the exemptions. *See, e.g.*, Statement of Wynn Esterline Before the House Committee on Education and the Workforce, March 20, 2012, attached as Exhibit to A.R. Comments of Husch Blackwell dated March 21, 2012.

of all home care providers from availing themselves of the exemptions. Nor does it make sense that Congress intended to achieve its primary goal of maintaining affordability of home care for the elderly and disabled by allowing the Department to increase the costs of such care at a time when state funding mechanisms are inadequate to meet the higher costs that will result from the new rule.

Neither the appeals court nor the Department explained why home care givers who perform exactly the same job duties, whether they are viewed as "breadwinners" or as "casual," should be treated as exempt when employed by the direct consumer but non-exempt when employed by a third party. The work performed is identical and Congress intended the exemption to apply equally to both. It cannot be a "permissible" construction of the FLSA exemptions to make home care unaffordable to 90 percent of the elderly and disabled individuals who need such care, solely because they obtain their care from someone hired outside the immediate family. If the "problem" identified by the Department is that home care providers have become overly "professional," then the proper remedy would be to impose restrictions on such professionalism, regardless of who the employer is.

Unlike the appeals court, the district court correctly understood that the Department's new Rule has given undue to weight to only "one side of the coin," *i.e.*, caregiver wages, which the Department has chosen to increase for those employers who seek to provide home care more than 40 hours per week, even though such cost increases

will adversely impact the neediest home health care consumers. (App. 41a). In conflict with other circuits, the D.C. Circuit's opinion will allow the Department to achieve its improper goal of narrowing the statutory home care exemptions, defying the will of Congress and disrupting a vital industry benefitting millions of elderly and disabled consumers, unless this Court intervenes by granting the present Petition and reversing the D.C. Circuit's decision.

CONCLUSION

The decision of the Court of Appeals directly conflicts with rulings of this Court and other circuits on issues of great public importance. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

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