No. 15-A-__

IN THE SUPREME COURT OF THE UNITED STATES

HOME CARE ASSOCIATION OF AMERICA, INTERNATIONAL FRANCHISE ASSOCIATION, AND NATIONAL ASSOCIATION FOR HOME CARE AND HOSPICE,

Applicants,

v.

DAVID WEIL, ADMINISTRATOR, WAGE AND HOUR DIVISION OF THE U.S. DEPARTMENT OF LABOR, THOMAS PEREZ, SECRETARY OF LABOR, AND THE U.S. DEPARTMENT OF LABOR,

Respondents.

EMERGENCY APPLICATION TO STAY MANDATE PENDING DISPOSITION OF CERTIORARI PETITION

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CORPORATE DISCLOSURE STATEMENT

The cover page of this Application contains a complete list of the parties who appeared in the proceedings below. The Applicants are all trade associations that do not have any publicly held parent companies owning a 10% or greater ownership interest in them.

**TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Applicants Home Care Association Of America, *et al*, (the "Applicants") hereby move for an emergency stay of the D.C. Circuit's mandate pending the filing and disposition of a timely petition for certiorari. Absent relief, a highly controversial new rule of the U.S. Department of Labor will go into effect on October 13, 2015. For the first time in the 77-year history of the Fair Labor Standards Act, the new rule would bar employers from "availing themselves" of access to statutory overtime exemptions whose terms apply to the employers' employees. The Department's unprecedented action threatens irreparable harm to the operations of home care providers and Medicaid payment models serving millions of elderly and disabled individuals, many of whom will lose access to vitally needed home care services as a result of the new rule.

District Court Judge Leon properly vacated the rule (Appendix C). But the D.C. Circuit reversed (Appendix A), and the appeals court has refused to stay its mandate beyond October 13 (Appendix B), though the Applicants advised the court of their intention to petition for certiorari in this Court.

An individual Justice is authorized to issue a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2121(f). Such action is proper if there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then

reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers).

As further explained below, each of the foregoing criteria for a stay is satisfied in this case. A reasonable probability of certiorari exists, based on the fact that this Court previously found the exempt status of home care workers to be sufficiently important to grant certiorari and reverse the Court of Appeals for the Second Circuit in the related case of *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). In *Coke*, the Court held that home care employees of third party employers were properly deemed by the Department to be exempt from the minimum wage and overtime provisions under the Fair Labor Standards Act (FLSA).

The D.C. Circuit's decision now at issue stands the *Coke* case on its head by declaring that the Court's holding compels judicial approval of a Labor Department rule that for the first time excludes an entire class of employers from "availing themselves" of access to the statutory exemptions mandated by Congress in Sections 13(a)(15) and 13(b)(21) of the Act. The Department has never before been authorized by Congress to prevent employers from "availing themselves" of statutory exemptions whose terms apply to their employees, and until now no court has ever upheld such an act of executive overreach.

The D.C. Circuit's misreading of the *Coke* decision in a manner that achieves the opposite result from the Court's holding, is clearly "an important question of federal law that has not been, but should be, settled by [this Court]." SUP. CT. R. 10(c); *see also Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983) (finding support for a stay where "the issues are debatable among jurists of reason;" where "a court could resolve the issues in a different manner;" or where "the questions are adequate to deserve encouragement to proceed further.").

With regard to the likelihood of irreparable harm in the absence of a stay, the district court made a finding that implementation of the new rule would cause such harm to the home health care industry justifying a temporary restraining order on December 31, 2014. (Appendix D). The district court's finding of irreparable harm was not disturbed by the D.C. Circuit's opinion on the merits or its ruling denying the Applicants' motion for stay.

The district court's TRO was based upon sworn affidavit testimony that the new rule would severely disrupt the ability of home care employers to provide companionship services to millions of elderly and disabled individuals. (Appendix F). The affidavits further make clear that state Medicaid funding is not available in many states to support the increased costs that will be created by the new rule, meaning that many elderly and disabled consumers would be unable to maintain desperately needed access

to home care upon implementation of the new rule. The affidavits demonstrating irreparable harm are being resubmitted to this Court as attachments to this Application. (*Id.*).

It must also be noted that the Department has itself acknowledged the lack of preparedness of the home care industry, consumers, and state governments for implementation of the new rule. Thus, in an October, 2014 announcement, the Department declared that enforcement of the new rule would be delayed by six months beyond its originally intended January 1, 2015 effective date. *See* 79 Fed. Reg. 60974 (Oct. 2014). More recently, following the D.C. Circuit's decision upholding the new rule, the Department has announced that it will delay enforcement of the new rule for an additional 30 days. 80 Fed. Reg. 55029 (Sept. 14, 2015). Unfortunately, the Department's delay in enforcement will not prevent chaos in the home care industry if the new rule takes effect on October 13, because any covered employee may then choose to exercise a private right of action to enforce the new rule in court, regardless of the Department's self-imposed delay in governmental enforcement.

For all of these reasons, as further explained below, a temporary stay should be granted to maintain the status quo until this Court has an opportunity to consider the Applicants' certiorari petition, which will be filed on an expedited basis if the Court so instructs.

STATEMENT OF THE CASE

1. The Department's New Rule

At issue in this Application for Stay is a new Department rule entitled "Application of the Fair Labor Standards Act to Domestic Service," 78 Fed. Reg. 60,454 (Oct. 1, 2013). Most pertinent to the present challenge, the Department's new rule states that "[t]hird party employers of employees engaged in companionship services with 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 services." Section 552.109(a). The Final 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 the family or household using the services." Section 552.109(c).

The statutory exemptions referenced in the new rule were added to the FLSA in the 1974 Amendments.[1] Section 13(a)(15), 29 U.S.C. § 213(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

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

unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." Section 13(b)(21) of the Act, 29 U.S.C. § 213(b)(21), 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 statutory provision contains any language authorizing the Department to exclude a class of employers from "availing themselves" of any exemption applicable to their employees. Since the passage of the FLSA in 1938, the Department has never before been authorized to exclude any class of employers from "availing themselves" of a Congressionally mandated exemption to the Act's overtime provision, other than those specified by Congress itself.[2] This is no doubt because 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, which is in turn cancelled altogether 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

[2] Congress has demonstrated its ability to limit the classes of employers who are eligible for exemption status, when it chooses to do so. *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").

provisions of ... section 207 of this title *shall not apply*." (emphasis added). An identical provision appears at the outset of Section 213(b).[3]

"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). Numerous statements in the Congressional Record, largely ignored by the D.C. Circuit's opinion, confirm 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).[4] None of these 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. 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.

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[3] The provisions of Section 213(a), but not Section 213(b) also cancel the minimum wage requirements of Section 206 of the Act along with the overtime provisions of Section 207. Only the overtime provisions are pertinent to this case, in as much as the Department has conceded that "few affected workers, if any, have an hourly rate less than the minimum wage." (Dept. Br. at 14, citing 78 Fed. Reg. at 60456).

[4] During the Senate floor debate on the 1974 amendment, Senator Dominick approvingly read into the record a definition of "private household worker" written by the Department in 1973, expressly including within that term those workers employed by "a household service business." 119 Cong. Rec. at 24,796 (emphasis added). *See* also S. Rep. No. 93-690 at 20 (1974); H.R. Rep. No. 93-913 at 36 (1974).

213(a)(15). As noted by the district court, no such restriction appears in the companionship portion of the exemption. (App. C- 13-14).[5]

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, including those "who are employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. at 7407. 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 upheld the Department's 1975 home care exemption rule as to employees of third party employers in the case of *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007).

In light of the mischaracterizations of the Court's holding in the D.C Circuit's opinion in this case, it is worth quoting the Court's actual holding in *Coke*: "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

[5] The plain language of the statute and its omission of the word "casual" as a modifier of companionship services thus belies the claim in the D.C. Circuit's opinion that Congress intended to limit the latter exemption only to "casual elder sitters." (App. A-17).

to *Chevron* omitted] We conclude that it is." *Id.* at 158. This Court was not asked to review in *Coke*, and did not consider, the question presented by the new rule, which is whether the Department is authorized to issue a rule that prevents third party employers from "availing themselves" of the Act's statutory exemptions of their employees. Nor did the Court have before it a rule that excluded employees of third party employers from the live-in statutory exemption (Section 13(b)(21)) at all.

In the *Coke* decision, the Court specifically held that the legislative history did not support the D.C Circuit's current claim that Congress somehow intended to limit the companionship exemption by excluding those employees who are employed by third parties. Respondent Evelyn Coke made almost exactly the same arguments regarding the legislative history that the D.C. Circuit relied on in support of the new rule.[6] This Court in *Coke* 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.

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[6] Respondent Coke's Supreme Court filings, like the D.C. Circuit's opinion here, 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.

2. Proceedings Before the District Court

As noted above, the new rule was scheduled to go into effect on January 1, 2015. The Applicants filed their complaint challenging the new rule in June 2014. 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 state Medicaid Directors and others regarding their lack of readiness to implement the new rule, the Department would not seek to enforce the new rule for six months beyond the rule's effective date of January 1, 2015. 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; *see also* Dist. Ct. Dkt #19. (*See also* App. C, n.6).

The district court proceeded to rule on the third party employer issue on December 22, 2014, granting Applicants' motion and vacating Section 552.109 of the new rule. (App. C). The district court agreed with the Applicants that although the Department was entitled to fill 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.*).

In response to arguments by the Department that affirmance of the new rule was somehow compelled by this Court's decision in *Coke*, the district court held as follows:

> 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.

(App. C-15). The district court accordingly 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 Department's new rule.

Following issuance of the district court's ruling on the third party employer issue, Applicants 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 (App. D), based upon Applicants' showing of irreparable harm. Following further briefing and argument, the district court granted

summary judgment vacating the companionship redefinition on January 14, 2015. (App. E).

On appeal by the Department, the D.C. Circuit reversed. (App. A). The appeals court held that the Applicants' (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*." (App. A-11). 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 A-12). Giving *Chevron* 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 A-19-23).

The appeals court denied Applicants' motion for stay of the mandate pending Applicants' filing of a petition for writ of certiorari. (App. B). By operation of D.C. Circuit rules, the D.C. Circuit's mandate will go into effect on October 13, 2015, absent intervention by this Court.

REASONS FOR GRANTING THE APPLICATION

I. THERE IS A REASONABLE PROBABILITY OF CERTIORARI AND A FAIR PROSPECT OF REVERSAL OF THE APPEALS COURT'S DECISION

As noted above, a motion to stay the mandate pending a certiorari petition is appropriate if there is a "reasonable probability" of certiorari, a "fair prospect" of reversal, and a "likelihood" of irreparable harm. *Maryland v. King*, 133 S. Ct. at 2. Here there is a reasonable probability of certiorari and a fair prospect of reversal of the appeals court decision, because the D.C. Circuit has authorized a degree of executive overreach never before attempted or achieved under the FLSA. In the entire 77-year history of the FLSA, the Department has never been authorized to exclude an entire class of employers from "availing themselves" of an exemption of their employees mandated by Congress. But that is what has occurred here, resulting in irreparable harm to the provision of home health care to millions of elderly and disabled consumers for whom the affordability of such care has now been placed in jeopardy. This case thus raises issues of great public importance.

This Court has also previously determined that the scope of exemption of home health care workers under the FLSA presents a cert-worthy issue of great public importance. In *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), the Court granted certiorari in order to uphold the exemption of home care employees of third party employers from the minimum wage and

overtime provisions under the FLSA. The D.C. Circuit's decision now at issue misreads the *Coke* case as compelling judicial approval of the Department's new rule, which not only achieves the opposite result from that upheld by *Coke*, but does so using an unprecedented exclusionary method that infringes for the first time on the statutory rights of employers to avail themselves of the FLSA exemptions mandated by Congress.

According to the D.C. Circuit, this Court "foreclosed" Applicants' *Chevron* Step I challenge to the Department's new rule by its finding in *Coke* that the text of the FLSA's home care exemptions does not "compel a result in either direction," leaving the Department "with the power to fill ... gaps through rules and regulations...." (*Id.* at 12). From the outset, the appeals court misunderstood the nature of Applicants' primary *Chevron* challenge to the new rule in this case, which was never addressed in *Coke*. As the district court understood (App. C-15), the *Coke* Court's discussion of the "gaps" in some of the exemption language was limited to the coverage of *employees*, not the unprecedented denial of statutory rights of *employers*.[7] Nothing in *Coke* authorized the Department to adopt the extraordinary means that it selected to achieve its questionable objectives, *i.e.*, depriving employers of their

[7] The Department rule that was before the Court in *Coke* stated only that the statute exempts companion caregivers "who are employed by an employer other than the family or household using their services." 40 Fed. Reg. at 7407. The new Department rule does not redefine the statutory exemption of caregivers. Instead, the new rule solely addresses third-party employers, declaring that they may not avail themselves of the statutory exemptions. *See* the new Section 552.109.

statutory rights under the FLSA in a manner completely unauthorized by Congress.

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. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994). In this instance Congress determined the appropriate means by which the Department is allowed to implement the exemptions from the FLSA, *i.e.*, filling gaps in the definition of covered employees. Congress has never delegated to the Department the authority to prohibit more than 90 percent of employers in the home care industry from availing themselves of the exemption to which their employees are subject. 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 stop the Department from deciding that certain air carriers can no longer avail themselves of the air carrier exemption (section 213(b)(3))? Or that large (or small) retailers can no longer avail

themselves of the retail exemption (section 207(i))? The point is that regardless of whether the Department is or is not entitled 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.

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) of 213(b)(21) in order to exclude third party employers from availing themselves of access to the exemptions, citing the general rulemaking authority provided by Section 29(b) of the Act. (*Id.* at 14-15). To the contrary, the general rulemaking authority of the Department has never been construed to allow it to override the express statutory provisions of the laws the Department enforces. This Court so held in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002), where it 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.").

Contrary to the D.C. Circuit, it is thus irrelevant here whether the Department claims to derive its rulemaking authority from Section 213(a)(15), 213(b)(21), or from Section 29(b). None of these provisions give the Department the authority to impose the overtime requirements of Section 207 on any employers whose employees fall within the scope of the statutory exemptions of Section 213. This Court in *Coke* certainly never so held, because the rule at issue in *Coke* did not purport to exclude any employers from availing themselves of any statutory provisions. At a minimum, a substantial and important question certainly exists as to whether this Court intended in *Coke* to authorize the Department to discriminate against an entire class of employers, comprising more than 90% of the home care industry, by selectively excluding such employers from availing themselves of the statutory exemptions that otherwise continue to apply by their terms to "any employees" under the Department's new rule.[8]

The D.C. Circuit's treatment of the legislative history of the companionship exemption (Op. at 15) also conflicts directly with this Court's holding in *Coke* and with numerous decisions applying the Congressional reenactment doctrine as "persuasive evidence" of legislative intent.

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[8] For the same reason, the appeals court erred in asserting that this Court in *Coke* considered and rejected Applicants' *Chevron* Step I argument, based on the Court's failure to adopt the reasoning of an *amicus* brief filed by one of the present Applicants in that case. (App. A-11). 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.

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). Indeed, this Court flatly rejected in *Coke* the interpretation of Congressional intent adopted by the appeals court's opinion. Respondent Evelyn Coke made essentially the same arguments to the Court regarding the legislative history of the companionship exemption that the D.C. Circuit repeated. But this Court properly declared: "We do not find these arguments convincing." 551 U.S. at 167.

The D.C. Circuit attempted to deflect this Court's holdings on legislative intent by noting the absence of discussion of the Congressional reenactment doctrine in *Coke*. (App. A-15). 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. A substantial question exists, however, 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 of Congressional intent to keep the old rule in place.[9]

[9] 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. A-15). That decision dealt only with a failed legislative proposal that was not combined with decades of Congressional acquiescence to a longstanding agency interpretation. The court of appeals did not distinguish or address the decisions of this Court relied

Finally, a substantial question exists as to whether the Department's new rule violates *Chevron* Step II and/or is arbitrary and capricious. Even if this Court's decision in *Coke* allowed the Department to get this far, the Department's new rule should have been found to be an unreasonable construction of the FLSA exemptions. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). Under *State Farm*, ignored by the appeals court, an agency action is deemed to be arbitrary and capricious if any of the following are met: (1) the agency relied on factors which Congress has not intended it to consider; (2) the agency entirely failed to consider an important aspect of the problem; (3) the agency offered an explanation for its decision that runs counter to the evidence; or (4) the agency's explanation is so implausible that it could not be ascribed to agency expertise. *Id.*

Here, contrary to the appeals court's opinion, all of these factors support a finding of arbitrary and capricious agency action. Of particular note, the appeals court failed to acknowledge that the Department's reliance on the factor of supposed Congressional intent to exclude third party employers from the exemption was inconsistent with this Court's rejection of that reading of the legislative history in *Coke*. (App. A-17). The D.C. Circuit and the Department also failed to consider an important aspect of the problem: the inadequate availability of funding under state Medicaid

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on above by the Applicants, which strongly argue against the appeals court's conclusion as to legislative intent.

programs to pay the increased costs imposed by the new rule. As further discussed below, irreparable harm will be caused to elderly and disabled individuals due to the unavailability of such funds.

The appeals court also erred in accepting the Department's claim that limited experience under 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,[10] and faulted the Applicants for failing to identify harm from statistical data that does not yet exist due to the small sample size. (App.A-21-22).

Contrary to the D.C. Circuit's opinion, it is simply irrational 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 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

[10] 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. A-21). 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.

care at a time when state funding mechanisms are woefully inadequate to meet the increased costs that will result from the new rule.

This Court was made aware of changes to the home care industry that allegedly occurred between 1974 and the Court's 2007 decision in *Coke*, yet unlike the D.C. Circuit, the 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.

Neither the appeals court nor the Department explained why home care givers who perform exactly the same job duties, whether they are viewed as "professional" 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 the exemption should apply equally to both. Why is it permissible 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 properly remedy would be to impose restrictions on such professionalism, regardless of who the employer is. Contrary to the D.C. Circuit's opinion, the Department's exclusion of 90

percent of home care providers from availing themselves of the exemptions that Congress expressly provided for their use is arbitrary and discriminatory. This Court should be given the opportunity to review the Department's unprecedented and dangerous new rule before it is allowed to go into effect.

Unlike the appeals court, the district court correctly understood that the Department's goal in the new rule was to "gut" the home care exemptions out of a misguided desire to raise caregiver wages at the expense of home health care consumers, regardless of the consequences. (App. C-16). The D.C. Circuit's opinion will allow the Department to achieve its improper goal, defying the will of Congress and disrupting a vital industry benefitting millions of elderly and disabled consumers, unless this Court intervenes.

II. Immediate Implementation Of The New Rule Will Result In Irreparable Harm.

Prior to vacating the new rule, the district court found that the Applicants would be irreparably harmed if the rule were allowed to go into effect. (App. D, E). This finding, which remains undisturbed by the appeals court's opinion on the merits, was based upon multiple sworn affidavits submitted by Applicants (and by the Department) from all sectors of the home care industry demonstrating the myriad adverse impacts of the new rule. (Resubmitted here as part of App. F).

Nothing has changed since the district court vacated the rule in January. If the new rule is allowed to go into effect in advance of this Court's review, the industry will be harmed in all of the previously identified ways, and it will be extremely burdensome if not impossible to "unscramble" the home care system in the event that this Court grants Applicants' petition for certiorari.

Applicants' evidence of irreparable harm in the record of this appeal includes detailed and specific testimony from multiple third-party employer representatives describing unrecoverable costs that will be imposed on them by the new rule. (App. F: Dombi Affidavit, Cardillo Affidavit, Foss Affidavit, Salerno Affidavit). In addition, representatives from the disabled community testified to the forced elimination of many companion care services under the new rule, with consequent loss of goodwill between consumers and Applicants' member employers that itself constitutes irreparable harm. (*Id.*, Buckland and Darling Affidavits).

The disabled home care consumers further testified that they will in many cases no longer be able to receive continuous services from a single caregiver, because working hours will have to be capped to control overtime compensation costs. Indeed, current recipients of home care spoke from personal experience about the likelihood of losing access to such care altogether, leaving them no choice but institutionalization. (*Id.*, Buckland Affidavit). Others reported that some caregiving services had already been

lost merely because of the imminent threat of the new rule in 2014. (Id., Darling Affidavits I and II). The replacement of full-time caregivers with multiple, part-time caregivers, another inevitable result of the new rule, has been shown to create confusion and stress for home care consumers, particularly those suffering from dementia and similar illnesses. The increased number of "handoffs" among and between caregivers will also reduce the quality of care and increase the amount of waiting time for new caregivers. (*Id.*).

The Secretary of the Kansas Department for Aging and Disability Services (KDADS) submitted a sworn affidavit testifying to the inadequate Medicaid funds available to pay the non-recoverable costs of the new rule as well as the discontinuity of care and related services befalling both public and private home care agencies and consumers once the new rule goes into effect. (*Id.*, Bruffett Affidavit). Additional testimony as to the adverse impact of the new rule in the many states that do not have funds available to pay for overtime is presented in the attached newly sworn declaration of Bruce Darling, on behalf of the disability rights organization ADAPT. (*Id.*). Mr. Darling reports that many states are responding to the additional costs imposed by the new rule by cutting hours or programs, citing examples from Kansas, Texas, and Arkansas. (Darling Aff., at Par. 7).

Applicants have also provided evidence of additional disruption of the home care industry that has already taken place in states such as California

and New York. These additional affidavits include a state-wide survey demonstrating the adverse impact of recent changes in California's overtime exemption. (Id., Salerno Affidavit).[11] The overwhelming majority of home care providers surveyed in California have lost significant percentages of their customers either because the home care consumers cannot afford the increased costs resulting from the partial loss of the overtime exemption, or because elderly and disabled customers have found the increased number of part-time caregivers to be harmful to their care needs, or for both reasons. (*Id.*). The California state survey also found reductions in overall weekly pay rates to employees at the vast majority of home care workplaces, along with many lost jobs due to customer terminations, and significant percentages of reported employee dissatisfaction. (*Id.*).

The record before the district court also included a declaration from the Executive Vice President of the Home Care Association of New York who is familiar with the New York State Medicaid program's lack of preparedness to incorporate the increased costs from the new rule, which has created a serious risk to patient access and continuity of care, as well as home care agency operations if the new rule is allowed to take effect. (Id., Cardillo Affidavit).

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[11] California's changes to the overtime exemption were and are far less severe than the Department's new rule. Unlike the new rule, California continues to exempt overtime up to 48 hours per week, among other important differences.

Finally, the Department has recently announced on its own initiative that it intends to delay enforcement of the new rule by 30 days after the mandate issues. *See* 80 Fed. Reg. 55029 (Sept. 14, 2015). As noted above, The Department previously announced that there would be a six-month delay in enforcement of its new rule prior to the rule's original January 1, 2015 effective date. *See* 79 Fed. Reg. 60974 (Oct. 2014). Since efforts to achieve compliance or additional funding came to a halt after the district court vacated the rule in January, there is no rational basis for cutting short the originally planned non-enforcement period.

Unfortunately, the Department's delay in enforcement will not mitigate the problems created for employers by the new rule, because the Rule will be immediately enforceable by private parties and plaintiff attorneys once it goes into effect. The Department's proposed delay in enforcement nevertheless constitutes an admission that immediate enforcement of the new rule will cause harmful disruption of the home care industry, and that such disruption is not in the public interest. For this reason as well, this Court should find there is good cause to stay the effective date of the new rule, in order allow full review by the Court of Applicants' Petition for Certiorari.

Taken as a whole, as the district court properly found, the industry model that has been so successful in providing quality, affordable home care to people in dire need of such services will be irreparably harmed by the new

rule. At a minimum, the sudden disruption of an entire industry on short notice after employers, consumers and state governments were informed that the rule had been vacated, is unnecessary and punitive.

The Department's previous rule has been in effect for 40 years. Staying the mandate for the brief period of time necessary for this Court to fully review the case is the most appropriate resolution of this litigation, insuring certainty for the entire industry and the millions of elderly and disabled consumers who depend on its vital services.[12]

Conclusion

For the reasons set forth above, the Court should stay the effective date of the new rule pending Appellees' filing of a petition for writ of certiorari to the Supreme Court.

Respectfully submitted,

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[12] Upon reversal of the appeals court's ruling on the third-party employer issue, Applicants' petition will ask that the case be remanded to the D.C. Circuit to consider the Applicants' challenge to the definitional changes to section 552.6, which the district court also correctly vacated (App. E), but which the D.C. Circuit did not address. (App. A-23-24). The definitional changes in the new rule should therefore likewise be stayed pending review, along with the third party provisions.

CERTIFICATE OF SERVICE

I, Maurice Baskin, a member of the bar of this Court, certify that on September 24, 2015, I served a copy of this Emergency Application for Stay Pending Certiorari on the following counsel of record and to the Solicitor General of the United States by Federal Express Priority Overnight to the following addresses:

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