IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION AND OPPOSITION TO DEFENDANTS' MOTION

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I. CONTRARY TO THE DEPARTMENT'S OPPOSITION, THE NEW RULE REMAINS IN CONFLICT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE FLSA.[1]

A. The Department's Opposition Fails To Reconcile The New Rule With The Plain Language Of The FLSA.

Plaintiffs contended in their opening brief that the Department's new Rule is in direct conflict with the plain language of the FLSA. (Pl. Br. at 11-13). To Plaintiffs' knowledge, the Department has never before attempted by regulation to exclude a category of employers, who employ as many as 98% of the employees covered by an FLSA exemption, from "availing themselves" of the statutory exemption mandated by the Act.[2] The Department's Opposition cites no precedent for its attempt to regulate employers in this manner under the FLSA, with regard to *any* of the Act's exemptions. The method by which the Department is proceeding to regulate employers in the new Rule therefore appears to be unprecedented in the 76-year history of the FLSA, a fact which should cast further doubt on the Department's claim of statutory authorization for its new Rule. The net result is to defy Congress's intent to ensure that working families in need of companionship services will be able to obtain them, "a concern that has nothing to do with the source of the companions' employment." Wage and Hour Advisory Memorandum 2005-1 (Dec. 1, 2005), http://www.dol.gov/whd/FieldBulletins/index.thm.

As explained in Plaintiffs' opening brief, the sole obligation of employers to pay overtime for hours worked over 40 in a week by any of their employees derives from 29 U.S.C. §

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[1] For ease of reference, all discussion of the "Department's Opposition" in this Brief will equally refer to and contest the Department's consolidated motion(s) for dismissal and/or summary judgment.

[2] As noted in Plaintiffs' opening brief and not contested in the Department's Opposition, the 98% figure comes from the Department itself, in its Brief as *Amicus Curiae* to the Supreme Court in Long Island Care at Home ltd. v. Coke, at 24 (2007).

207. The opening lines of Section 213 plainly state that Section 207's provisions "shall not apply" with respect to "any employee" listed in the exemption provisions of Section 213. The Department therefore lacks any authority under Section 207 to impose overtime obligations on employers whose employees fall within the exemption provisions of Section 213; yet that is exactly what the new Rule purports to do.

In response, the Department's Opposition arbitrarily dismisses the plain language of the Act as mere "semantics," claiming that it does not matter by what means the Department achieves its objective of causing third party employees to receive overtime pay under the Act. (Def. Opp. at 17). But the unprecedented means by which the Department has chosen to regulate employers under the new Rule, *i.e.*, preventing third party employers from "availing themselves" of a Congressionally mandated exemption from overtime, in effect rewrites the entire Congressional scheme underlying the FLSA. If the Department is allowed to start choosing categories of employers who can be prevented from availing themselves of the Act's exemptions without Congressional authorization, the careful balance of exemptions established by Congress under the Act will be destabilized, and the authority of the Department will know no limits. *See Railway Lab. Executives Assn. v. National Mediation Board*, 29 F. 3d 655, 671 (D.C. Cir. 1994) (holding that allowing agencies to "enjoy virtually limitless hegemony" is "a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well"); *see also Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134, 139 (D.C. Cir. 2006) (holding that an agency is "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.").[3]

[3] The sole case support offered by the Department for its novel "semantics" defense is the utterly inapposite district court decision in *Coalition for Common Sense in Govt. Procurement v. U.S.*, 821 F. Supp. 2d 275, 287 (D.D.C. 2011). There, in analyzing a Defense Department rule about

Here, instead of issuing a regulation that defines or delimits the *employees* covered by the exemptions of Section 213(a) or (b), which is the only statutory authority the Department claims to be implementing, the Department has instead issued a regulation that imposes new overtime obligations on *employers* in a manner that the Act does not permit. Thus, contrary to the Department's claim that the new Rule is "not substantively different from the current regulations" (Dept. Opp. at 17), the difference between the old and new rules is stark and instructive. The Department's original rule, as set forth in 29 C.F.R. 552.109, focused on the employees and identified which types of employees are covered by the exemption, just as the Act calls for in its statutory text. The new Rule is focused entirely on *employers*, declaring for the first time that third party employers of employees who are otherwise exempt from overtime under Sections 13(a)(15) and 13(b)(21) of the Act "may not avail themselves of" those exemptions. The old rule was a permissible regulation of employees under the Act; but the new Rule is an impermissible regulation of employers that is prohibited by the Act's plain language.

The Department appears to have adopted this novel regulatory approach in order to avoid the appearance of conflict with another element of plain language in the exemptions themselves: the statutory mandate that "any employee" who engages in the job duties described in the exemption provisions is supposed to be exempt. The Department was well aware that it had previously declared that this plain language precluded exclusion of employees of third parties from the exemptions coverage. *See* 78 Fed. Reg. at 60482, citing the Department's own brief to the U.S. Supreme Court in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) and the

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refunds to drug manufacturers in excess of federal pricing standards under *Chevron* Step Two (not Step One as is being argued here), the district court made a passing comment about semantics in a context entirely separate from any analysis of plain statutory language under *Chevron*. The Department cites no case allowing it to ignore plain statutory language under the guise of "semantics," and there is none.

Wage and Hour Advisory Memorandum, 2005-1 (Dec. 1, 2005), http://www.dol.gov/whd/FieldBulletins/index.htm. Indeed, for the past four decades, the Department has recognized that the phrase "any employee" in the statutory exemption is plain language that does not allow exclusion of any employees based solely on the identity of their employers. *Id*.

However, by adopting an unprecedented regulatory means of avoiding conflict with the plain language of the home care and live-in exemptions, *i.e.*, by attempting to regulate employers instead of employees, the Department has compounded its violation of the plain language of the FLSA. Not only has the Department disregarded the Congressional mandate that "any employee" meeting the job duties of the home care and live-in exemptions be exempt from overtime; but the Department has also arrogated unprecedented authority unto itself to impose overtime obligations on employers in defiance of the plain language of Sections 207 and 213.[4]

It is significant that in the preamble to the new Rule, the Department offered no explanation for the new Rule's focus on employers rather than employees. The Department's Opposition attempts a *post hoc* explanation, claiming that the new Rule is worded as it is "for the sake of clarity for the regulated community" (Dept. Opp. at 17). This explanation is entitled to no consideration, both because it is entirely *post hoc*,[5] and because it is specious. No one

[4] The Department's Opposition, at 24, cites *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993), for the principle that the court should "not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law…." Yet it is the Department that has ignored this principle by its attempt to take unto itself the authority to decide which employers may avail themselves of the exemptions in the Act. As explained above, the provisions of the "whole law" of the FLSA, including Sections 207 and 213 in their entirety, establish that Congress retained to itself the power to limit access of categories of employers to the exemptions in the Act.

[5] It is well settled that agency rules must be reviewed solely on the basis of the explanations that the agency itself has provided in the rulemaking, not the *post hoc* rationalizations of agency counsel. *See Hearth, Patio & Barbecue Assn. v. United States Dept. of Energy*, 706 F. 3d 499, 509 (D.C. Cir. 2013) (rejecting explanation of agency counsel not proffered by the agency during

previously claimed that the third party employment aspect of the current rule was confusing or unclear to the regulated community. The only thing "clarified" for the regulated community by the wording of the new Rule is that the Department is violating the plain language of the FLSA.

Equally misguided is the Department's claim that its statutory authority to impose new overtime obligations on third party employers derives from the general rulemaking authority "to prescribe necessary rules, regulations, and orders" with regard to the 1974 amendments to the FLSA. (Dept. Opp. at 15, citing 1974 Amendments § 29(b), 88 Stat. 76). To the contrary, the D.C. Circuit has long held that such general rulemaking authority does not allow any court to presume a delegation of statutory authority to enact specific rules that Congress has not expressly authorized. Plaintiffs cited numerous cases to this effect in their opening brief (Pl. Br. at 9-10), which the Department has failed to acknowledge or distinguish.

Thus, in *Colorado River Indian Tribes*, *supra*, 466 F.3d at 139, the D.C. Circuit expressly held that "general rulemaking authority," although facially broad, "does not mean that the specific rule the agency promulgates is a valid exercise of that authority." (*quoting MCI Telecomm. Corp. v. Am. Tel. & Tel. Co*., 512 U.S. 218, 231, n.4 (1994)). *See also Hearth, Patio & Barbecue v. U.S. Dept. of Energy*, 706 F. 3d 499, 506-7 (D.C. Cir. 2013) ("Congress employed specific statutory mechanisms to circumscribe [the agency's] authority….[The agency] cannot now escape these limits through 'linguistic jujitsu.'").

As further noted in Plaintiffs' opening brief, and again not refuted by the Department, the above referenced cases are part of a long line of authority in the D.C. Circuit adhering to the court's *en banc* refusal to presume a delegation of authority to federal agencies in *Railway Lab. Executives Assn., supra,* 29 F. 3d 655. Most recently, in *National Resources Defense Council v.*

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the rulemaking process); *Consumer Federation of America v. Dept. of Health and Human Services*, 83 F. 3d 1497, 1507 (D.C. Cir. 1996).

EPA, 749 F. 3d 1055, 1064 (D.C. Cir. 2014), the D.C. Circuit reaffirmed this principle: "[T]he suggestion implicit in EPA's argument – that we should 'presume a delegation of power absent an express withholding of such power' – is 'plainly out of keeping with *Chevron*'" (quoting *Railway Labor Executives*).

Previously, in *American Petroleum Institute v. Environmental Protection Agency*, 706 F. 3d 474, 479 (D.C. Cir. 2013), the court struck down a biofuel regulation promulgated under the EPA's broad authority to "make rules necessary to carry out its functions." The court cited its previous holding involving the same parties, *American Petroleum Institute v. EPA (I)*, 52 F. 3d 1113, 1120 (D.C. Cir. 1995), where the court observed: "EPA argues that because Congress has not explicitly limited its authority to promulgate a [requirement], …this court must then defer to its expansive interpretation of the section under *Chevron*'s second step." "[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of such power."

Similarly, in *Echostar Satellite LLC v. Federal Communications Comm'n*, 704 F. 3d 992, 995 (D.C. Cir. 2013), the D.C. Circuit struck down an FCC rule promulgated pursuant to broad powers given by statute to that agency to "adopt regulations to assure the commercial availability" of certain equipment. Citing *Railway Labor Executives*, the court declared the agency rule unlawful because to do otherwise would allow an agency to exercise "omnibus powers limited only by the [agency's] creativity in linking its regulatory actions to the [statutory] goal." *Id*.

The D.C. Circuit relied on *Railway Labor Executives* again in *American Bar Association v. FTC*, 430 F. 3d 457, 468 (D.C. Cir. 2005). There, the appeals court invalidated the FTC's inclusion of the practice of law within the statutory definition of "financial institutions" that the

agency was charged with regulating. There as here, the statute at issue broadly empowered the FTC to "prescribe such regulations as may be necessary to carry out the purposes of the [Act]," and the statute was silent as to exempting attorneys from such regulations. The court nevertheless struck down the rule, holding that Congress could not be presumed to have intended delegation of the power to regulate merely "from the absence of an express withholding of that power." *Id*.

To the same effect are such cases as *American Library Association v. FCC*, 406 F. 3d 689, 708 (D.C. Cir. 2005) ("The [Commission's] position in this case amounts to the bare suggestion that it possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area. We categorically reject that suggestion." (emphasis in original)); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F. 3d 796, 801 (broad general powers did not authorize agency to mandate video description rules); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F. 3d 395, 399; *See also Chamber of Commerce v. NLRB*, 721 F. 3d 152, 159 (4th Cir. 2013).

The point of each of the foregoing appeals court cases is that the Department is entitled to no presumption of authority to exclude employers from availing themselves of a statutory exemption created by Congress. It is the agency's burden to show that Congress in fact delegated authority to the agency to require employers to pay overtime to employees in a manner not expressly enumerated in the statute. The Department has failed to make any such showing here, and the *means* it has selected to achieve its new objective of narrowing the home care employee exemptions of the FLSA, *i.e.*, imposing an unprecedented regulatory barrier against all third party employers, is inconsistent with the Act. For each of these reasons, the new Rule must be set aside.

B. Contrary To The Department's Opposition, The Supreme Court's Holding In *Coke* Supports Plaintiffs' Argument And Does Not Justify The New Rule.

As anticipated in Plaintiffs' opening brief (Pl. Br. at 15-16), the Department's claim of broad authority to exclude third party employers from the Act's home care exemptions relies heavily on *dicta* from the Supreme Court's decision in *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158 (2007). The Department's argument, however, turns on its head the actual holding in the case. As stated at the outset of the Court's opinion: "The question before us is whether, in light of the statute's text and history, … the Department's [current] regulation is valid and binding. We conclude that it is." The Court thus only considered the validity and binding nature of the previous, still-current rule, *i.e.*, the rule that permissibly interpreted the statutory definition of companion employees under Section 213(a)(15). The Court found the current rule to be both "valid and binding."

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 Department. Thus, the Supreme Court in *Coke* was not asked to review, and did not consider, the question presented by the new Rule, which is whether the Department is authorized to issue 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 Sections 207 and 213 of the Act. Nor did the Court even review a rule that redefined the term "any employee" to exclude employees of third party employers from that term's definition. Rather, all of the Court's comments were made in the context of reviewing the regulation that was before it - a regulation that expressly *included* employees of third party employers within the scope of the exemption of employees under 213(a)(15), despite the claim of the respondent in *Coke* that Congress did not intend for third party employees to be exempt.

As Plaintiffs have previously noted, the *Coke* Court rejected the respondent's claim (now adopted by the Department) that Congress did not intend to exempt third party home care employees. In that limited context, the Court declared that the statutory language of that provision "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." Again, by this language, the Court remained focused on the inclusion of third party employees under the statutory exemption; the Court did not consider or state whether it would approve the opposite, *i.e.*, a rule that excludes third party employees from the statutory exemption; and the Court certainly did not consider or authorize the Department to exclude *employers* from availing themselves of a statutory exemption that otherwise applies to their employees.[6]

It is also significant that the *Coke* case did not address at all the exemption for live-in domestic employees in Section 213(b)(21), nor did the Department cite any statutory authorization for excluding employers from availing themselves of this entirely separate exemption of their employees. In an attempt to overcome these deficiencies, the Department's Opposition inappropriately relies on previously un-cited legislative history to justify the exclusion of third party employers from Section 213(b)(21), *i.e.*, a committee report that was not referenced for this purpose anywhere in the new Rule. (Dept. Opp. at 25, citing S. Rep. No. 93-

[6] The Department's reliance on the series of questions posed by the Court about the scope of the companionship exemption is therefore misplaced. (Dept. Opp. at 20). Each question of coverage was directed towards the Department's possible regulation of *employees*, not employers, in keeping with the fact that the Court was reviewing a rule solely regulating the coverage of employees, unlike the presently challenged Rule. And even as to employees, 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. *See* 511 U.S. at 167.

690 at pp. 20-21). Again such *post hoc* rationalizations by agency counsel cannot substitute for the absence of explanation by the agency itself. *Hearth, Patio & Barbecue Assn., supra,* 706 F. 3d at 509.

C. The Department's Opposition Fails To Reconcile The New Rule With The Legislative History Of The FLSA.

Plaintiffs' opening brief showed that the Department's new Rule relied on a view of the FLSA's legislative history that was expressly rejected by the Supreme Court in *Coke*. (Pl. Br. at 13-15).[7] Contrary to the Department's Opposition, Congress expressed no intention to exclude application of the companionship exemption to third party employment. As noted previously, Congressional silence with regard to exclusion of third party employers in Section 213(a)(15) and (b)(21) contrasts sharply with other provisions of Section 213, in which Congress expressly limited the classes of exempt employers.[8] Again, Congress included no similar restriction of the class of employers whose employees are exempt under Section 213(a)(15) or 213(b)(21), a fact which the Department's Opposition fails to address.

The Department's Opposition likewise fails to acknowledge or address the fact that the new Rule, as noted above, would by the Department's own admission exclude as many as 98% of all home care employees from the Act's exemption. *See* U.S. Amicus Curiae Brief in *Coke, at 24*. It defies belief that Congress would have gone to the trouble of creating an exemption for

[7] Contrary to the Department's Opposition, Supreme Court Respondent Evelyn Coke made almost exactly the same arguments regarding the legislative history that the Department is now making in support of the new Rule. The Supreme Court in *Coke* flatly rejected Coke's (and now the Department's) reading of legislative history, stating: "We do not find these arguments convincing." *Id.*, 127 S. Ct. at 2346.

[8] *See, e.g.*, 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is an 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").

home care companions with the intention of excluding the vast majority of such employees from the coverage of the exemption, as the new Rule now dictates.

The Department's Opposition also ignores the expressed intent of Congress to exempt home care workers from overtime in order to keep such services affordable for the families of the elderly and disabled, regardless of the identity of the employer of the service providers. The Department's Opposition does not address any of the statements in the Congressional Record cited in Plaintiffs' brief that establish this Congressional intent. *See* 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick); *Id*. at 24,798 (statement of Sen. Johnston); *Id*. at 24,801 (statement of Sen. Burdick). Nor does the Department's Opposition explain how the new Rule is consistent with the Congressional concern expressed over increased costs. *See Welding v. Bios Corp.*, 353 F. 3d 1214, 1217 (10th Cir. 2004) (holding that Congress created the companionship 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.").

As the Department itself recognized in its 2005 Advisory Memorandum, applying the exemption to employees of third parties "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Id*. at 2. As further stated therein, the exemption is "naturally read to apply based on the activities of the employee, not the identity of the employer." *Id*. Beyond that the Department previously recognized that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. As stated in the 2005 Memorandum: "That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party." [ ] "Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern

that has nothing to do with the source of the companions' employment." *Id*. The Department's selective view of the legislative history of the 1974 amendments further ignores the Congressional statements indicating Congress's focus on the nature of the employees' activities, rather than their employer.[9]

Finally, the Department's Opposition gives short shrift to the numerous holdings of the Supreme Court and the D.C. Circuit finding significance in the fact that Congress has amended the FLSA without overruling the Department's previous interpretation of the home care exemptions at any time during the past four decades. Contrary to the Department's Opposition, at 26, this is not a case where the Court is asked only to consider mere Congressional silence as an indication of legislative intent. Rather, Congress has repeatedly *considered and rejected* legislation to change the Department's companion overtime rules. *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 (113th Cong. 2013). Meanwhile, Congress has repeatedly amended the FLSA to modify other exemptions, without changing the Department's exemption of third party employers of home care workers.

The Department's Opposition has failed to distinguish or meaningfully address the longstanding case authority holding that Congressional re-enactment of a statute without pertinent change to an agency's longstanding interpretation of it is "persuasive evidence that the interpretation is the one intended by Congress." *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); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Altman v. SEC*, 666 F. 3d

[9] *See, e.g.*, H.R. Rep. No. 93-913, at 33 (1974); S. Rep. No. 93-690, at 20 (1974); 119 Cong. Rec. 24,801 (1973); H.R. Conf. Rep. No. 93-413, at 27 (1973).

1322, 1326 (D.C. Cir. 2011); *Creekstone Farms Premium Beef, LLC v. Department of Agriculture*, 539 F. 3d 492 (D.C. Cir. 2008). For this reason as well, contrary to the Department's Opposition, the Department's new Rule must be found to be inconsistent with legislative intent, and the new Rule must be set aside.[10]

II. THE DEPARTMENT'S OPPOSITION FAILS TO PROVIDE ANY ADEQUATE JUSTIFICATION FOR THE DEPARTMENT'S REVERSAL OF LONGSTANDING ENFORCEMENT OF THE HOME CARE AND LIVE-IN EXEMPTIONS.

As further contended in Plaintiffs' opening brief, even if the new Rule could be found not to be inconsistent with the plain language and legislative intent underlying the FLSA, the Rule should still be set aside under the arbitrary and capricious standard of the APA. *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 41 (1983); and *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 503 (2009). (Pl. Br. at 17-21). In response, the Department's Opposition improperly shirks its burden to justify the abrupt change in the Department's enforcement of the FLSA's home care and live-in exemptions. (Opp. Br. at 27-28).

Contrary to the Department's Opposition, the Supreme Court held in *Fox TV* that agencies must meet a heightened standard of justification for changing their position where the reversal "rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interest that must be taken into account. In such cases, … a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." 556 U.S. at 515-16. In the present case, the

[10] For the same reasons, the Department's construction of the statutory language and legislative intent as somehow precluding third party employers from availing themselves of the home care and live-in exemptions is not a permissible construction under *Chevron* Step II, contrary to the Department's Opposition, at 21-24.

Department's reversal of policy certainly rests upon factual findings regarding Congressional intent and supposed changes in the home care industry that contradict the findings underlying the previous rule. In addition, numerous industry comments in the Record, including those of the Plaintiffs (to be included in the Joint Appendix), attest to the substantial reliance by home care businesses on the longstanding overtime exemptions which the new Rule has arbitrarily discarded after four decades. Therefore, the Department was required to do more to justify its policy reversal in this case than occurred in the presently challenged rulemaking.

In further response, the Department's Opposition simply repeats that the primary justification for the new Rule was to bring the regulation of home care "more in line with Congress's intent in expanding FLSA protections in 1974, in light of a home health care industry that has drastically grown and evolved over the last several decades." (Dept. Opp. at 30). Yet the Opposition fails to support either asserted justification as a ground for excluding third party employers from availing themselves of the statutory home care and live-in exemptions.

As noted above and in Plaintiffs' opening brief, the Department's claim that Congress did not intend to exempt employees of third party employers when it enacted the 1974 amendments has been rejected by the Supreme Court in the *Coke* case, and the Department presents no grounds for overturning that finding. It remains impermissible for the Department to rely on its erroneous and judicially rejected view of Congressional intent as its primary basis to change the Rule, a mere six years after the Supreme Court declared the previous interpretation to be "valid and binding." Likewise, though the Department's Opposition argues that the home care industry has changed in the four decades since the 1974 amendments to the FLSA, the Opposition nowhere claims that the industry has changed in any significant way since the Supreme Court

issued its 2007 ruling in *Coke*. For this reason as well, the new Rule must be deemed to be arbitrary and capricious and set aside.

But even if it were deemed to be acceptable for the Department to consider changes to the home care industry that occurred before the Supreme Court's 2007 ruling, the industry changes identified by the Department's Opposition fail to justify the new Rule's exclusion of all third party employers from availing themselves of the statutory exemptions for companionship and live-in domestic employees. The Department's Opposition, like the Rule itself, ignores the fact that the job duties of home care service providers are the same today as they were in 1974 (and 2007). Regardless of who their employers are, home care and live-in employees continue to provide "fellowship, care, and protection" for people who are physically or mentally infirm, just as they always have. There is thus no rational connection between the asserted justification for the new Rule (changes in the industry unrelated to third party employment) and the Rule itself (excluding third party employers from access to overtime exemptions).

The Department's Opposition also fails to identify any wrongful aspect of third party employment that needs to be remedied by the new Rule's arbitrary exclusion of third party employers from availing themselves of the overtime exemptions. Indeed, it is undisputed in the Record that third party employers have contributed to higher standards of home care and have reduced the need for institutionalization. (See Plaintiffs' Comments in the Joint Appendix). The new Rule ignores the established benefits of third party employment, and fails to explain why the blanket exclusion of third party employers from the overtime exemption, in and of itself, benefits consumers or employees.

Plaintiffs' opening brief further identified significant adverse impacts on consumers resulting from the new Rule's exclusion of third party employers from availing themselves of the

overtime exemption. These adverse impacts include in particular the likelihood of increased institutionalization due to the inevitable increased costs of home care as a direct result of the new Rule. In response, the Department's Opposition claims that the Department "carefully considered" this issue and "does not believe" that increased institutionalization will result from the new Rule. (Dept. Opp. at 33). But the evidence cited by the Opposition for this belief is wanting, and the new Rule is not supported by substantial evidence in the record as a whole, as required by the Administrative Procedure Act.

The Department's Opposition attributes the decline in institutionalization to the availability of government funding assistance for home care under Medicare and Medicaid. (*Id*. at n.15). In response to Plaintiffs' previous observation that Medicaid does not currently pay for home care overtime and travel costs, however, the Department's Opposition asserts only that Medicaid "can" pay for overtime, even though such reimbursement is not taking place now. Indeed, the recently published interpretive bulletin of the U.S. Department of Health and Human Services cited in the Opposition (Dept. Opp. at 34), concedes that Medicaid does not currently cover overtime while suggesting hoped-for changes to allow for such coverage. *See* CMCS Informational Bulletin, July 3, 2014, at 2: ([M]any states will need to develop policies and consider programmatic changes in order to address the costs related to overtime … to avoid or minimize negative impacts to individual budgets….").

As a result of the continuing confusion over Medicaid reimbursement issues, the National Association of Medicaid Directors (NAMD) wrote to the Department in April 2014 requesting postponement of the effective date of the new Rule by an additional 18 months. *See* Letter to Thomas E. Perez from the NAMD dated April 23, 2014, which will be made part of the Joint

Appendix). The Medicaid Directors themselves stated the following with regard to problems arising from the new Rule:

> [T]he current effective date of January 1, 2015, fails to provide sufficient time for the federal agencies and state partners to understand the policy and operational issues, develop workable solutions on key components and determine an appropriate course of action if we cannot identify a feasible solution." [ ] In addition, many states are increasingly concerned that the tools and technology to comply with the rule do not exist in some areas and may require a significant investment of resources in other areas. State legislatures will need to approve funding for any such investment in many states. More time is needed to refine the cost estimates and secure approval for such resources.

To Plaintiffs' knowledge, the Department has not made any substantive response to the NAMD's concerns, and most importantly, has not postponed the effective date of the new Rule as requested.

With regard to the institutionalization issues as a whole, the Department's Opposition concedes that the Department has not received "any reliable data" indicating one way or the other what the impact will be of eliminating the overtime exemption for 98% of home care workers. (Dept. Opp. at 34). The Department improperly attempts to shift the responsibility for producing such data onto the business community, when it should have been incumbent on the Department to definitively answer this question before proceeding ahead with the new Rule.

The Department's Opposition also repeats the Rule's exaggerated claims as to the number of states that currently have eliminated the overtime exemption for home care workers.[11] Because the reality is that only a very few of the states have enacted overtime requirements comparable to the draconian provisions of the new Rule, it becomes entirely understandable that

[11] The Department's Opposition falsely claims that "many" states require the payment of minimum wage and overtime to home care workers, when in fact only a very few states (no more than four) have eliminated the overtime exemption for all third party employees, as is arbitrarily required by the new Rule.

there is no reliable data establishing the impact of such a radical change on elderly and disabled consumers at the state level. The Plaintiffs filled this gap by conducting their own studies of the industry-wide impact of the new Rule on home care. Contrary to the Department's Opposition, the results of Plaintiffs' studies establish a strong likelihood that the new Rule will cause significant adverse impacts on consumers, employees, and businesses.[12] The Department's Opposition fails to justify the Department's arbitrary decision to proceed with the new Rule in the face of such proven negative consequences.

Thus, contrary to the Department's Opposition, the Department has arbitrarily ignored or improperly discounted the facts underlying the prior policy of exempting home care companions and live-in domestics. The new Rule capriciously undermines the intent of Congress to encourage deinstitutionalization of care, control costs of care, and maintain continuity of care for a longer number of hours each day. Substantial evidence in the record indicates strongly that each of the foregoing factors will be adversely impacted by the new Rule. Therefore, this Court should find that the Department has failed to justify the new Rule with substantial evidence in the record as a whole, and the new Rule must be found to be arbitrary and capricious as a result. *FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515-6.

[12] *See* Pl. Br. at 20, citing Comments of NAHC at 11; Comments of NPDA at 5; Comments of IFA at 3; see also Navigant Report at 49 ("It is certain … that the demand for institutional care will increase, perhaps substantially."); *See also* the Companionship Exemption Survey Report jointly conducted by NPDA and NAHC, Attached as App. 1 to the Comments filed by NAHC (Reporting that more than 80% of home care providers predict significant cost increases to consumers as a result of the new Rule). The same survey identifies particularly severe consequences of the new Rule for elderly consumers suffering from dementia. *See* Companionship Exemption Survey Report, at p.13.

III. CONCLUSION

For each of the reasons set forth above and in Plaintiffs' opening brief, Plaintiffs' Motion for Expedited Partial Summary Judgment should be granted, Defendants' Motion should be denied, and the third-party provisions of the new Rule should be set aside and an injunction issued against their enforcement prior to January 1, 2015.

Respectfully submitted,

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