IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR IN THE ALTERNATIVE CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Two fundamental points should drive the resolution of this case. First, the Secretary of Labor ("Secretary") has authority to define the scope of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq*., companionship services and live-in domestic service worker exemptions, as explained by the Supreme Court in *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158 (2007). Indeed, in creating these exemptions, Congress granted the Secretary broad general authority to prescribe "rules, regulations, and orders" implementing them, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974), as well as explicit authority to "define[] and delimit[]" the scope of the companionship services exemptions. *See* 29 U.S.C. § 213(a)(15). Second, the Secretary promulgated the regulations at issue in this case through notice-and-comment rulemaking, based on his determination that the existing regulatory provision regarding third party employment in the domestic service context was outdated. Because the Secretary filled a statutory gap through notice-and-comment rulemaking and did so in a reasonable manner, plaintiffs' challenge to the Secretary's "third party" regulation must fail. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984). The Court should dismiss Counts I and II of plaintiffs' complaint or grant summary judgment on those Counts in defendants' favor.

ARGUMENT

I. The "Third Party" Regulation is A Proper Exercise of the Department's Broad Authority to Interpret the Domestic Service Employment Exemptions Under the FLSA.

Congress explicitly granted the United States Department of Labor ("Department") both the authority to "define[] and delimit[]" the terms "domestic service employment" and "companionship services," *see* 29 U.S.C. § 213(a)(15), and the broad general authority to prescribe "rules, regulations, and orders" implementing the 1974 Amendments, Pub. L. No. 93-

259, § 29(b), 88 Stat. 55, 76. In keeping with its broad authority to regulate in this area, the Department engaged in notice-and-comment rulemaking and issued its third party regulation prohibiting third party employers of domestic service employees from claiming an exemption from the FLSA with regard to companionship services or live-in domestic services. *See* 29 C.F.R. § 552.109(a), (c) (as amended). Accordingly, this rulemaking is entitled to *Chevron* deference.[1] *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). Nothing in the text and legislative history of the FLSA or the Supreme Court's decision in *Coke* conflicts with the revised regulation.

A. The Third Party Regulation Is Entirely Consistent with the Plain Meaning of the FLSA and the Act's Legislative History.

To begin with the basics, 29 U.S.C. §§ 206 and 207 impose minimum wage and overtime obligations upon employers. In 1974, Congress explicitly included domestic service workers within these protections; there are provisions of each section that extend the Act's minimum wage and overtime compensation protections to workers "employed in domestic service in a household." 29 U.S.C. §§ 206(f), 207(*l*). Sections 213(a)(15) and 213(b)(21) of the Act contain two narrow exemptions to the Act's minimum wage and overtime requirements. Congress

[1] Under step 1 of *Chevron* analysis, the Court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If it has, "that is the end of the matter" and the Court "must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue," the Court should proceed to step 2 of *Chevron* analysis, asking "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id*. at 843-44.

expressly granted the Department specific, as well as general, delegations of authority to define and delimit the scope of these exemptions. *See* 29 U.S.C. § 213(a)(15); Pub. L. No. 93-259, § 29(b), 88 Stat. at 76. After an exhaustive notice-and-comment rulemaking process, the Department did delimit those exemptions, so that third party employers of employees providing companionship services or live-in domestic services may no longer avail themselves of the exemptions.

1. The Regulation Does Not Conflict with the Plain Language of the FLSA.

As noted above, and as plaintiffs effectively acknowledge by supporting the current third party regulation, *see* Pls.' Reply to Defs.' Opp. And Opp. To Def.' Mot., Setp. 2, 2014, ECF No. 16 ("Pls.' Opp'n"), at 3, the FLSA contains gaps "as to the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services,'" *see Coke*, 551 U.S. at 165, that need to be filled. *See also* 29 U.S.C. § 213(a)(15). It is well settled that an agency's decision regarding how to fill such gaps is entitled to considerable deference. *See Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

Plaintiffs fail to show any incompatibility between the language of the third party regulation and the FLSA. As explained in defendants' opening memorandum, the new third party regulation is worded as it is for purposes of clarity, so that it effectively prohibits the application of the exemptions to employees employed by third party employers. *See* Defs.' Mem. at 17-18; *see also* 78 Fed. Reg. 60,460. Indeed, the preamble to the Final Rule emphasizes that the Department fully understands and intends the exemptions to apply to employees; however, the Department used the language that it did because it is employers who avail

themselves of such exemptions when processing payroll. The Department noted in the preamble that home care workers "employed by third parties are the sorts of domestic service employees Congress specifically intended the FLSA to cover: Their work is a vocation." 78 Fed. Reg. 60,482. In furtherance of this objective, the Department states its "position that employees providing home care services who are employed by third parties should have the same minimum wage and overtime protections that other domestic service and other workers enjoy." *Id*. The language of 29 C.F.R. § 552.109, as revised, is consistent with this position.

Plaintiffs also place great emphasis on some of the wording of the revised regulation—"Third party employers . . . may not avail themselves"—but fail to acknowledge other phrases used—"Third party employers *of employees engaged in companionship services*" and "Third party employers *of employees engaged in live-in domestic service employment*"—which demonstrate that the provision regulates employees as well as employers. *See* 29 C.F.R. § 552.109 (as revised) (emphases added).[2]

[2] Plaintiffs have arguably waived their linguistic argument by failing to raise this objection in their comments submitted during the public notice period despite receiving notice that the Secretary intended to modify the third party regulation in this manner. "[P]arties waive their right to raise issues in challenging an agency rule by failing to raise the issues during the notice-and-comment rulemaking period." *Alliance for Natural Health US v. Sebelius*, 775 F. Supp. 2d 114, 124 (D.D.C. 2011); *see also Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) ("It is black-letter administrative law that [a]bsent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue." (citation and internal quotations omitted)). The regulatory language in the NPRM, published in December 2011, is exactly the same language as adopted in the Final Rule. *Compare* 76 Fed. Reg. 81,244 *with* 78 Fed. Reg. 60,557. The comments submitted by plaintiffs, however, during the rulemaking do not express any concerns about the wording of the regulation. Indeed, the International Franchise Association's comment stated that "[i]t is clear that the Department's sole focus in this NPRM is on employees." *See also* Comment of Home Care Association of America ("WHD proposes to make companion care exemptions to the FLSA unavailable for caregivers who are employed by a third party entity.") (comments to be included in joint appendix). Because plaintiffs failed to raise their objections to the challenged regulation with regard to this point during the notice-and-comment period, they are barred as a matter of law from challenging the regulation here with this particular argument. *See Universal Health*

Consequently, plaintiffs' argument—that by articulating the regulation with reference to employers the Department violated the statute—elevates form over substance. Contrary to plaintiffs' unsupported assertions, nothing requires the Secretary to describe FLSA exemptions strictly in terms of the employee. The FLSA governs employers and employees and even defines those terms in relation to each other: an "employee" is "any individual employed by an employer" and an "[e]mployer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. §§ 203(d), (e)(1). Therefore, describing employees by means of their employment relationship to an employer in regulations interpreting the companionship services and live-in domestic service worker exemptions is permissible, and does not in any way exceed the Secretary's authority to enforce the statute. To hold otherwise would be to exalt formalism over functionality. *See, e.g.*, *Gulfstream Aerospace Corp. v. United States*, 981 F. Supp. 654, 668 (Ct. Int'l Trade 1997) (holding that a "purely semantic distinction between" two phrases did not mean the phrases had different meanings); *Rayford v. Bowen*, 715 F. Supp. 1347, 1352 (W.D. La. 1989) (statute's use of term "criteria" instead of "rules" did not prevent court from concluding that criteria were rules because "[f]unction, not form, governs the APA"). In addition, plaintiffs' assertion that the Department is regulating employers in an "unprecedented" manner by referring to a group of employers, Pls.' Opp'n at 1, is unfounded. The Department routinely regulates groups of employers in this way. *See, e.g.*, 29 C.F.R. § 778.601 ("Special Overtime Provisions Available for Hospital and Residential Care

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Servs. v. Thompson, 363 F.3d 1013, 1021 (9th Cir. 2004); *see also Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 211 (D.C. Cir. 2007) (refusing to address merits of plaintiffs' claim because plaintiffs failed to raise it during the comment period).

Establishments"); 29 C.F.R. § 779.383 ("Hotel and Motel Exemptions"); 29 C.F.R. § 779.385 ("May qualify as exempt establishments" – Amusement or Recreational Establishments).

Surely it cannot be correct, as implied by plaintiffs' argument, that if the Secretary reversed the order of the terms in the third party regulation—that is, if it changed "Third party employers of employees . . . may not avail themselves of . . . section 13(a)(15)" to "Employees of third party employers . . . may not avail themselves of . . . section 13(a)(5)"—his authority to promulgate the regulation would be different. Under either version, the employers in question must comply with the minimum wage and overtime provisions of FLSA. As a result, the Secretary's regulation does not create any new, extra-statutory obligation for plaintiffs, but instead merely requires them to meet their obligations under the FLSA.

In addition, plaintiffs' assertion that the Act does not allow for the exclusion of employees based on the identity of their employers is inconsistent with their support of the Department's current third party regulation (deemed "permissible" by plaintiffs, Pls.' Opp'n at 3). The current regulation permits domestic service workers employed by covered third parties to be classified as exempt from the minimum wage and overtime protections to which they were entitled prior to the Department's 1975 regulations. *See* Defs.' Mem. at 23. And the Supreme Court made explicit that the Department could decide whether third party employers could claim the companionship services exemption. *See Coke*, 551 U.S. at 167-68.

Plaintiffs' attempt to argue otherwise based on numerous inapposite cases is unpersuasive. Pls.' Opp'n at 2, 5-6. For example, in *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), in stark contrast to the case before this Court, the agency acted in a manner inconsistent with the relevant statute, as to which "Congress left no ambiguity." *Id.* at 664. Indeed, in *Railway Labor*, the agency acted "[d]espite the

absence of any statutory authority." *Id.* at 658. In contrast, in this case, the Department does not "presume" a grant of congressional authority; rather, the delegation of authority was written into the Fair Labor Standards Act by Congress.[3] Moreover, the court in *Railway Labor* found *Chevron* to be inapplicable because there were no statutory gaps to fill. *Id.* at 664. Here, the Supreme Court has recognized that Congress left statutory gaps to fill, and that the agency is in the best position to fill those gaps. *See Coke*, 551 U.S. at 165-68.

Plaintiffs' reliance on several other similar cases is also misplaced. *See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134 (D.C. Cir. 2006) (the agency's action blatantly conflicted with the governing statute); *Hearth, Patio & Barbeque Ass'n v. DOE*, 706 F.3d 499 (D.C. Cir. 2013) (the agency's factual determination found improper); *Natural Res. Def. Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (the agency exceeded its authority in adopting an affirmative defense to private civil suits). By contrast, in this case the Department extended the minimum wage and overtime protections of the FLSA to certain domestic service workers in clear harmony with the broad remedial nature of the Act and with Congress's intent in 1974 to extend FLSA coverage to all employees whose "vocation" was domestic service. *See* 29 U.S.C. § 202(a); *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); S. Rep. No. 93–690, at 20 (1974).

[3] Plaintiffs contend that the "Department is entitled to no presumption of authority." Pls.' Opp'n at 7. But here, no presumption is necessary because the delegation of authority is clear and was recognized by a unanimous Supreme Court in *Coke*. *See Coke*, 551 U.S. at 158. Moreover, plaintiffs' contention that it is the Department'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," *see* Pls.' Opp'n at 7, is at odds with the language of the statute itself, which directs *all* employers to pay overtime unless an exemption applies. *See* 29 U.S.C. §§ 206, 207. As the Supreme Court held in *Coke*, *see* 551 U.S. at 165, it is within the Department's purview to define and delimit those exemptions such that the Act's broad remedial purposes may be effectuated.

In fact, even when Congress has not provided the agency with an express delegation of authority or responsibility "'to implement a particular provision or fill a particular gap, [ ] it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result.'" *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843-44 (2012) (quoting *Mead*, 533 U.S. at 229). Here, with the Department's generally conferred authority, it is clear that the Department was expected to act in filing a statutory gap with a regulation that has the force of law. Indeed, as laid out in *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013), in which the Supreme Court upheld a specific rulemaking done under a general grant of authority, "[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *Id.* at 1868. The text of revised 29 C.F.R. § 552.109, and the rulemaking record, demonstrate that the Court must answer this question in defendants' favor in this case.

2. The Legislative History Provides Ample Support for the Revised Third Party Regulation.

Under step 1 of the analysis mandated by *Chevron*, "the court uses the 'traditional tools of statutory interpretation—text, structure, purpose, and legislative history,' to determine whether the statute speaks directly to the question at issue." *Prime Time Int'l Co. v. Vilsack*, 930 F. Supp. 2d 240, 248 (D.D.C. 2013) (citing *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001)). If the statute is clear, the unambiguous intent of Congress must control and the court's inquiry is over. *Id.* However, if the statute is "silent or ambiguous with

respect to the specific issue, the court must defer to the agency's interpretation if it is reasonable." *Citizens Coal Council v. Norton*, 330 F.3d 478, 481 (D.C. Cir. 2003) (citation and internal quotation marks omitted). In deciding the reasonableness of an agency's interpretation, the court may not "substitute [its] preferred interpretation for an agency's reasonable interpretation when that agency is the entity authorized to administer the statute in question." *Id.* at 482.

Thus, in analyzing this case under *Chevron*, the Court can look to the legislative history for guidance. Although it does not definitively elucidate Congress's intent with respect to the "third party employment" question, *see Coke*, 551 U.S. at 165-68, there is ample evidence in the legislative record that Congress intended only the most casual of arrangements to be included within the exemptions, and did not intend them to include the type of professionalized and trained work force that usually provides home care services today. *See* 78 Fed. Reg. 60,455-57.

As explained in defendants' opening brief, the goal of the 1974 Amendments was "to update the level of the minimum wage and to continue the task initiated in 1961 – and further implemented in 1966 and 1972 – to extend the basic protection of the Fair Labor Standards Act to additional workers and to reduce to the extent practicable at this time the remaining exemptions." S. Rep. No. 93-690 at 7. With these 1974 Amendments, Congress sought to "include within the coverage of the Act *all* employees whose vocation is domestic service," but to exclude from coverage people who "are not regular bread-winners or responsible for their families' support." *Id.* (emphasis added); H.R. Rep. No. 93-913, at 36 (1974). Congress further indicated that these amendments were intended to "raise the wages of these workers . . . [and] help to raise the status and dignity of this work." *Id.* at 33-34.

Indeed, during the floor debate, the Senate floor manager of the 1974 FLSA amendments explained that the companionship services exemption was meant to apply to "elder sitters" whose primary responsibility was "to be there and to watch" over an elderly person or a person with an illness, injury, or disability in the same manner that a babysitter watches over children, "not to do household work." 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973) (statement of Sen. Williams). Senator Williams, Chairman of the Senate Subcommittee on Labor, explained that the category of workers intended to be included in this exemption would be "a neighbor" who "comes in and sits with" "an aged father, an aged mother, an infirm father, an infirm mother." *Id.*; *see also* 78 Fed. Reg. 60,457.[4]

B. In *Coke*, the Supreme Court Explicitly Affirmed the Department's Authority to Answer the Precise Question Raised in this Litigation.

As already discussed in defendants' opening memorandum, the Supreme Court affirmed the Department's authority to address the issue of third party employment in the domestic service context in *Coke*, 551 U.S. at 158. Plaintiffs are correct that *Coke* affirmed the Department's previous rulemaking—which permitted third party employers to claim the two exemptions that are the focus of the rulemaking at issue in this case—but to assert that the Court was anything less than explicit about the Department's authority to promulgate a regulation addressing the question at issue here in a different manner is to mischaracterize the case.

[4] The Department does not agree with plaintiffs' assertion that only two percent of home care workers are solely employed by the individual or family needing services. Pls.' Opp'n at 1, 10, 17. Examining multiple data sources and recognizing the challenges of quantifying workers who primarily do not have payroll records, the Department estimated that there were approximately 182,600 home health aides and personal care aides employed directly by families, which comprises about ten percent of workers performing these services. *See* 78 Fed. Reg. 60,519-20.

As the Court made clear, the Act's text and history do not provide an explicit answer to the "third-party-employment question"; instead, the FLSA "leaves gaps … as to the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services,'" and Congress delegated to the Secretary "the power to fill these gaps through rules and regulations." *Id*. at 165-68. Notably, the Court found the agency's use of notice and comment rulemaking a compelling factor in deciding to defer to its view of how to fill these gaps. *Id.* at 165 ("When an agency fills such a 'gap' reasonably, and in accordance with other applicable (*e.g.*, procedural) requirements, the courts accept the result as legally binding."). Similarly, "[s]ince on its face the regulation seems to fill a statutory gap, one might ask what precisely is it about the regulation that might make it unreasonable or otherwise unlawful?" *Id.* The Court states that the statutory language "expressly instructs the agency to work out the details of those broad definitions ["domestic service employment" and "companionship services"]. And whether to include workers paid by third parties within the scope of the definitions is one of those details." *Id.* at 167. The Court concluded by explaining that "[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable," a court should "ordinarily assume[] that Congress intended it to defer to the agency's determination." 551 U.S. at 173-74.

The Supreme Court found that these considerations—which are present in this case as they were there—weighed in favor of deferring to the Department's rulemaking in *Coke*. Further, as in *Coke*, the Department engaged in a robust notice-and-comment rulemaking process in promulgating the Final Rule, providing additional evidence that it promulgated the rule

pursuant to its authority to make legally binding rules. *See Mead*, 533 U.S. at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). In light of all of these factors weighing in favor of deference to the agency's rulemaking, a decision overturning the revised third party regulation, particularly after the agency's thorough regulatory process created it, would abrogate established Supreme Court precedent. *See Coke*, 551 U.S. at 165-68.

II. The Department's Robust Notice-and-Comment Rulemaking Process and Reasonable Third Party Regulation Satisfy APA Requirements.

The Secretary conducted a robust, complete, and thorough process of notice-and-comment rulemaking, providing a full and reasonable explanation for the new rule. Consequently, the rule should be upheld.

A. By Conducting Notice-and-Comment Rulemaking, the Department Met its Procedural Obligations.

A rulemaking process that meets the requirements of the APA is entirely adequate. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978) (explaining that the notice-and-comment procedures prescribed by section 4 of the APA are "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures"). For this reason, regulations promulgated pursuant to notice-and-comment rulemaking are entitled to the highest degree of deference courts afford to agencies. *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) ("The Department issued the [] rule only after notice-and-comment procedures . . . again a consideration identified in our precedents as a 'significant' sign that a rule merits *Chevron* deference.") (quoting *Mead*, 533 U.S. at 230-31); *Catskill Mountains Chapter of*

Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001) (referring to the "indicia of expertise, regularity, rigorous consideration, and public scrutiny" that accompany "formal, binding articulation of an agency's views," which are therefore entitled to *Chevron* deference) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978) ("[I]f the Agency, in carrying out its essentially legislative task, has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have negate[d] the dangers of arbitrariness and irrationality in the formulation of rules.") (citations and internal quotation marks omitted). It is not clear, nor have plaintiffs articulated, what additional procedural steps plaintiffs could have wished the Department to take. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012) ("[C]ourts may not, under the guise of the APA's arbitrary-and-capricious review standard, impose procedural requirements that the APA's procedural provisions . . . do not themselves impose.").

As the Secretary explained in his opening memorandum, *see* Defs.' Mem. at 30-32, the Department engaged in robust notice-and-comment rulemaking in promulgating this rule. The Department published the NPRM in December 2011 proposing the third party regulation as adopted, extended the comment period twice, *see* 76 Fed. Reg. 81,190, and in 2013 it published a comprehensive Final Rule that addressed all of the major issues raised by commenters and included a thorough economic analysis, as well as providing stakeholders with an unprecedented 15-month effective date delay. 78 Fed. Reg. 60,454, *et seq.* Plaintiffs allege no specific deficiency in the Department's rulemaking process, nor can they.

B. The Secretary's Rationale for Changing the Third Party Employment Regulation was Well-Supported and Therefore Was Not Arbitrary or Capricious.

Given the Department's thoughtful and comprehensive rationale for promulgating the third party regulation, the decision to adopt the regulation was not arbitrary or capricious. "[T]he arbitrary and capricious standard is 'highly deferential' and 'presumes agency action to be valid.'" *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 245 (D.C. Cir. 2013) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 997 (D.C. Cir. 2008)); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). The scope of review "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court assesses only "'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43).

The rulemaking record shows that the Department considered comments regarding the proposed change, including those regarding the potential impact of the challenged regulation, as evidenced by the detailed preamble and economic analysis included in the Final Rule. In addition to sections of the preamble providing important background concerning the FLSA and the 1974 Amendments, as well as contextual information regarding the changing home care industry, the preamble also includes a comprehensive section addressing the third party regulation specifically. *See* 78 Fed. Reg. 60,458-60, 60,480-83. This section first describes the many comments the Department received regarding the third party regulation—summarizing those in favor of and those opposed to the proposed change—and then explains why the Department chose to revise the regulation as proposed in the NPRM.

The preamble explains that "[m]any commenters, including employees, labor organizations, worker-advocacy organizations, and consumer representatives, expressed strong support for the proposed change to § 552.109." 78 Fed. Reg. 60,480. The Department further noted that "[n]umerous commenters agreed with the Department's assertion that the proposed changes were consistent with Congressional intent." *Id.* In addition to citing comments on this point from the National Employment Law Center and the Equal Justice Center, the preamble discussed a comment signed by Senator Harkin and 18 other U.S. Senators, which stated that "'[a] close look at the legislative history of the 1974 changes establishes that Congress clearly intended to include today's home care workforce within the FLSA's protections.'" 78 Fed. Reg. 60,480. The Department also discussed a comment by the Paraprofessional Healthcare Institute ("PHI"), which argued that "'employment by a home care agency strongly suggests that the worker is providing home care services as a vocation and is a regular bread-winner responsible for the support of her family. Such a formal employment arrangement is inconsistent with the teenage babysitters and casual companions for the elderly that Congress intended to exclude.'" *Id.*

The Department observed that several commenters agreed with "the Department's statements in the NPRM concerning the increased professionalization and standardization of the home care workforce." 78 Fed. Reg. 60,480. Specifically, "[t]he Westchester Consulting Group noted that third party employers 'are in the trade and business of providing services to the public and experience financial profit and loss' while household employers are purchasing companionship services 'for their personal use to address their specific support needs.'" *Id.* The preamble went on to note that "[t]he Legal Aid Society explained that 'the proposed regulations appropriately recognize that this work is not the kind of casual neighborly assistance that

Congress had in mind when it created the companionship services exemption. Rather, these workers are professional caregivers, who work long hours for agencies that are businesses, whether for-profit or not-for-profit.'" *Id.* The Department also explained that "the ACLU and others observed that many members of this workforce, such as home health aides and personal care assistants, are now often subject to training requirements and competency evaluations." *Id.*

The preamble next discussed, at length, comments opposed to the revised third party regulation. The Department explained that "[e]mployers and employer associations … generally opposed the proposed revision of § 552.109." 78 Fed. Reg. 60,480.[5] The arguments contained in those comments—that the Department's distinguishing among employers was problematic, that the legislative history supports the previous regulation, that Congress had not acted to change the previous regulation, and that the Department was altering its position, *see id.* at 60,480-81—are essentially identical to some of the plaintiffs' arguments in this case.

The Department concluded that it would adopt the revised regulation as proposed, because it was, "as many commenters agreed, consistent with Congress's intent to provide the protections of the FLSA to domestic workers while providing narrow exemptions for workers performing companionship services and live-in domestic service workers." 78 Fed. Reg. 60,481. The Department then explained in detail why the revised third party regulation was needed to reverse the regulatory "roll back" of coverage for some domestic service workers employed by third parties. *Id.*[6] The Department stated that it was "apparent from the legislative history that

[5] The Department cited several comments in making this statement, including those submitted by 24Hr Home Care, ResCare Home Care, the National Association of State Directors of Developmental Disabilities Services, and the Texas Association for Home Care & Hospice, Inc. *See* 78 Fed. Reg. 60,480.

[6] The Preamble defined the "roll back": "Prior to 1974, domestic service employees who worked for a placement agency that met the annual earnings threshold for FLSA enterprise coverage, but

the 1974 amendments were intended only to expand coverage to include more workers, and were not intended to take away coverage of employees of third parties who already had FLSA protections" prior to those amendments. *Id.* "The focus of the floor debate concerned the *extension* of coverage to categories of domestic workers who were not already covered by the FLSA, specifically, those employed by an individual or small company rather than by a covered enterprise." *Id.* (citing 119 Cong. Rec. at S24800) ("coverage of domestic employees is a vital step in the direction of insuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act"); S. Rep. No. 93-690 at 20 ("The goal of the Amendments embodied in the committee bill is to update the level of the minimum wage and to continue the task initiated in 1961—and further implemented in 1966 and 1972—to extend the basic protection of the Fair Labor Standards Act to additional workers and to reduce to the extent practicable at this time the remaining exemptions.")). The Department explained that the "only expressions of concern by opponents of the amendment related to the new recordkeeping burdens on private households." *Id.* at 60,482(citing 119 Cong. Rec. 18,155 (statement of Rep. Harrington); 119 Cong. Rec. 24,797 (statement of Sen. Dominick)).

Because of this intended expansion of the Act in 1974, the Department explained that "the exemptions excluding employees from coverage must therefore be defined narrowly in the regulations to achieve the law's purpose of extending coverage broadly." 78 Fed. Reg. 60,482. The Department noted that its decision was "consistent with the general principle that coverage under the FLSA is broadly construed so as to give effect to its remedial purposes, and exemptions are narrowly interpreted and limited in application to those who clearly are within

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were assigned to work in someone's home, were covered by the FLSA. [39 Fed. Reg. 35,385.] However, the Department's 1975 regulations, by allowing those covered enterprises to claim the exemption denied those employees the Act's minimum wage and overtime protections." *Id.*

the terms and spirit of the exemption." *Id.* (citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)). The preamble also explicitly disagreed with the notion that Congress's absence of action to change the 1975 third party regulation was indicative of its approval of the provision. *Id.* ("The Department is not persuaded by comments contending that because section 13(a)(15) has never been amended, the prior regulations were therefore consistent with Congressional intent. . . . As the Supreme Court has observed, Congressional inaction 'is a notoriously poor indication of [C]ongressional intent.' *Schweiker v. Chilicky*, 487 U.S. 412, 440 (1988); *see also Minor v. Bostwick Labs, Inc.*, 669 F.3d 428, 436 (4th Cir. 2012).").

The Department explained that "as the home care workforce has grown, the impact of the Department's roll back … has become even more magnified." 78 Fed. Reg. 60,482. "[F]ew direct care workers are the 'elder sitters' envisioned by Congress when enacting the [companionship services] exemption. … Instead, direct care workers employed by third parties are the sorts of domestic service employees Congress specifically intended the FLSA to cover: Their work is a vocation. … For example, a direct care worker who has sought out work through a private home care agency is engaged in a formal, professional occupation and he or she may well be the primary 'bread-winner' for his or her family." *Id.* (quoting 119 Cong. Rec. at S24801; Senate Report No. 93-690, p. 20; House Report No. 93-913, p. 36).

The preamble described the holding of *Coke* and the Department's express authority, affirmed by the Supreme Court, to amend the third party regulation. 78 Fed. Reg. 60,482. It also explained that the Department could use notice-and-comment rulemaking to change its regulation, and that it now believed that its previous position about third party employment in the domestic service employment context was outdated. *Id.* The Department also explicitly rejected

the reasoning in its Wage and Hour Advisory Memorandum 2005-1, to which plaintiffs in this case refer repeatedly. *Id.*

The concerns cited by plaintiffs regarding institutionalization, continuity of care, and cost impacts were addressed in great detail in the Final Rule. The Department explained that it "did not identify or receive any information suggesting that [deleterious] effects have occurred in the 15 states that already provide minimum wage and overtime protections to all or most third party-employed home care workers who may otherwise fall under the federal companionship services exemption." 78 Fed. Red. 60,482.[7] The Department explained that "[t]he existence of these state protections diminishes the force of objections regarding the feasibility and expense of prohibiting third parties from claiming the companionship services and live-in domestic service worker exemptions." 78 Fed. Reg. 60,483. Commenters such as the Michigan Olmstead Coalition reported that "'we have seen no evidence that access to or the quality of home care services are diminished by the extension of minimum wage and overtime protection to home care aides in this state almost six years ago.'" *Id.* In addition, "PHI noted that the growth of home

[7] Plaintiffs' assertion that the Department "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," is misleading. Pls.' Opp'n at 17 n.11. As explained in the Department's opposition, 15 states already provide minimum wage and overtime protections to all or most third party-employed home care workers. *See* 78 Fed. Reg. 60,482-83. In the Final Rule, the Department included a chart detailing state regulation in each of the 50 states, including state-specific statutory limitations. 78 Fed. Reg. 60,466-69, 60,482-83, 60,499, 60,510-11. Significantly, California's recently enacted Domestic Worker Bill of Rights extends overtime compensation rights to home care workers employed by home care agencies or solely by private households after 9 hours per day and 45 hours per week. Cal. Labor Code §§ 1451(b), 1454. Although there are carve-outs in many state statutes, those carve-outs rarely, if ever, include for-profit home care agencies such as plaintiffs in this case. *See* 78 Fed. Reg. 60,510-11 (summarizing state laws); *see, e.g.*, Me. Rev. Stat. Ann. tit. 26, §§ 663, 664 (creating exemptions from Maine's wage and hour law for certain family members); Mich. Comp. Laws § 408.382(c) (workers employed by employers with fewer than two employees not covered by Michigan's wage and hour law).

care establishments in Michigan 'is actually higher in the period after implementing wage and hour protections than before—41 percent compared to 32 percent.'" *Id.* The Department also cited the comment of Workforce Solutions, which wrote that "[t]here is no data showing that states with minimum wage and overtime protections for home care workers have higher rates of institutionalization." *Id.* The preamble also explained that "as summarized by AARP [in its comment], there is no strong correlation between states that have minimum wage and overtime protections with expenditures on [home and community-based services] versus institutionalized care." *Id.*

Regarding continuity of care concerns, the Department explained in the preamble that it anticipates that "this rule will bring more workers under the FLSA's protections, which in turn will create a more stable workforce by equalizing wage protections with other health care workers and reducing turnover." 78 Fed. Reg. 60,483. "This industry is currently marked by high turnover, which can be very disruptive to consumers. The Department believes that consumers would benefit from reduced turnover among direct care workers and the accompanying improvement in quality of care." *Id.*

Concerning fiscal impacts, plaintiffs renew their argument that studies they funded demonstrate that the new rule will create adverse effects for the regulated community. Pls.' Opp'n at 18. Putting aside the expertise that Congress ascribed to the Department by providing it with rulemaking authority, the shortcomings of plaintiffs' studies were expressly discussed in the Final Rule. The Department explained that "[s]everal industry organizations … administered two surveys in response to the NPRM that suggest the existence of a larger private pay market, but these surveys failed to provide any conclusive empirical evidence in support of this claim." 78 Fed. Reg. 60,500. The Department noted that these surveys were sent to members of the

International Franchise Association ("IFA"); "the overall response rates were fairly low, and respondents self-selected into the survey." *Id.* The Department explained how "[t]his can lead to selection bias; in other words, the respondents who chose to participate in the survey may be different from the overall population in a way that shifts the results of the survey." *Id.* For example, "the IFA members that responded to the survey may have been particularly motivated to participate due to campaigns to raise awareness of the NPRM in specific states, and that would lead the results to include a greater proportion of members from those states than a random sample would include." *Id.* As a result, the Department concluded, it was "not clear if the results are representative of IFA members or the industry as a whole." *Id.*

The Department did, however, consider and rely upon numerous leading data sources in its economic analysis, including: the National Home Health Aide Survey, a multistage probability sample survey; U.S. Census Bureau's Annual Social and Economic Supplement ("ASEC") data on overtime worked in this industry; multiple academic sources (i.e., *The American Economic Review*, *the Journal of Health Economics*, *Inquiry*); the National Long Term Care Survey, a nationally representative sample of elderly persons with disabilities living in community-based and institutional settings; the nationally representative source Medical Expenditure Panel Survey ("MEPS"), published by the Department of Health and Human Services; Congressional Research Service Reports; and the RAND Health Insurance Experiment report, the only large-scale study based on a randomized, controlled trial. *See* 78 Fed. Reg. 60,500-20.

In its analysis, the Department examined three scenarios concerning how firms may adjust overtime hours worked in response to the overtime compensation requirement; within each of these overtime scenarios, the Department considered three benchmarks for reallocating

overtime hours between new hires and current part time workers. Thus, the Department projected the economic impact for a total of nine combinations of overtime and hiring decisions. *See* 78 Fed. Reg. 60,505 & n.52.

This thorough and careful consideration of the comments received, direct discussion of the issues raised by commenters opposed to the regulatory change, and analysis of available data more than satisfy the APA standard of arbitrary and capricious review. The Department fully explained its rationale for the change, and although its decision was plainly not the option plaintiffs would have preferred, it was certainly reasonable and based on extensive relevant information.[8]

CONCLUSION

As demonstrated by the foregoing and the Secretary's opening brief, plaintiffs' claims are without merit. Accordingly, the Secretary respectfully requests that the Court dismiss Counts I and II of plaintiffs' complaint. Alternatively, the Court should grant summary judgment on those Counts in the Secretary's favor.

[8] Plaintiffs' discussion of how stakeholders have reacted to and prepared for implementation of the Final Rule since its promulgation, Pls.' Opp'n at 16-17, is not relevant to whether the Department's rationale for changing the regulation presented in the preamble was arbitrary and capricious. It is "black-letter administrative law that in an [APA] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision." *CTS Corp. v. EPA*, --- F.3d ---, No. 12-1256, 2014 WL 3056493, at *10 (D.C. Cir. July 8, 2014) (citation and internal quotation marks omitted). Plaintiffs make no argument, nor can they, that the "quite narrow and rarely invoked," *see id.*, exceptions to this rule apply here. Even if the Court were to consider the letter to which plaintiffs cite, it is hardly sufficient to overcome the overwhelming evidence supporting the agency's rulemaking. Should the Court nonetheless decide to credit plaintiffs' argument based upon material outside the record, the Court should give defendants an opportunity to submit information regarding the outreach and technical assistance efforts in which the Department has engaged since promulgation of the Final Rule. Further, should the Department determine that it is in the best interest of consumers and workers to extend the effective date of a rule, it could do so by notifying the public through a Federal Register Notice.

Dated: September 9, 2014

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MELISSA A. MURPHY
Senior Attorney

SARAH K. MARCUS
Attorney
U.S. Department of Labor
200 Constitution Ave NW, N-2716
Washington, DC 20210

STUART F. DELERY
Assistant Attorney General

RONALD C. MACHEN, JR.
United States Attorney

JUDRY L. SUBAR
Assistant Branch Director

/s/ Julie S. Saltman
JULIE S. SALTMAN (DC Bar No. 975015)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7111
Washington, D.C. 20530
Tel: (202) 532-4252
Fax: (202) 616-8470
Email: Julie.saltman@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Julie S. Saltman
JULIE S. SALTMAN