AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

September 2, 2025

SUBMITTED VIA REGULATIONS.GOV

Daniel Navarrete
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Comments on RIN 1235-AA51: Application of the Fair Labor Standards Act to Domestic Service Workers

Dear Mr. Navarrete:

The American Civil Liberties Union ("ACLU") submits this comment to oppose the proposed rule, "Application of the Fair Labor Standards Act to Domestic Service," by the Department of Labor (the "Department" or "DOL"). The ACLU opposes DOL's proposal to turn back the clock 50 years for millions of the nation's paid caregivers, both by redefining what constitute in-home "companionship" services that are excludable from the FLSA's minimum wage and overtime protections and by reinstating third-party employers' exemption from the obligation to pay FLSA-compliant wages to such workers. The ACLU supports the DOL's proposed alternative of preserving the existing regulatory scheme, adopted in 2013 to end home care workers' decades-long unjust exclusion from the FLSA as well as to respond to myriad changes in the home care workforce. Those regulations properly take into account the business realities of today's home care industry, while providing vital economic security for home care workers—who overwhelmingly are women of color, and overwhelmingly are themselves heads of households. Those economic benefits, in turn, help assure the availability of stable, quality care for our elders and loved ones with disabilities.

For more than 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

Beginning with its efforts to counter the vehement anti-union crusades of the 1920s, the ACLU has championed the rights of workers throughout its history. The ACLU strongly supports the right of every worker in America to earn fair pay, including by eliminating enduring disparities in the opportunities available and compensation paid to historically disadvantaged groups. We have advocated for passage and robust enforcement of laws that mandate equal treatment in the workplace, including the Equal Pay Act, Title VII of Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, Lilly Ledbetter Fair Pay Act, the Pregnant Workers Fairness Act, and the PUMP for Nursing Mothers Act. Our recent efforts to advance the Paycheck Fairness Act, which would update and close loopholes in the Equal Pay Act, and the BE HEARD in the Workplace Act, which would enhance workers' right to be free from unlawful harassment, reflect this continuing commitment.

Through its Women's Rights Project (WRP), co-founded by Ruth Bader Ginsburg, and its Disability Rights Program (DRP), the ACLU also has utilized impact litigation to achieve justice for our nation's most vulnerable workers. WRP has litigated some of the nation's most significant cases challenging sex-based stereotypes and establishing the contours of on-the-job rights, beginning with *Frontiero v. Richardson*,[1] the first Supreme Court decision to apply heightened scrutiny to constitutional claims alleging sex-based distinctions. In this work, the ACLU long has targeted the distinct abuse faced by low-wage workers, who disproportionately are women of color and immigrants—from our lawsuit on behalf of women migrant workers from Mexico working in North Carolina's seafood processing industry, successfully settled in 2011,[2] to our partnership with Fight for $15 challenging systemic sexual harassment in McDonald's restaurants nationwide,[3] including a class action ultimately settled for $1.5 million and benefiting nearly 100 women,[4] to our cases challenging abuse of domestic workers by foreign diplomats.[5] In 2007, WRP's joined an *amicus* brief in support of Evelyn Coke in her challenge to DOL's 1975 FLSA companionship regulations exempting third-party employers and in 2015, co-authored an *amicus* brief supporting of DOL in its defense of the 2013 revised regulations that the agency now seeks to rescind.

[1] 411 U.S. 677 (1973) (policy providing for automatic provision of "dependent" benefits for wives of married male servicemembers while imposing eligibility requirements for husbands of married female servicemembers violated Equal Protection clause).
[2] ACLU Press Release, "North Carolina Seafood Company to Implement Gender Non-Discrimination Policy after Guest Workers' Lawsuit," (Nov. 21, 2011), https://www.aclu.org/press-releases/north-carolina-seafood-company-implement-gender-non-discrimination-policy-after-guest.
[3] Gillian Thomas, "McDonald's is Serving Up Sexual Harassment," ACLU Blog, (Jan. 14, 2019), https://www.aclu.org/news/womens-rights/mcdonalds-serving-sexual-harassment.
[4] ACLU Press Release, "Former McDonald's Workers Win $1.5 Million in Class-Action Sexual Harassment Lawsuit," (Apr. 4, 2022), available at https://www.aclu.org/press-releases/former-mcdonalds-workers-win-15-million-class-action-sexual-harassment-lawsuit.
[5] *See*, *e.g.*, *Aisah, et al. v. U.S.*, Petition No. 1418-07 (Inter-American Comm'n on Human Rights) (petition by six Filipino and Nepali domestic workers alleging human rights abuses by diplomats and other foreign officials, including extreme wage and hour violations; virtual imprisonment in the homes of their employers; employer surveillance; passport deprivation; physical and emotional abuse; and invasion of privacy), https://www.aclu.org/cases/iachr-petition-domestic-workers-trafficked-diplomats.

Home care workers are among our nation's most critical "essential workers," and its most undervalued. The COVID-19 disaster brought into vivid relief their indispensability in assuring our loved ones' well-being, as well as the grave personal risk they assume on a daily basis. The pandemic also exacerbated a longstanding labor shortage that will only worsen if DOL moves forward—or more accurately, backward—with the proposed rulemaking. In addition to devastating workers and threatening the public's health, the monumental changes the NPRM contemplates are unlawful in myriad respects.

I. BY HELPING TO REMEDY THE HISTORIC DEVALUATION OF HOME CARE WORK, THE 2013 RULE ADVANCES GENDER AND RACIAL JUSTICE AND PROMOTES FAMILIES' ECONOMIC SECURITY

DOL's proposed rescission of its 2013 Rule expanding minimum wage and overtime protections under the Fair Labor Standards Act of 1938 ("FLSA")[6] for workers providing companionship and in-home services to seniors and people with disabilities (the "2013 Rule"), and reinstatement of its 1975 regulations that excluded large swaths of workers from such entitlement (the "1975 Rule")[7] should be rejected. By proposing to strip millions of workers of wage and hour protections that have been in place for over a decade and return them to the workplace of five decades ago, the rescission of the 2013 Rule will entrench stereotypes that devalue "women's work" and deepen the gender wage gap, particularly for women of color.

Home care work historically has been devalued because it has been performed chiefly by women of color—first by enslaved women, then by their descendants and by women who willingly immigrated to this country. The 2013 Rule corrected an historic injustice by remedying domestic workers' second-class status under the FLSA, thereby advancing gender and racial equity while helping home care workers, among the worst-paid in our nation, to better support themselves and their families.

Moreover, because care work for generations has been performed by women in the home, stereotypes persist that it is inherently less skilled, less strenuous, and otherwise less deserving of remuneration than other forms of labor. The 2013 Rule helps to dismantle those stereotypes about this increasingly-professionalized field, and thereby helps to diminish the wage gap attributable to workforce sex segregation. Finally, given the demonstrated link between better wages and lower rates of labor shortage and job turnover, the 2013 Rule also facilitates the labor force participation of women whose unpaid caregiving obligations for elders and family members with disabilities might otherwise interfere with their jobs or force them to stop working altogether—with attendant benefits to their families specifically, and to gender equity more broadly.

[6] 29 U.S.C. § 201, *et seq.*
[7] 90 Fed. Reg. 28976 (July 2, 2025).

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

A. Home care workers' exclusion from New Deal legislation and other laws is a direct legacy of slavery and Jim Crow that relegated them to low pay and economic precarity.

The exclusion of home health aides, personal care aides, and other domestic workers from statutory labor and employment protections is a direct legacy of slavery and Jim Crow.[8] It is well established that Congress carved out domestic workers (as well as agricultural workers) from New Deal-era legislation like the FLSA, the National Labor Relations Act,[9] and the Social Security Act,[10] because of southern lawmakers' concerted resistance to extending these new rights to formerly enslaved laborers.[11] As one scholar put it, entrenched and intersecting biases led women of color performing domestic labor in white households to be "perceived as too far outside of the regularized workforce to merit full labor and employment protection."[12] As a result, domestic workers and agricultural service workers—the occupations of a majority of Black people in the 1930s and '40s—were excluded from receiving minimum wage and overtime pay under the FLSA.[13] The statutory exclusion of those categories of workers was then replicated in other federal legislation—such as the Occupational Safety and Health Act of 1970 ("OSHA")[14]—and in state labor and employment laws nationwide.

---

[8] *See, e.g.*, Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 1 95, 96 (2011).

[9] 29 U.S.C. §§ 151-169.

[10] 42 U.S.C. §§ 1381-1385.

[11] *See* Perea, *supra* note 8 (citing Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* 27–28 (Princeton University Press) (2008); Risa L. Goluboff, *The Lost Promise of Civil Rights* 29 (Harvard University Press) (2007); Ira Katznelson, *When Affirmative Action Was White* 59 (W.W. Norton & Company) (2005); and Harvard Sitkoff, *A New Deal for Blacks* 52 (Oxford University Press) (1978)).

[12] Daniela Kraiem, *Consumer Direction in Medicaid Long Term Care: Autonomy, Commodification of Family Labor, and Community Resilience*, 19 Am. U. J. Gender, Soc. Pol'y & L. 671, 686 (2011).

[13] *See*, *e.g.*, Brief for Urban Justice Center et al. as Amici Curiae Supporting Respondent, *Long Is. Care at Home, Ltd. v. Coke*, 462 F.3d 48 (2007), http://www.aclu.org/files/pdfs/scotus/lic_careathome_v_coke_aclu_amicus.pdf; Terri Nilliasca, Note, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 Mich. J. Race & L. 377, 394 (Spring 2011) ("Domestic service was part of the racial caste system").

[14] 29 U.S.C. §§ 651-678. While Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), does not expressly exclude domestic workers from its anti-discrimination protections, the statute's application only to employers with 15 or more employees effectively does so in many cases.

These injustices, born of racism and misogyny, have grave consequences today. Most home care workers are women,[15] and 64 percent are people of color.[16] They disproportionately are born outside the U.S. and are more likely to be older than the average age of the nation's other workers.[17] And as discussed further below, they are among the poorest workers in our labor force, despite performing the essential role of caring for the nation's seniors and people with disabilities.

B. Rescinding the 2013 Rule would worsen the economic status of home care workers, who already are among the poorest in the nation's labor force.

There are more than 2.9 million home care workers in the U.S., comprising the vast majority of domestic workers.[18] Even at the wage levels set under the 2013 Rule, researchers report a large "domestic worker wage gap"—that is, "a wide gulf between the median hourly wage of domestic workers and the median hourly wage of all other workers."[19] The average annual earnings for direct care workers total just over $25,000.[20] They earn lower wages than other entry-level workers in every state and the District of Columbia.[21] Home care workers are three times more likely to be living in poverty than other workers, and even those who live above the poverty line are less likely than other workers to be able to make ends meet.[22] They rarely receive health insurance or retirement benefits from their employers,[23] and roughly half rely on public benefits, such cash assistance and food

---

15 Asha Banerjee, *et al.*, *Domestic Workers Chartbook 2022*, Economic Policy Institute (Nov. 22, 2022), https://www.epi.org/publication/domestic-workers-chartbook-2022/ (reporting that 81.8% of non-agency and 87.8% of agency home care workers are women).

16 U.S. Dep't of Health & Hum. Servs., Office of the Assistant Sec'y for Planning and Evaluation, *Health Care Workforce: Key Issues, Challenges, and the Path Forward* (Oct. 2024), https://aspe.hhs.gov/sites/default/files/documents/82c3ee75ef9c2a49fa6304b3812a4855/aspe-workforce.pdf (compare to "40% of the nationwide workforce").

17 U.S. Bureau of Labor Statistics, *TED: The Economics Daily* (Nov. 13, 2024), https://www.bls.gov/opub/ted/2024/in-2023-the-majority-of-home-health-aides-and-personal-care-aides-were-women.htm.

18 Kezia Scales, Ph.D. & Stephen McCall, *Understanding the Direct Care Workforce*, PHI Key Facts & FAQ, https://www.phinational.org/policy-research/key-facts-faq/.

19 Banerjee, *et al.*, *supra* note 15, at 19. *See also id.* at 23-24 & Table 11.

20 PHI, *Direct Care Workers in the Unites States: Key Facts 2024* (Sept. 2, 2024), https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-2024/, at 2.

21 Marie Squillace, *et. al*, *Wages of Direct Care Workers Continue to Be Lower in Most States Relative to Other Entry-Level Jobs*, Dep't of Health & Hum. Servs. (Dec. 20, 2024), https://aspe.hhs.gov/sites/default/files/documents/9f37d617a1b21bf0c2dfad433b1c95af/dcw-entry-level-wages-continue-lower.pdf (reporting that home care workers and personal aides had "an average median wage of $15.18 per hour and a wage gap of $3.73 between these workers and workers in other entry-level jobs").

22 Banerjee, *et al.*, *supra* note 10, at 31-34 & Tables 15-16.

23 *Id.* at 35-36 & Table 17 (noting that just 25 percent and 13 percent of agency-based home care workers receive health insurance and retirement benefits, respectively, from their employers).

stamps.[24] One recent survey found that 85 percent of participating domestic workers experienced food scarcity in the last month, and 50 percent experienced housing insecurity.[25]

Home care workers are especially vulnerable to workplace abuses, such as being victimized by wage theft due to employers' misclassifying workers as independent contractors or violating the FLSA's minimum wage and overtime rule.[26] In one recent study, for instance, only half of respondents who worked more than 40 hours a week received time-and-half pay "sometimes or always," and 40 percent reported *never* receiving overtime pay.[27]

Home care workers also are "frequently exposed to a variety of potentially serious or even life-threatening hazards" in the workplace, including "overexertion," "unhygienic conditions," and "verbal abuse and other forms of violence."[28] Indeed, one recent study found that "[i]n the last 15 years of [Bureau of Labor Statistics] data available, the workplace violence injury rate in . . . home health services has increased more than 100 percent."[29] The health risks for domestic workers became most stark during the COVID-19 pandemic, when many home care aides continued to work under dangerous conditions, often without access to personal protective equipment or health

---

[24] Squillace, *et al.*, *supra* note 21 (reporting that nearly half of home care workers rely on public assistance).

[25] La Alianza Surveys, *Domestic Workers Economic Situation Report January 2024* (Feb. 5, 2024), https://www.ndwalabs.org/economic-january-2024.

[26] *See* U.S. Dep't of Labor, *U.S. Department of Labor Finds Increased Number of Care Industry Employers Engaged in Wage Theft, Recovers $735K in Wages, Damages in Recent Cases* (Dec. 30, 2024), https://www.dol.gov/newsroom/releases/whd/whd20241230 ("A recent series of U.S. Department of Labor investigations shows a substantial increase in the number of care industry employers in California who are exploiting workers by underpaying them deliberately in violation of federal regulations."); Ethan Geringer-Sameth, *Home Care Agencies Lead New York City in Wage Theft Violations*, Crain's New York Business (Sept. 24, 2024), https://www.crainsnewyork.com/health-pulse/wage-theft-rampant-home-health-care-industry ("From 2020 to 2022, the top seventeen wage theft offenders investigated by the state Department of Labor were all home health care agencies."); USA Employment Lawyers, *Home Health Care Violations* (Feb. 3, 2025), https://www.usaemploymentlawyers.com/blog/2025/february/home-health-care-violations/ (in the year of its inception, a DOL initiative to address wage violations in healthcare completed 1,600 investigations, finding violations in "80% of investigations in the home healthcare and nursing care sectors.").

[27] Anastasia Christman, *Surveying the Home Care Workforce: Their Challenges & the Positive Impact of Unionization*, National Employment Law Project Policy & Data Brief (Sept. 22, 2017), https://www.nelp.org/insights-research/surveying-the-home-care-workforce/.

[28] NIOSH Education and Information Div., *Occupational Hazards in Home Healthcare*, Dep't of Health & Hum. Servs. at iii (Jan. 2010), https://www.cdc.gov/niosh/docs/2010-125/pdfs/2010-125.pdf.

[29] AFL-CIO, *Death on the Job: The Toll of Neglect, 2024* (Apr. 23, 2024), https://aflcio.org/reports/dotj-2024, at 138.

insurance to cover COVID-19 diagnosis and treatment, nor paid sick time, workers' compensation benefits, or unemployment insurance.[30]

DOL asserts that persistent high turnover rates and labor shortages among home care workers prove that the 2013 Rule has failed to attract more people to the field.[31] But it is the other shortcomings of home care work—low pay and lack of benefits, poor working conditions, and abusive employer practices, to name a few—that drive home care workers off the job.[32] Indeed, DOL data shows that since the 2013 Rule went into effect, home care agencies have paid $157.8 million in back wages, compared to $25.6 million in the ten prior years.[33] DOL should be building on these positive effects to make home care work more remunerative, safe, and stable, not erasing these gains by stripping home care workers of wage and hour protections that already are insufficient to assure economic security.

Rescinding the 2013 Rule would open the door to subminimum wages, undercompensated excessive work hours, and further wage abuses in an industry already rife with such exploitation—thus exacerbating workers' economic precarity, including by subjecting them to greater food and housing insecurity, compelling them to work through illnesses that endanger the clients they serve and to take on additional jobs to make ends meet, and forcing them to leave the profession altogether.[34]

C. Rescinding the 2013 Rule will magnify persistent sex stereotypes that devalue "women's work," and will exacerbate the wage and wealth gap.

The proposed expansion of the FLSA companionship and in-home services exemption through rescission of the 2013 Rule and return to the 1975 Rule will revive and retrench discriminatory assumptions about the labor of caregiving. The original exclusion of domestic workers from federal statutory protections reflected and perpetuated prevailing stereotypes that the "women's work" of caring for others was not as productive or demanding as work done by men outside the

---

[30] The Institute for Policy Studies and National Domestic Workers Alliance (NDWA), *We Dream In Black Program, "Notes from the Storm: Black Immigrant Domestic Workers"* (June 2021), https://www.domesticworkers.org/wp-content/uploads/2021/06/IPS-WDiB-survey-brief-English.pdf.
[31] *See*, *e.g.*, 90 Fed. Reg. 28979.
[32] Christman, *supra* note 27.
[33] U.S. Dep't of Labor, *Wage and Hour Compliance Action Data* (2025), https://enforcedata.dol.gov/views/data_summary.php; analysis by PHI (July 2025).
[34] RTI International, *Definitions and Occupational Characteristics of Direct Support Professionals: Environmental Scan and State Interview Findings Report*, U.S. Dep't of Health & Hum. Servs. (Jan. 2025), https://aspe.hhs.gov/sites/default/files/documents/97952b77e7410a29d755158e4aed46bd/dsp-definitions-occupational-characteristics.pdf ("One frequently cited explanation for the high rates of vacancies and turnover [among home care workers] is the combination of low wages, limited benefits, and career opportunities").

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

home.[35] In the many decades since, this view has persisted even as women have entered myriad spaces historically closed to them,[36] and even as nearly half of all working mothers have taken on the role of primary breadwinner in their households.[37] Notably, home care workers themselves have been found even more likely than other working women to be their families' principal source of income.[38]

Moreover, the legacy of slavery that excluded Black and Brown home care workers from the FLSA and other statutory protections laid the foundation for the occupational segregation that continues to characterize the U.S. workforce. All women continue to be clustered in relatively few, low-paying jobs—including stereotypically "feminine" jobs like home care work—and excluded from higher-paid, male-dominated fields.[39] Research confirms that sex segregation is a key driver of the pay gap[40]; indeed, the higher women's participation is in a given field, the lower the average

---

[35] *See, e.g.*, Phyllis Palmer, *Domesticity and Dirt: Housewives and Domestic Servants in the United States, 1920–1945* 12 (Temple University Press) (1989); Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 Am. U. L. Rev. 851, 880–918 (1999).
[36] *See*, *e.g.*, Will McGrew, *Gender Segregation: "Separate but Equal" or "Inefficient and Unfair"*, Washington Center for Equitable Growth (Aug. 18, 2016), https://equitablegrowth.org/gender-segregation-at-work-separate-but-equal-or-inequitable-and-inefficient/.
[37] Center for American Progress, *Breadwinning Women Are a Lifeline for Their Families and the Economy* (May 9, 2025), https://www.americanprogress.org/article/breadwinning-women-are-a-lifeline-for-their-families-and-the-economy/.
[38] National Domestic Workers Alliance, *Coronavirus' Economic Impact on Domestic Workers* (2020), https://www.domesticworkers.org/wp-content/uploads/2021/06/Coronavirus_Report_4_8_20.pdf (reporting that 77% of nearly 30,000 domestic workers surveyed are the primary breadwinners for their families).
[39] *See*, *e.g.*, Marina Zhavoronkova, Rose Khattar & Mathew Brady, *Occupational Segregation in America*, Center for American Progress (March 29, 2022), https://www.americanprogress.org/article/occupational-segregation-in-america/ ("[W]omen are stereotyped as caring and domestic, and thus likely to be successful in teaching, nursing, or caregiving roles, or as physically weak and unauthoritative, and thus unsuccessful in construction and trades or management positions."); Philip N. Cohen & Matt L. Huffman, *Occupational Segregation and the Devaluation of Women's Work across U.S. Labor Markets*, 81 Social Forces 881 (Mar. 2003), https://www.jstor.org/stable/3598179.
[40] Kimberly Bayard, *et al.*, *New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data*, 21 J. Lab. Econ. 887 (Oct. 2003), https://doi.org/10.1086/377026.

earnings for women workers.[41] But this segregation and the concomitant negative effect on pay is more pronounced for women of color.[42]

The intersectional adverse effects of the sex-segregated workforce are documented and entrenched. While women earn, on average, 73 cents for every dollar earned by a white man, that figure falls to 58 cents for Black women and, for Latinas, falls to 49 cents[43]—gaps that have remained stubbornly unchanged for years.

In the face of such systemic disparities, eliminating the barest wage and hour protections for the nation's lowest-paid workers moves the wage-gap in precisely the opposite direction, reinforcing antiquated notions that labor performed predominantly by women is, in fact, not really labor at all.

D. Rescinding the 2013 Rule will increase labor shortages and job turnover among home care workers, shifting caregiving obligations to women family members and hindering their labor force participation.

Home care workers are foundational to families' and communities' well-being. As life expectancy rises and health care for seniors and people with disabilities shifts from institutional to community settings, the longstanding assumption that family members can provide all necessary care

---

[41] Ariane Hegewisch, *et al.*, *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap*, Institute for Women's Policy Research Briefing Paper (Sept. 2, 2010), https://iwpr.org/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap/.

[42] *See*, *e.g*., National Employment Law Project, *Fact Sheet: Occupational Segregation of Black Women Workers in the U.S.* (Apr. 9, 2024), https://www.nelp.org/insights-research/occupational-segregation-of-black-women-workers-in-the-u-s/ (Black women comprise more than one quarter of home health aides, preschool and kindergarten teachers, nursing and psychiatric aides, and housekeepers, despite comprising fewer than 10 percent of all workers); Zhavoronkova, *et al.*, *supra* note 39 ("[T]he occupations that women and people of color tend to be segregated into often offer the lowest compensation, provide less access to benefits, and limit workers' economic security. . . . In predominantly female roles, occupational earnings are lower across the board for all workers in those roles, across different genders, races, and ethnicities. Highly gender-segregated labor markets depress wages for all women in that market but particularly the earnings of Black women."); Mark Paul, *et al.*, *Returns in the Labor Market: A Nuanced View of Penalties at the Intersection of Race and Gender*, Washington Center for Equitable Growth (Aug. 7, 2018), https://equitablegrowth.org/how-workplace-segregation-fosters-wage-discrimination-for-african-american-women/; Paula England, Michelle Budig & Nancy Folbre, *Wages of Virtue: The Relative Pay of Care Work*, 49 Social Problems 455 (Nov. 2002), https://www.jstor.org/stable/10.1525/sp.2002.49.4.455 (finding Black women disproportionately harmed by wage penalty associated with care work).

[43] Zhavoronkova *et al.*, *supra* note 39.

is untenable.[44] For instance, "[f]rom 2022 to 2060, the population of adults age 65 and older in the U.S. is projected to increase dramatically from 57.8 million to 88.8 million, and the number of adults age 85 and older is expected to nearly triple over the same time period, from 6.5 million to 17.5 million."[45] Due to such surging demand, as well as the profound current shortage of home care workers and high turnover in the field, it is expected that 5.5 million home care jobs will need to be filled between 2022 and 2032,[46] making it, in the words of the U.S. Department of Health and Human Services, "the largest occupational category in the economy."[47]

But if home care professionals decide not to take those jobs or to stay in them, the exploding caregiving burden will not disappear; it merely will shift, chiefly to family members. Today, nearly one in five people in the U.S.—roughly 48 million adults—is a caregiver to an adult with health or functional needs, an increase of more than 8 million caregivers from just five years earlier.[48] As vividly illustrated during the COVID-19 pandemic, when care professionals left the field in droves, those unpaid care duties fall disproportionately to women.[49] Indeed, women are estimated to comprise 61 percent of caregivers.[50] Notably, it is Black women and women of color in low-income households who provide, on average, more time-intensive unpaid care to family members.[51]

These obligations have direct, deleterious effects on women's job opportunities. One study found that, as a result of elder caregiving obligations, 33 percent of working women cut their job hours, 29 percent passed up a promotion, training opportunity, or assignment, 22 percent took a leave of absence, 20 percent switched from full-time to part-time employment, and 29 percent either quit

---

[44] I. Blackberry, *et al.*, *What Is the Care Economy? A Scoping Review on Current Evidence, Challenges, Facilitators and Future Opportunities*, Frontiers in Public Health (May 14, 2025), https://pmc.ncbi.nlm.nih.gov/articles/PMC12116328/, at 1. *See also* Joanne Binette, *Where We Live, Where We Age: Trends in Home and Community Preferences* (AARP 2021), https://datastories.aarp.org/2021/home-and-community-preferences/.
[45] Scales & McCall, *supra* note 18.
[46] PHI, Workforce Data Center (2024), https://www.phinational.org/policy-research/workforce-data-center/#tab=National+Data&natvar=Employment+Projections.
[47] *Health Care Workforce: Key Issues, Challenges, and the Path Forward*, *supra* n. 16, at 8.
[48] National Alliance for Caregiving & AARP Public Policy Institute, *Caregiving in the U.S. 2020* (May 2020), https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf, at 4 & Figure 1.
[49] *See, e.g.*, Lydia DePillis, Jeanna Smialek, & Ben Casselman, "Jobs Aplenty, but a Shortage of Care Keeps Many Women from Benefiting," *The New York Times* (June 22, 2023), https://www.nytimes.com/2022/07/07/business/economy/women-labor-caregiving.html.
[50] Nat'l Alliance for Caregiving & AARP Public Policy Inst., , *supra* note 48, at 10.
[51] Sean Fahle & Kathleen McGarry, "How Caregiving for Parents Reduces Women's Employment: Patterns Across Sociodemographic Groups," in *Overtime: America's Aging Workforce and the Future of Working Longer*, Lisa F. Berkman & Beth C. Truesdale, eds. (Oxford Univ. Press 2022).

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

their jobs or retired early.[52] Caregiving also can be associated with diminished performance, which also may affect opportunities for advancement. In one study, for instance, caregivers reported having difficulty functioning at work approximately 40 percent of the time in the prior month, including diminished physical and mental task performance, quality of work, efficiency, and time management.[53]

Such wide-ranging, adverse workplace effects on caregivers cause profound economic consequences. One study estimated that women who left the workforce early due to caregiving obligations had average losses in wages, Social Security, and pension benefits totaling $324,044 (as compared to an average of $283,716 for men).[54] Another found that past parental caregiving increases women's economic insecurity later in life, from relying on public assistance benefits and Medicaid to living a household with an income below the poverty level.[55] Significantly, research also shows that the job-related harms of women's caregiving last even after they have stopped providing such care. For instance, studies have found that women who cut their hours to provide care do not return to their prior level of work,[56] while those who resume full-time employment are more likely to "[e]arn lower wages," "[h]ave a 'benefit-poor' job," and "[r]eceive reduced retirement benefits."[57]

---

[52] MetLife Mature Market Institute, National Alliance for Caregiving & the National Center on Women and Aging, *The MetLife Juggling Act Study: Balancing Caregiving with Work and the Costs Involved* (Nov. 1999). *See also* Peter M. Smith, *et al.*, *Male/Female Differences in the Impact of Caring for Elderly Relatives on Labor Market Attachment and Hours of Work: 1997-2015*, 75 The Journals of Gerontology: Series B 694 (2020), https://academic.oup.com/psychsocgerontology/article/75/3/694/5423973 (elder care responsibilities cause women, as compared to men, to be greater than five times more likely to work part-time, twice as likely to take time off, and nearly 75 percent more likely to leave the workforce altogether).

[53] Debra Lerner, *et al.*, *A Population-Based Survey of the Workplace Costs for Caregivers of Persons with Treatment-Resistant Depression Compared with Other Health Conditions*, 62 J. Occup. Environ. Med. 746 (Sept. 2020). *See also* Nat'l Alliance for Caregiving & AARP Public Policy Inst, *supra* note 48, at 68 (in survey of working caregivers, 8 percent reported receiving a warning about their performance or attendance and 7 percent turned down a promotion).

[54] MetLife Mature Market Institute, *The MetLife Study of Caregiving Costs to Working Caregivers: Double Jeopardy for Baby Boomers Caring for Their Parents* (June 2011), https://www.homecaregenerations.com/wp-content/uploads/2012/02/study.pdf, at 15.

[55] Chizuko Wakabayashi & Katharine Donato, *Does Caregiving Increase Poverty Among Women in Later Life? Evidence from the Health and Retirement Survey*, 47 J. Health Soc. Behav. 258 (Sept. 2006). *See also* Richard L. Kaplan, *Family Caregiving and the Intergenerational Transmission of Poverty*, 46 J. Law Med. Ethics 629 (Sept. 2018).

[56] Eliza K. Pavalko & Julie E. Artis, *Women's Caregiving and Paid Work: Causal Relationships in Late Midlife*, 52B J. Gerontol.: Ser. B S170 (July 1997).

[57] Emma Dentinger & Marin Clarkberg, *Informal Caregiving and Retirement Timing among Men and Women: Gender and Caregiving Relationships in Late Midlife*, 23 J. Fam. Issues 857 (2002).

Workers are not the only ones who experience economic harm due to caregiving-related job disruptions. Employers, too, incur considerable losses. According to just one estimate, the business cost of replacing women who leave work due to caregiving totals $3.3 billion, absorbing women's caregiving-related absenteeism costs $270 million, women's "partial absenteeism"—such as arriving late or leaving early to attend to caregiving—costs $327 million, and women's caregiving-related interruptions during the workday amounts to $3.8 billion.[58] Such estimates do not include the significant health care-related costs borne by employers that are experienced by workers juggling caregiving obligations.[59]

In sum, women's ability to participate fully in U.S. workforce and to assure the financial stability of their families plainly depends upon their ability to secure reliable, quality care for their loved ones. Rescinding the 2013 Rule will only exacerbate the existing shortage of such workers, precisely when they are needed most.

As discussed further below, such rescission not only is dangerous policy for workers, families, and employers; it is illegal.

II. THE DEPARTMENT'S PROPOSED RESCISSION OF THE 2013 RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The APA is "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391 (2024) (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)). The APA "prescribe[s] procedures for agency action," and "delineates the basic contours of judicial review of such action." *Id.* In promulgating rules, agencies must observe "procedure required by law." 5 U.S.C. § 706(2)(D). Moreover, when an agency's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A), "contrary to constitutional right," *id.* § 706(2)(B), or "in excess of the agency's authority," *id.* § 706(2)(C), those actions violate the APA.

DOL has violated these directives in numerous respects, all of which preclude rescission of the 2013 Rule.

---

[58] Metropolitan Life Insurance Company & National Alliance for Caregiving, *The MetLife Study of Employer Costs for Working Caregivers*, Connecticut: Metropolitan Life Insurance Company (June 1997).

[59] *See*, *e.g.*, MetLife Mature Market Institute, National Alliance for Caregiving, & University of Pittsburgh Institute on Aging, *The MetLife Study on Working Caregivers and Employer Health Care Costs: New Insights and Innovations for Reducing Health Care Costs for Employers* (Feb. 2010), https://www.kff.org/wp-content/uploads/sites/2/2010/09/mmi-working-caregivers-employers-health-care-costs.pdf.

A. DOL has effectively rescinded the 2013 Rule without undertaking public notice and comment, in violation of the APA.

Just days after publishing the instant NPRM in the Federal Register on July 2, 2025, on July 25 the Acting Administrator of the Wage and Hour Division released guidance directing Regional Administrators and District Directors to "suspend enforcement of all provisions introduced in the 2013 final rule," including discontinuing enforcement in all open cases that predate the guidance. ("Bulletin No. 2025-4").[60] Bulletin No. 2025-4 violates the APA's procedural mandate to observe "procedure required by law," 5 U.S.C. § 706(2)(D), in two ways.

First, while the NPRM at least technically comports with the APA's notice-and-comment procedures for informal rulemaking[61]—in that it was published in the Federal Register,[62] allows the opportunity for public comment,[63] and provides 60 days for submission of such comment[64] — Bulletin No. 2025-4's suspension of the 2013 Rule's enforcement constitutes an effective rescission of the rule without following any of these procedures. The APA may excuse an agency from engaging in the requisite notice-and-comment when issuing "interpretive rules and statements of policy,"[65] but in an instance like this one—where the "interpretive rule and statement[ ] of policy" in many respects effectuates the precise result proposed by the NPRM—the exemption improperly swallows the rule. It also violates the APA for all of the substantive reasons detailed further *infra*.

Second, by effectively rescinding the 2013 Rule *during* the period when the public putatively has been provided "an opportunity to participate in the rule making through submission of written data, views, or arguments," and *before* the agency has had the opportunity for "consideration of the relevant matter presented," 5 U.S.C. § 553(c), DOL betrays that the NPRM is purely for show—and that reinstatement of the 1975 Rule is a foregone conclusion. Indeed, preemptively halting enforcement of the 2013 Rule hardly provides "clarity and consistency" to field offices, employers, or workers, as DOL claims in Bulletin No. 2025-4, at 2, unless DOL has no intention of actually "consider[ing]" contrary public comment urging preservation of the status quo.

B. DOL's proposed rescission of the 2013 Rule is arbitrary and capricious.

The APA's bar on arbitrary and capricious agency action, 5 U.S.C. § 706(2)(A), requires an agency to "articulate a satisfactory explanation for its action," including a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591

---

[60] U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2025-4, *Home Enforcement Guidance* (July 25, 2025), https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-4.pdf.
[61] 5 U.S.C. § 553.
[62] *Id.* § 553(b).
[63] *Id.* § 553(c).
[64] *Id.* § 553(d).
[65] *Id.* § 553(d)(2).

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

U.S. 1, 16 (2020) (APA "requires agencies to engage in 'reasoned decisionmaking'") (citation omitted). "An agency decision fails to pass this test if . . . the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise." *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 21 (1st Cir. 2020) (internal quotation marks omitted). The NPRM fails this test in multiple ways.

DOL's stated justifications for abandoning regulations protecting millions of workers that have been in place for more than a decade and returning to the regulations of 50 years ago—articulated in two scant pages of the Federal Register—are that the Department "questions whether the 1975 regulations better comport with the statute and Congress's intent to exempt home care employees from FLSA coverage" and its belief that "[r]eturning to the 1975 regulations would also significantly reduce regulatory burden for the consumers and providers of home care services, which in turn could help to expand access to home care services." 90 Fed. Reg. 28978. Neither of these explanations satisfy the APA.

1. DOL has not provided sufficient reasoning for abandoning the statutory interpretation in the 2013 Rule.

DOL has fallen far short of its duty under the APA to "articulate a satisfactory explanation for its action," *State Farm*, 463 U.S. at 43, particularly given that that "action" is the abandonment of protections that have been in place for twelve years. Under the "change-in-position doctrine," agencies may only change accepted interpretations if "they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). *Accord Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 917 (2025). That "reasoned explanation" specifically must account for the agency's "disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Moreover, "'when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec.,* 591 U.S. at 30 (quoting *State Farm*, 463 U.S. at 51).

As a threshold matter, as detailed further *infra*, DOL's "preliminary assessment" that the 1975 Rule "better comport[s] with congressional intent" than the 2013 Rule is simply wrong. *See* Section C. So, too, is the Department's supposition that the 2013 Rule has imposed a "regulatory burden for the consumers and providers of home care services" that has inhibited "access to home care services." *See* Section A. Indeed, a return to the 1975 Rule is more likely to *diminish* access to such services. *See id*.

Aside from these many flaws, DOL also fails to provide any of the detail required under the change-in-position doctrine to justify abandoning the 2013 Rule. Indeed, when it adopted the Rule over a decade ago, the Department specifically rejected the 1975 Rule's reading of congressional intent as obsolete:

> In the 1970s, many individuals with significant care needs were served in institutional settings rather than in their homes and their communities. Since that time, there has been a growing demand for long-term home care for persons of all ages, largely due to the rising cost of traditional institutional care and, in response to the disability civil rights movement, the availability of federal funding assistance for home care, reflecting the nation's commitment to accommodate the desire of individuals to remain in their homes and communities. As more individuals receive services at home rather than in nursing homes or other institutions, workers who provide home care services, referred to as "direct care workers" in this Final Rule but employed under titles including certified nursing assistants, home health aides, personal care aides, and caregivers, perform increasingly skilled duties. Today, direct care workers are for the most part not the elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974, but are instead professional caregivers.
>
> . . . .
>
> *Because the 1975 regulations define companionship services and address third-party employment in a manner that*, given the changes to the home care services industry, the home care services workforce, and the scope of home care services provided, *no longer aligns with Congress's intent when it extended FLSA protections to domestic service employees*, the Department is modifying the relevant regulatory provisions . . . . These changes are intended to clarify and narrow the scope of duties that fall within the definition of companionship services in order to limit the application of the exemption. The Department intends for the exemption to apply to those direct care workers who are performing "elder sitting" rather than the professionalized workforce for whom home care is a vocation. In addition, *by prohibiting employers of direct care workers other than the individual receiving services or his or her family or household from claiming the companionship services or live-in domestic service employment exemptions, the Department is giving effect to Congress's intent in 1974 to expand coverage to domestic service employees rather than to restrict coverage for a category of workers already covered*.

Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60455 (Oct. 1, 2013) (emphasis added).

In the present NPRM, DOL acknowledges the 2013 abandonment of the 1975 Rule—as well as the 2013 Rule's approval by the U.S. Court of Appeals for the D.C. Circuit, a decision the Supreme Court declined to review[66]—without meaningful discussion of any of the above reasoning. 90 Fed. Reg. 28978. Nor does the Department address why these "facts and circumstances" should

[66] 90 Fed. Reg. 28978 (citing *Home Care Ass'n v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015), *cert. denied*, 579 U.S. 369 (2024)).

now be "disregard[ed]" and the 1975 Rule should be considered the better reading of congressional intent. *Fox Television Stations*, 556 U.S. at 515.

Instead, DOL merely invokes the Supreme Court's 2024 ruling in *Loper Bright*, 603 U.S., , as the sole ground for "taking a fresh look" at the 2013 Rule. But *Loper Bright* does not compel DOL to change its interpretation of the FLSA. Indeed, since the Supreme Court's decision, DOL has "taken the position in litigation that the 2013 rule is still valid." 90 Fed. Reg. 28978.[67] And *Loper Bright* does not displace the change-in-position doctrine or otherwise direct agencies to rescind their own regulations *sua sponte* without complying with APA standards. *See*, *e.g.*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 n.4 (2005) ("We must note the conceptual difference between the *Chevron* inquiry, which asks whether an agency's substantive interpretation of a statute is a reasonable one, and the procedural question of whether an agency provided an adequate explanation for its decision to switch from one statutory interpretation to another."). Moreover, DOL's reliance on a misreading of Supreme Court precedent plainly does not come close to satisfying the rigorous "reasoned explanation" standard applicable to the proposed policy change. *See Department of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1912-13 (2020) (rescission of Deferred Action for Parents of Americans and Lawful Permanent Residents program, based on flawed reading of legal opinion provided by Attorney General, did not supply the requisite "reasoned analysis" for changing agency policy).

In any event, for the reasons discussed below, the 2013 Rule is the "best reading" of the statute. *Loper Bright*, 603 U.S. at 400. By contrast, the 1975 Rule does not give meaning to statutory text or adequately further congressional intent, and thus is not a permissible interpretation of the companionship exemption.[68]

[67] *See*, *e.g.*, *Dep't of Labor v. Amer. Healthcare Servs., LLC*, 762 F. Supp. 3d 666 (S.D. Ohio 2025) (granting summary judgment to DOL in enforcement action against third-party employer under 2013 Rule, after renewed briefing post-*Loper Bright*).

[68] Both the 1975 Rule and the 2013 Rule replacing it have been upheld based on Chevron deference. *Long Island Care at Home*, 551 U.S. at 167; *Home Care Association of America v. Weil*, 799 F.3d 1084, 1087 (D.C. Cir. 2015), *cert. denied*, 579 U.S. 927 (2016); *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); 799 F.3d at 1090. As the Department notes, the validity of agency rules facing APA challenges must now be evaluated under the legal standard laid out in *Loper Bright*, which asks whether agency interpretations are the "best reading" of the statute. 603 U.S. at 400; 90 Fed. Reg. 28978. When the "best reading" is that Congress has delegated "discretionary authority to an agency," as the Supreme Court and D.C. Circuit have acknowledged Congress did in the FLSA on the issue of third-party agency exemptions, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 603 U.S. at 395; *see also Long Island Care*, 551 U.S. at 167; *Home Care Association*, 579 F.3d at 1087.

2. DOL ignores the serious reliance interests engendered by the 2013 Rule.

When an agency changes an existing policy, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account,'" *Encino Motorcars*, 579 U.S. at 221–22, and "[i]t would be arbitrary or capricious to ignore such matters." *Fox Television*, 556 U.S. at 515. *See also Regents*, 140 S. Ct. at 1915 ("[B]ecause [the agency] was 'not writing on a blank slate' [in changing policy], it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." (quoting *id.* at 1929 n.14 (Thomas, J.))).

Here, the 2013 Rule has been in place for over a decade, conferring benefits for millions of the nation's most vulnerable workers. Yet the NPRM contains no discussion of these workers' serious reliance interests—in deciding to enter the home care field, in deciding to pursue additional training and other investment in their careers, and in planning for their and their families' economic future—nor those of the families that rely on such workers' assistance in their homes. Given the profound economic precarity of these workers, as well as the dominance of third-party employers in today's home care industry, DOL's wholesale failure to even mention, let alone reckon with, the serious reliance implicated by the 2013 Rule's rescission renders the contemplated change arbitrary and capricious.

So, too, does the NPRM wholly ignore the reliance interests of home care providers. While devoting considerable—albeit conclusory—attention to the purported burdens of the 2013 Rule on third-party providers and the cost savings they will enjoy under a return to the 1975 Rule, DOL underestimates the extent of the dislocation to the home care workforce that the proposed rescission will cause. While workforce shortages unquestionably exist now, notwithstanding the 2013 Rule, business models concerning infusions of labor to address such costs depend on access to livable hourly wages and overtime. Wholesale withdrawal of such protections will disrupt the settled expectations of providers, as well as the workers they employ.

3. The Department fails to consider important aspects of the problem.

DOL's action also is arbitrary and capricious because it fails to consider "important aspect[s] of the problem" created by the rescission of the 2013 Rule and reinstatement of the 1975 Rule. *State Farm*, 463 U.S. at 43.

a. Rescission of the 2013 Rule would eliminate vital protections for home care workers, worsen the race- and gender-based wage gap, and entrench gender stereotypes.

As discussed extensively *supra* and further *infra*, the Department has failed to consider the benefits of the 2013 Rule to home care workers—including their reliance interests in the Rule's continued implementation—or quantify the value of the current protections. Nor has DOL considered whether stripping workers of wage and overtime protections could exacerbate their vulnerability to wage theft and underpayment, among other abuses. Also absent from the NPRM is any discussion of the racist and misogynist roots of domestic workers' initial exclusion from the FLSA, or how continuing to exclude them from the statute's protections perpetuates vestiges of chattel slavery and Jim Crow—including the continued systemic barriers to Black and Brown women's economic security or the entrenchment of harmful stereotypes of domestic work as "personal" care rather than "professional" labor.

b. Reverting to the 1975 Rule would reduce the availability and quality of home care.

Contrary to DOL's scant analysis, stripping overtime and minimum wage protections would exacerbate existing high turnover rates and worker shortages. Indeed, the Department has offered virtually no evidence connecting the 2013 Rule to slow growth and high costs in the home care industry. Slow growth could be explained by numerous other factors including employers' noncompliance with the regulation and insufficient regulatory protections—such as OSHA oversight and collective bargaining rights—both of which drive turnover and deter new entrants into the industry. DOL provides no explanation as to how *diminishing* wage and hour protections would drive greater worker interest in the home care field. Finally, the Department also fails to account for how high turnover costs drive high prices to consumers and providers of home care services, which may be exacerbated by a regulatory rollback.

c. Consumers of home care services and home care workers both benefit from the 2013 Rule.

Older people and people with disabilities are best served by highly skilled, well-paid workers who maintain continuity of employment. Put simply, better working conditions translate to better care. By pitting consumers of home care against the workers providing it, the NPRM creates a false dichotomy. Research shows that it is the federal and state underfunding Medicaid, Medicare, and other forms of support that pose the greatest barriers to seniors and people with disabilities' having access to care, not measures that protect workers' right to a living wage and other conditions of work.

d. The 1975 Rule does not reflect the realities of the modern home care industry.

In substance as well as language, the Department ignores the realities of the modern home care industry. The former is discussed in depth *infra* in Section C.2. But the 1975 Rule's profoundly outdated language vividly illustrates why DOL saw fit to change the regulations in 2013, and why, twelve years later, it makes even less sense for workers to be forced back in time by five decades. Each of the following proposed changes signals a troubling disregard for the evolution of essential home care work and the individuals, primarily women of color, who perform it.

- Listing "governesses" and "footmen" as examples of domestic service employees and excluding "home health aides" in 29 C.F.R. § 552.3.

The Department proposes to revert to an outdated list of home occupations in Section 552.3, and to exclude "home health aides" and "personal care aides." By making this change, the Department would signal deep disregard for the modern home care workforce, which did not exist in the same form in 1975 but is now primarily made up of home health and personal care aides, the fastest-growing job categories in the United States.[69] The exclusion of these job titles from regulatory language would perpetuate the historical marginalization of domestic workers and obscure the Department's statutory obligation to provide them with basic labor protections. There is no possible "reasoned explanation," *see FDA*, 145 S. Ct. at 917, for why the Department should include "governesses" and "footmen," archaic and culturally obsolete positions, in its regulations while excluding "home health aides" and "personal care aides."

- Restricting domestic service to employment in the home of the employer in 29 C.F.R. § 552.3 and 552.101.

The Department's proposed reversion to the textual requirement that domestic service occur "in or about the private home of the employer," 90 Fed. Reg. 28984, needlessly reinserts extraneous and confusing language into the regulation. On its face, this language may be "misread as impermissibly narrowing coverage of domestic service employees under the Act" to only care workers who are directly employed by their clients. 78 Fed. Reg. 60460. The Department "has consistently maintained that the phrase is an extraneous vestige." *Id.* at 60461 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 169–170 (2007)).

As the Department aptly observed in its response to comments on the 2013 Rule, "[t]his phrasing is not applicable to the realities of domestic service employment today, in which many employees are employed, either solely or jointly, by an entity other than the person in whose home the services are performed. Removal of this extraneous language more accurately reflects Congressional intent and clarifies coverage of these workers." *Id.* (citing 76 Fed. Reg. 81192). The Department's decision to reinsert this outdated and confusing language now, when domestic workers are even more likely to be employed by third parties than in 2013, is arbitrary and unsupported by any reasoned explanation.

- Focusing on "infirmity" rather than "disability" in 29 C.F.R. § 552.6.

DOL proposes to return to language describing care recipients as "the aged or infirm" rather than using modern, inclusive terminology such as "person with a[] . . . disability." *Compare* 90 Fed. Reg. 28984 (describing companionship as serving "a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.") *with* 29 C.F.R. § 552.6 (same, but for "an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself.").

[69] *Health Care Workforce: Key Issues, Challenges, and the Path Forward*, *supra* n. 16, at 8.

This change introduces two significant regressions. First, it replaces "disability," the favored term in modern statutes, including the Americans with Disabilities Act, with "infirmity," which evokes outdated and demeaning notions of physical and mental incapacity that is stigmatizing to individuals with disabilities. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (codified as amended at 42 U.S.C. §§ 12101–11213 and scattered sections in 47 U.S.C.); Douglas C. Baynton, *'These Pushful Days': Time and Disability in the Age of Eugenics*, 13 Health and History 43, 60 (2011) (noting that terms like "infirmity" are viewed as "offensive relics from an unenlightened age"). Second, the 1975 Rule implies that an individual receiving care must be wholly unable to care for themselves, while the 2013 Rule allows that someone may retain capacity for self-care but require assistance. The latter, more nuanced understanding is more accurate to the actual needs of many individuals receiving home care.[70]

The change is not merely semantic: it signals a troubling return to stigmatizing language that undermines both the dignity of care recipients and the clarity of the regulation.

4. DOL fails to consider the costs of rescinding the 2013 Rule and reverting to the 1975 Rule.

"As a general rule, the costs of an agency's action are a relevant factor that the agency must consider before deciding whether to act." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732–33 (D.C. Cir. 2016) (Kavanaugh, J., dissenting); *see also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017). But the Department makes no attempt to quantify the potential costs of the rule for home care workers. It merely vaguely notes that some workers may lose overtime pay, which could "negatively impact the morale of affected home care workers and lead to increased employee turnover and difficulty attracting skilled workers to the industry." 90 Fed. Reg. 28982. It also fails to consider potential costs for employers and customers that would result from workers leaving the industry because of the rule change.

[70] Tracy L Mitzner et al., *Older Adults' Needs for Home Health Care and the Potential for Human Factors Interventions*, Proc. of the Hum. Factors and Ergonomics Soc'y Annual Meeting (Oct. 2009) (Roughly half of all home care patients do not receive assistance with "activities of daily living" or "instrumental activities of daily living"); Nat'l Inst. Of Health, Nat'l Inst. On Aging, *Services for Older Adults at Home*, https://www.nia.nih.gov/health/caregiving/services-older-adults-living-home (last accessed Aug. 1, 2025) (noting that the home care services for older adults may range from "a few hours each day" to "24/7").

C. DOL's proposed rescission of the 2013 Rule is contrary to law.

The Department's proposed rescission of the 2013 Rule and return to the 1975 Rule violates the APA because it is not "in accordance with law." 5 U.S.C. § 706(2)(A). Congress repeatedly amended the FLSA with the intention of bringing within its coverage domestic workers who were originally excluded from minimum wage and overtime protections.

1. Congress amended the FLSA with the intention of covering the domestic workers originally excluded from the statute.

After 1960, Congress and DOL made ongoing efforts to eliminate the legal structures in the FLSA that undervalued the caregiving work typically performed by women of color.

The 1961 and 1966 amendments. Congress first amended the statute to cover women's caregiving labor performed in institutions. In 1961 and 1966, it amended the FLSA to require minimum wages and overtime for workers employed by enterprises earning more than $500,000 per year. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 2, 75 Stat. 65, 65-66 (1961) (codified as amended at 29 U.S.C. § 203(r), (s) (2006)); Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(a) and (c), 80 Stat. 830, 831 (1966) (codified as amended at 29 U.S.C. § 203(r), (s)(2006)). The amendments sought to cover employees working:

> in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit).

Fair Labor Standards Amendments of 1966 § 102(a), 80 Stat. 830, 831 (1966) (codified as amended at 29 U.S.C. § 203(r)(2)(A) (2006)).

Compared with the original 1938 FLSA, this amendment covered many workers in predominantly female occupations. It granted minimum wages and overtime to workers engaged in personal care of adults who are sick, disabled, or elderly, and children—whether at institutions, hospitals, or schools. The 1966 Amendment thereby elevated the status of personal care work to that of a proper profession. This was a significant correction to the racist and sexist legacy encoded in the 1938 statute, but domestic workers remained outside the statute's purview.

The 1974 amendments. In 1974, Congress's efforts to rectify gaps for women continued. In enacting the Fair Labor Standards Amendments of 1974 (the "1974 Amendments"), Congress was so determined to rectify the 1938 omission of domestic workers from the original FLSA that it took the unusual step of amending its original legislative findings. Section 7(a) of the 1974 Amendments adds "[t]hat Congress further finds that the employment of persons in domestic service in households affects commerce." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7(a), 88 Stat. 62 (1974) (codified as amended at 29 U.S.C. § 202(a) (2014)). The 1974 Amendments specifically extended minimum wages and overtime to any employee employed in domestic service. Pub. L. No. 93-259, § 7(b), 88 Stat. 62 (codified as amended at 29 U.S.C. §§ 206(f), 207(*l*) (2014)).

The House of Representatives report accompanying introduction of this legislation stated that its goal was to "improve the sorry image of household employment." H.R. Rep. No. 93-913, at 34 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2843. The Committee's view was that "[i]ncluding domestic workers under the protection of the Act should help to raise the status and dignity of this work." *Id*. The report also included a letter signed by thirteen female Members of Congress asking the House to remember that "[c]ontrary to popular opinion, women work not for 'pin money' but because they have to. They are either the head of the household or contribute substantially to their family's income." *Id.* Congress thus sought to remedy the sexism encoded in the 1938 Act.[71]

Congress also sought, in these 1974 Amendments, to eliminate the racially biased exclusions that disadvantaged low-income women of color. Senator Williams noted, "the plain fact is that private household domestic workers are overwhelmingly female and members of minority groups," and "in failing to cover domestics under our basic wage and hour law, we would be turning our backs on these people." 119 Cong. Rec. S24799 (daily ed. July 19, 1973) (statement of Sen. Williams). Remedying racial and gender discrimination and achieving equity was foremost in legislators' minds. Senator Williams noted that:

> [t]wo-thirds of all household workers are black and of the remaining one-third, many are Chicanos, American Indians, or members of other minority groups. They are called "girl" and by their first names while they, themselves, must still address their employers and their employers' children as "ma'am" or "sir" or "Miss Jane."

Id.; *see also* 119 Cong. Rec. 18341 (daily ed. June 6, 1973) (statement of Rep. Chisholm) ("Women, especially black women, simply have not had a fair shake in the job market. It is time they were given their due.").

The 1974 Amendments exempted from wage and hour protections "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." Pub. L. No. 93-259, § 7(b)(3), 88 Stat. 62 (codified as amended at 29 U.S.C. § 213(a)(15) (2014)). The terms in this section were to be

[71] *See generally* Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 J. of Pol'y Hist. 416, 419-440 (1995).

“defined and delimited by regulations of the [DOL].”[72] *Id.* These exemptions were intended to be applied only to “casual” babysitters and “companions” or “elder sitters” for the elderly or those with disabilities. *Id.* § 7(b)(3); 119 Cong. Rec. S24801 (daily ed. July 19, 1973) (statement of Sen. Burdick). The Senate Committee on Labor and Public Welfare and House of Representatives Committee on Education and Labor Reports made explicit, however, that “[i]t is the intent of the committee to include within the coverage of the Act all employees whose *vocation* is domestic service. . . . People who will be employed in the excluded categories are *not regular bread-winners or responsible for their families' support.*” H.R. Rep. No. 93-913, at 36 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2845; S. Rep. No. 93-690, at 20 (1974) (emphasis added).

Accordingly, professional caregivers were intended to be covered by the 1974 Amendments, but those who did not make their living from providing such services, and provided them merely on an incidental basis, were not.

2. The 2013 Rule furthers the purposes of the 1974 Amendments to extend wage protections to all professional home care workers.

The Department of Labor’s 2013 Rule furthers Congress’s intent in its 1974 Amendments to rectify sexual and racial discrimination, and to protect workers trying to support their families. At the time of their issuance, the regulations brought the statutory scheme into line with the contemporary reality of the home care industry. That reality has become even more pronounced in the twelve years since the 2013 Rule became effective, namely: home care workers are a professional workforce—the vast majority of whom are employed by third-party agencies—providing in-home care to a growing population.

Today, most long-term care “workers care for clients in private homes,” not in residential-care institutions.[73] The change reflects a cultural and legal shift in favor of community- based care. This shift is inspired by newer laws like the Americans with Disabilities Act of 1990 and the associated directive that society provide services to elderly and people with disabilities in their own homes, or otherwise in the “most integrated setting appropriate.” *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (quoting 28 C.F.R. § 35.130(d) (1998)).[74] Home care workers perform strenuous work, including bathing and dressing individuals, administering medication, and providing other care, such as feeding and assistance with toileting. Such work “was previously almost exclusively provided in hospitals, nursing homes, or other institutional settings and by trained nurses. This work is far more

---

[72] Domestic service employees who resided with their employers were also exempted from the FLSA’s overtime’s provisions. 1974 Amendments, § 7(b)(4), 88 Stat. 62 (codified as amended at 29 U.S.C. § 213(b)(21) (2014)).

[73] Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa L. Rev. 1835, 1846 (2007).

[74] For a discussion of Olmstead’s impact on home health care, *see generally* Andrew I. Batavia, *A Right to Personal Assistance Services: “Most Integrated Setting Appropriate” Requirements and the Independent Living Model of Long-Term Care*, 27 Am. J. L. & Med. 17 (2001).

skilled and professional than that of someone performing 'elder sitting.'" Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60454, 60458 (Oct. 1, 2013) (codified at 29 C.F.R. pt. 552).

In addition to becoming more professionalized, the home care sector has grown and continues to burgeon. The population of the U.S. aged 65 and over has grown significantly, from 8.1% of the total population in 1950 to 16.8% in 2020.[75] As discussed *supra*, the home care industry will "experience the largest increase in new jobs of any occupation" during this decade, and grow to "the largest occupational category in the economy" by 2032.[76]

The Department's 2013 Rule appropriately recognized that Congress in 1974 could not have intended to deprive the basic protections of the FLSA from a large and professional workforce whose services will be even more critically needed in the decades to come. Given the contours of today's home care industry, reverting *back* to the regulatory scheme of 50 years ago is directly contrary to Congress's intent.

a. The 2013 Rule's definition of "companionship services" in 29 C.F.R. § 552.6 best reflects congressional intent.

In 2013, the Department revised its definition of "companionship services for the aged and infirm" to mean "to engage the person in social, physical, and mental activities" and "to be present with the person in his or her home" or to accompany him or her outside the home. *See* 29 C.F.R. § 552.6(a). Care activities like dressing, grooming, feeding, bathing, toileting, and transferring and instrumental activities of daily living (like meal preparation, driving, and light housework) are included in exempt work only if they do not exceed 20% of total hours worked. *See* 29 C.F.R. § 552.6(b). Medically related services for the person being cared for are not included, and domestic services for the benefit of other members of the household are not included. *See* 29 C.F.R. §§ 552.6(c), (d).

Reverting to the 1975 Rule would contravene the clearly stated congressional intent behind the 1974 FLSA amendments by excluding breadwinning, professional caregivers performing demanding care work inside the home from basic labor protections. It would needlessly and unlawfully narrow the distinction that Congress created between "employees whose vocation is domestic service" and those who are "not regular bread-winners or responsible for their families' support" when it first created the companionship exemption. H.R. Rep. No. 93-913, at 36 (1974); S. Rep. No. 93-690, at 20 (1974). By including "care" work within the definition of companionship, the

[75] *See* Zoe Caplan, *2020 Census: 1 in 6 People in the United States Were 65 and Over*, U.S. Census Bureau (May 25, 2023), https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html; Laura B. Shrestha & Elayne J. Heisler, Cong. Rsch. Serv., The Changing Demographic Profile of the United States 13 (2006), https://www.fas.org/sgp/crs/misc/RL32701.pdf.
[76] *Health Care Workforce: Key Issues, Challenges, and the Path Forward*, *supra* note 16, at 8.

Department is straying from congressional intent that exempt companions predominantly engage in passive activities such as "sit[ting]" and "watch[ing]." 78 Fed. Reg. 60464. In light of the demographics of home care workers discussed *supra*, the proposed rule would also contravene congressional intent that women of color are given a "fair shake in the job market" by "cover[ing them] in our basic wage and hour law." *See* 119 Cong. Rec. 18341 (1973) (statement of Rep. Chisholm); 119 Cong. Rec. S24799 (daily ed. July 19, 1973) (statement of Sen. Williams).

The Department argues that "the regulation for exempt companions should not be any more restrictive" than the one for casual babysitters, who may provide unlimited care including "feeding, bathing, and changing the diapers of young children." 90 Fed. Reg. 28979. While these services bear some superficial similarity to those provided by home care workers, this comparison is inapposite. The key criterion for the babysitting exemption is not the type of care provided, but rather that it is offered on a "casual basis." As defined in 29 C.F.R. § 552.5, babysitting is by definition "casual," and refers to "employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting." The Department's proposed reversion to the 1975 Rule is therefore internally inconsistent—it would extend the exemption to professional home care workers but not to professional babysitters, i.e. in home childcare providers. This not only departs from congressional intent, but also disregards the social reality that while elder and disability care is now largely performed by professional, breadwinning workers, babysitting remains a service that is often provided on a casual basis.

This result is flatly inconsistent with the FLSA amendments, which were intended to address longstanding racial and gender exclusions and provide labor protections for all but "casual" workers. Pub. L. No. 93-259, § 7(b)(3); 119 Cong. Rec. S24801 (daily ed. July 19, 1973) (statement of Sen. Burdick). As such, the 1975 rule is not a "permissible" interpretation of the companionship rule, and reverting to it would therefore be in violation of the Administrative Procedure Act. *See Loper Bright*, 603 U.S. at 400; 5 U.S.C. § 706(2)(A).

b. The 2013 Rule's exclusion of third-party employers from the companionship services and live-in domestic service employees exemption in 29 C.F.R. § 552.109 best reflects congressional intent.

Under the 2013 Rule, third-party employers of home care workers cannot avail themselves of the section 213(a)(15) wage and hour exemption. 29 C.F.R. § 552109. Accordingly, third-party employers of such workers must pay them minimum wages and overtime. 29 C.F.R. § 552.109. The Department now proposes to allow third-party employers to claim the exemption. 90 Fed. Reg. 28985. As justification, the Department argues that the "statutory provisions do not explicitly or implicitly include third party employers," while "other FLSA exemptions specify employer-related exemption criteria." 90 Fed. Reg. 28978. DOL is considering whether Congress would have "explicitly" narrowed the exemption rather than legislating that "any employee" who lives in the household in which they work is exempt. *Id.* It also notes that allowing third-party employers to claim the exemption "would be consistent with the Department's contemporaneous understanding of the 1974 FLSA Amendments." *Id.*

Under this standard, the proposed return to the 1975 rule is contrary to law. As discussed *supra*, congressional intent in amending the FLSA was to extend minimum wage and overtime protections to direct care workers engaged in this work as a vocation, as opposed to on a casual basis. Workers employed by a third-party agency are inherently not casually employed—they are engaged in a formal, professional occupation. Therefore, an agency action to return to the 1975 rule would be contrary to the "will of Congress" and a violation of the APA. *Loper Bright*, 603 U.S. at 395; 5 U.S.C. § 706(2)(A).

Furthermore, the Department's focus on the phrase "any employee" over the statutory purpose of expanding minimum wage and overtime protections to home care workers is misguided. *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). In view of both the congressional purpose to extend wage and hour protections to women of color performing home care work and the settled determination that FLSA exemptions "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit," third-party employers must not be allowed to avail themselves of the exemption. *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392 (1960).

Finally, while the agency's contemporaneous understanding of congressional intent is relevant, it is not dispositive. *Loper Bright*, 603 U.S. at 371, 394-95 ("interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning," but reviewing courts' role is always "to independently interpret the statute and effectuate the will of Congress").

The 2013 Rule that third-party employers of home care workers may not avail themselves of the section 213(a)(15) wage and hour exemption is plainly the "best" reading of the statute.

c. The 2013 Rule's recordkeeping requirements for employers of live-in workers in 29 C.F.R. § 552.102 best reflects congressional intent.

The 2013 Rule requires employers to "maintain records of hours worked by each covered domestic service employee," and to "make, keep, and preserve a record showing the exact number of hours worked by" live-in domestic service employees. 29 C.F.R. 552.110(b), (d). The Proposed Rule would not require employers to "maintain records" generally, or "records of the actual hours worked" for live-in domestic service employees. 90 Fed. Reg. 28985. Instead, it would allow work agreements to be used "in lieu of maintaining precise records of the hours actually worked." *Id.* at 28984; 29 C.F.R. § 552.102.

The Department claims that obviating recordkeeping requirements would result in "cost savings" for "employer home care agencies." However, "[t]he more limited recordkeeping requirement [of using an agreement in lieu of hours actually worked] does not apply to third party employers," who must keep records of total hours worked. 90 Fed. Reg. 28985; 29 C.F.R. §

552.110(a). In other words, home care agencies could not possibly benefit from the rule change, because their recordkeeping requirements would remain the same. The proposed change to 29 C.F.R. § 552(b) would only affect live-in care workers who are directly employed by their clients. Given that it is common for live-in workers to work longer hours than they are contracted to perform, the modest requirement that direct employers of live-in workers record their actual hours of work adds another layer of protection of the minimum wage rights of workers who are among the most vulnerable to pay-related abuses. This protection aligns with the congressional intent behind the FLSA amendments, as minimum wage and overtime protections are not meaningful without accurate recordkeeping.

III. CONCLUSION

For the foregoing reasons, the ACLU urges the Department to preserve the 2013 Rule in its entirety. Please feel free to contact Ming-Qi Chu, Deputy Director for the ACLU Women's Rights Project, at mchu@aclu.org with any questions.

Sincerely,

Ming-Qi Chu
Deputy Director
ACLU Women's Rights Project

Zoe Brennan-Krohn
Director
ACLU Disability Rights Program

Gillian Thomas
Senior Counsel
ACLU Women's Rights Project

Vania Leveille
Senior Legislative Counsel
ACLU National Political Advocacy Department