No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD, ET AL.,
Petitioners,

v.

EVELYN COKE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE URBAN JUSTICE CENTER, BRENNAN CENTER FOR JUSTICE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, LEGAL MOMENTUM, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AND AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* SUPPORTING RESPONDENT

MOLLY K. BIKLEN
RAYMOND H. BRESCIA
Urban Justice Center
666 Broadway, 10th Fl.
New York, NY 10012

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

PAUL K. SONN
RAJESH D. NAYAK
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas
New York, NY 10013

Attorneys for Amici Curiae

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL LEGISLATIVE MATERIALS

FEDERAL ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[*]

Amici are ten non-profit legal advocacy organizations from across the nation that share a longstanding commitment to promoting civil rights, economic opportunity, and fair treatment in the workplace for all – especially women, people of color and immigrants. See Appendix (describing *amici*).

Amici have a strong interest in seeing that the Fair Labor Standards Act is correctly interpreted here, so that company-employed home health care workers – typically, African-American and Latina women working to support families – are not denied modest, but vitally important, congressionally-intended wage protections.

STATEMENT

This case concerns whether a provision of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, relieved a commercial enterprise of its obligation to pay the federal minimum wage and overtime premiums to employees who provide health care in customers' homes – or empowered the Labor Department to legislate such an exemption.

1. *Statutory Background.* Congress enacted the Fair Labor Standards Act in 1938, responding to President Roosevelt's call for a law "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work," see S. Rep. No. 75-884 at 2. Based, *inter alia*, on a congressional finding that low wages and long work weeks are "detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202, the law requires that employers pay covered individuals – originally those employees "engaged in commerce or in the production of goods for commerce," Fair Labor Standards Act of 1938, ch. 676, §§ 6(a), 7(a) – a minimum

---

[*]No counsel for any party authored any part of this brief, and no person or entity other than *Amici* or counsel made a monetary contribution toward its submission. The parties have filed blanket consents to *amicus curiae* briefs.

wage and a premium for overtime work. See 29 U.S.C. §§ 206, 207.

Although "[t]he Act declared its purpose in bold and sweeping terms [and] [i]ts scope was stated in terms of substantial universality," *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950), African-American workers were largely excluded from its protections. At a time when 65 percent of black Americans worked in either agriculture or domestic service, neither category of employment was covered.[1] Agriculture was expressly exempted, see 1938 ch. 676, § 13(a)(6), and domestic service fell outside the stringent coverage test, which had been initially drafted in the shadow of the Court's restrictive understanding of the federal Commerce Clause power. See Palmer, *Outside The Law: Agricultural and Domestic Workers Under The Fair Labor Standards Act*, 7 J. POLICY HIST. 416, 417 (1995).

This pattern of coverage was of a piece with that in other labor and social reform legislation enacted during the New Deal. In order to satisfy the staunch segregationists who controlled the levers of congressional power at the time, explicit exclusions for agricultural and domestic service workers were included in the National Labor Relations Act, ch. 372, § 2(3) (1935), and the Social Security Act, ch. 531, tit. II, § 210(b)(1)-(2) (1935), and New Deal relief legislation was carefully crafted and administered to ensure that decisions about assisting black citizens would be made by local officials in the South. See A. BADGER, THE NEW DEAL 252-53 (1989); J. QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 115-16 (1988); H.

---

[1]By 1940, 60 percent of all black female workers were domestic servants, as compared to only 10 percent of all white women workers. J. JONES, LABOR OF LOVE, LABOR OF SORROW 200 (1995). This disproportion was even larger in the South. See D. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 290-91 (1981); *id.* at 185 ("In the South, domestic service was a complex system that was part of the racial caste structure").

SITKOFF, A NEW DEAL FOR BLACKS 52 (1978).[2]

In addition to accommodating prevailing racial prejudices, these laws' treatment of domestic service workers reflected stereotypical assumptions about the nature of household work – that the relationship between employer and "servant" was "personal," rather than commercial, in character; that employment within a household was not "real," productive work; and that women did not work to support their families. See P. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945 at 12 (1989); Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 880-918 (1999); KATZMAN, *supra* at 265-77.[3]

The discriminatory treatment provoked strong opposition from civil rights groups. Dean Charles Houston testified on

---

[2]Even these exclusions did not appease the most stalwart segregationists, who objected to the principle that covered black and white workers would receive the same wage. Speaking against the FLSA, Representative J. Mark Wilcox of Florida stated:

> Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted * * * * You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge * * * * This is just another instance of the well-intentioned but misguided interference of our uninformed neighbors in a delicate racial problem that is gradually being solved by the people of the South.

82 Cong. Rec. 1404 (1937) (quoted in Linder, *Farmworkers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1374-75 (1987)). Cox concluded by likening the law to pending federal anti-lynching legislation, *i.e.*, a "political goldbrick for the Negro."

[3]Thus, State employment and welfare statutes, which were not subject to Commerce Clause constraints, often exempted domestic workers, and even labor laws passed to protect women workers drew a line between industrial and domestic workers. See Smith, 48 AM. U. L. REV. at 853-55 & n. 15.

behalf of the NAACP at the congressional hearings concerning the Social Security Act that statutory exemptions for farm workers and domestics made that law "look[] like a sieve with the holes just big enough for the majority of Negroes to fall through," Hearings on S. 1130, Sen. Finance Comm., 74th Cong., 1st Sess. 644 (1935); and a witness representing the National Negro Congress at the 1937 FLSA hearings complained about the exclusion of "Negro domestic and agricultural [workers] – representing the bulk of Negro labor." Joint Hearings Sen. Educ. and Labor Comm. & House Labor Comm., 75th Cong., 1st Sess. 571 (1937).[4] These groups worked tirelessly afterward to attract the attention of the various branches of the government to the dire economic straits of and intolerable employment conditions of domestic workers, see Goluboff, *The Thirteenth Amendment And The Lost Origins of Civil Rights*, 50 DUKE L. J. 1609, 1678 (2001); Palmer, *Outside The Law*, *supra,* at 427-28, persuading Congress to amend the Social Security Act in 1950 to require households to make social security payments on behalf of their domestic employees. See Pub. L. 81-734.

Amendments to the FLSA enacted in the 1960s brought meaningful numbers of employees in domestic service within that statute's protections for the first time. By extending minimum wage and overtime protections to all individuals "employed in an enterprise" of a certain size, 29 U.S.C.

---

[4] While the most politically powerful opponents of racial equality in federal law were Southerners, domestic work in other parts of the country was considered the province of women from other racial backgrounds, see Palmer, *Outside the Law*, *supra*, at 420 & n.13, and the exclusionary provisions drew support from Western agribusiness interests, who employed a predominantly Mexican-American workforce, *id.* See C. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941 at 261 (1981) (legislation helped "transform[] farmworkers into * * * what was for all practical purposes a rural caste"). When the FLSA was amended in 1966 to provide minimum wages for farm workers, Congress recognized that immigrant laborers were the largest and most vulnerable segment of this workforce. S. Rep. No. 89-1487 (supp. views of Sens. Williams and Javits).

§ 203(r), (s), the 1961 and 1966 Amendments, Pub. L. Nos. 87-30 § 2 and 89-601 § 102, ensured that domestic service workers employed by substantial firms and agencies, rather than individual households, would be covered.[5]

Domestic workers employed by households were finally granted FLSA protection under the 1974 Amendments, see Pub. L. 93-259 § 7, which also brought numerous other categories of workers within the Act's coverage.[6] Extension of coverage to domestic service employees was enacted only after substantial debate. An amendment removing a similar provision from a predecessor had been narrowly approved by the House in 1972, see 118 Cong. Rec. 11,393 (1972), and opponents of extension expressed doubt about whether the Commerce Clause empowered Congress to regulate employees of households and complained that coverage would impose intolerable administrative burdens on "housewives." See, *e.g.*, S. Rep. No. 93-300 at 121 (minority views). Opponents also objected to treating services provided occasionally or informally by teenagers, friends, and neighbors, as equivalent, for FLSA purposes, to the kind of formal, bread-winning employment relationships the Act was meant to govern. See, *e.g.*, 119 Cong. Rec. 24,797 (1973) (Sen. Dominick).

Highlighting statistics showing that almost all domestic service workers were female and most were either African American or members of disadvantaged immigrant groups, proponents of extended coverage invoked considerations of racial justice and gender equality. See 119 Cong. Rec. 18,341 (1973) (Rep. Griffiths) ("Women, especially black women,

---

[5]The 1966 Amendments also limited the long-objected-to agricultural worker exclusion and increased by 7.2 million the total number of workers entitled to FLSA protection. See S. Rep. No. 89-1487 at 3.

[6]In addition to extending coverage for governmental employees, see *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985), the law eliminated exemptions for, among others, employees of telegraph agencies, seafood canners, nursing homes, bowling establishments, cotton gins and sugar processors, see Pub. L. 93-259 §§ 8-20.

simply have not had a fair shake in the job market. It is time they were given their due"). They responded that the record-keeping was comparable to that already required of household employers under the Social Security Act and disclaimed interest in extending the FLSA to the kinds of marginal cases raised by opponents, agreeing that neither casual babysitters nor individuals paid to spend a few hours in the home of an aged neighbor, "elder sitters," would be covered under the new provision. See 119 Cong. Rec. 24,801 (1973) (statements of Sens. Williams and Burdick).

As enacted, Section 7 of the 1974 measure included a congressional finding, codified at 29 U.S.C. § 202(a), "that the employment of persons in domestic service in households affects commerce," along with new subsections to the minimum wage and overtime provisions, see §§ 206(f), 207(*l*). It also provided that individuals "employed on a casual basis in domestic service employment to provide babysitting services or employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)," 29 U.S.C. § 213(a)(15), would remain uncovered. The Act did not amend or revisit the "enterprise" coverage provisions, apart from adding language to section 3(r)(2)(c), reflecting newly-expanded coverage for public employees.

In 1975, DOL issued rules for the newly added coverage, see 29 C.F.R. Pt. 552, announcing that "[t]he definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6," 40 Fed. Reg. 7,404, 7,405. Section 552.6 defines the term "companionship services." Section 552.3 states that "[a]s used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." See also 29 C.F.R. § 552.101(a).

Included among the "interpretations and statements of policy" in the DOL's final Federal Register notice was a newly-worded provision, 29 C.F.R. § 552.109(a), declaring that "by virtue of section 13(a)(15)," third-party employers of workers providing companionship services – including firms already covered under the Act's "enterprise" provisions – need not pay these employees the federal minimum wage or comply with the Act's overtime pay provisions. The notice acknowledged that the agency's originally-proposed version had taken the precisely opposite approach, *i.e.*, that individuals who provide companionship services in the home as employees of a firm "qualify[ing] as a covered enterprise under Sections 3(r) and 3(s)(1) of the FLSA" would remain protected. See 39 Fed. Reg. 35,385 (1974). By way of explanation, DOL quoted the statute's reference to "'any employee,'" 40 Fed. Reg. 7,405 (quoting § 213(a)(15)), and described excusing these enterprises from FLSA obligations as "more consistent with the statutory language" and with "prior practices concerning other similarly worded exemptions." *Id.*

2. *The Home Health Care Industry.* As government statistics and the briefs of other *amici* attest, for a large and fast-growing number of Americans, the home care of today is largely provided by home health care workers employed by substantial business enterprises. An estimated 62 percent of home health care aides work for the thousands of for-profit companies in the field, see Montgomery, et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45:5 GERONTOLOGIST 593, 597 (2005).

As with other forms of domestic service, home health care work is performed by a labor force that is overwhelmingly female, with women from racial and ethnic minority backgrounds disproportionately represented. See Univ. Cal. San Francisco, Ctr. for Cal. Health Workforce Studies, *An Aging U.S. Population & The Health Care Workforce* (2006) Table B2 (89 percent of home health care workers are female;

34 percent are African American; 18 percent are Latina and 20.4 percent are immigrants). Many of these women are heads of households, with responsibilities for young children (and often for their own aging parents). See Testimony of William J. Scanlon, Director, Health Care Issues, G.A.O., *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony Before the Senate Committee on Health, Education, Labor and Pensions* 22 (released May 17, 2001) ("Scanlon Testimony ").

The work responsibilities of home health aides are stressful, physically demanding – yielding high rates of occupational injury – and often unpleasant. In addition to "duties, such as emptying bedpans and changing soiled bed linens," U.S. Dept. Labor, Occupational Outlook Handbook 2006-2007, at 399, workers often must travel to multiple client homes in a single work day, and are called upon to provide services to individuals who are "abusive, depressed, or otherwise difficult" and balance conflicting demands of clients, agency employers, medical professionals, and clients' family members. *Id.*

Earnings of home care workers "remain among the lowest in the service industry," 66 Fed. Reg. 5,483 (Jan. 19, 2001); see Occupational Outlook Handbook at 353, 400. Median earnings for all home health care workers were $12,265 in 2001, Scanlon Testimony at 24 Table 3, and median earnings for those working on a full-time, full-year basis were below the federal poverty level for a family of four, *id.*; see 66 Fed Reg. 10,695 (H.H.S. poverty guidelines 2001). Large numbers of home health worker families receive food stamps, Scanlon Testimony at 22, and they receive Medicaid at much higher rates than other workers, *id.* at 13. As with others in domestic service, few home health workers receive retirement or other employment benefits; they have few opportunities to advance into higher-paying, higher status work; and they lack amenities and protections available to those who work in more conventional commercial work environments.

3. *Proceedings Below.* Respondent Evelyn Coke, a home health care worker, filed this suit against her former employer – a for-profit corporation employing approximately 40 home health aides – alleging that they violated the FLSA by paying her less than minimum wage and failing to pay extra compensation for overtime work. See J.A. 21 (Complaint); *id.* 19-20 (petitioner satisfied requirements for FLSA enterprise coverage). The employers, citing the Labor Department's § 552.109(a) interpretation, asserted that Ms. Coke's employment was exempt under § 213(a)(15).

After the district court sustained that defense, Pet. App. 46a, the Court of Appeals reversed. The court first held that the DOL "interpretation" was not entitled to judicial deference – both because the agency had not in fact exercised its congressionally-delegated power to "define and delimit" the statutory exemption in issuing it and because the rule conflicts squarely with the provision, § 552.3, that the Labor Department *did* promulgate in exercise of those legislative rulemaking powers. Finding the agency's explanation of its action ignored both this conflict and "the plain language of the statute," Pet. App. 32a, the court held that it lacked even the power to persuade, and was therefore unenforceable.[7]

The Second Circuit reaffirmed this conclusion, after this Court directed it to reconsider the judgment in light of an intervening DOL "Advisory Memorandum." Pet. App. 3a. That agency policy statement was not itself owed *Chevron* deference, the court reasoned, and the general rule favoring agency interpretations in cases of regulatory ambiguity did not support a different outcome. The Memorandum's claim – that the regulatory phrase "services of a household nature performed by an employee in or about a private home * * * *of the person by whom he or she is employed.*" 29 C.F.R. § 552.3 (emphasis in

[7] The Court of Appeals affirmed the district court's dismissal of Respondent's facial challenge to the "companionship" regulation, § 552.6, Pet.App.15a-22a.

opinion) was "ambiguous" and could be "interpreted" to mean "services performed by an employee [of an enterprise] in or about a private home" – was, the court concluded, itself untenable. Pet. App. 5a (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

SUMMARY OF ARGUMENT

The Court of Appeals properly rejected the employers' claim of FLSA exemption. As its decisions recognized, a necessary predicate for judicial deference to agency law-making is lacking here because the Department did not in fact exercise its delegated authority in issuing its third-party employer policy. And as respondent emphasizes, the efforts of petitioners and the government to rehabilitate DOL's 1975 regulatory process (and their highly abstract quarrels with the Second Circuit's discussion of *Chevron*) cannot overcome a critical fact: that § 552.3, a DOL regulation that *was* lawfully and unambiguously promulgated under the § 213(a)(15) authority, plainly rejects the notion that agency-employed health care workers may be paid less than minimum wage.

But petitioners' argument suffers from an even more fundamental problem. It is axiomatic that even the most "self-conscious" exercise of administrative lawmaking still requires proof that Congress intended to confer the authority claimed. The policy at issue here fails at that threshold. The power petitioners assert for the Labor Department is not the familiar one of marking the boundary between those newly covered domestic service employees and those who, by virtue of an exception, would remain uncovered. Rather, because (as all parties here recognize) Congress had *already* extended FLSA protection to companions and other domestic service employees in "enterprise" employment, they read § 213(a)(15) as delegating power to remove coverage from employees who were already entitled to the minimum wage and overtime.

As this Court's statutory interpretation cases make clear, it makes little sense to construe an amendment adopted to *expand*

a statute's reach as having effected (or authorized) a contraction in coverage. And what is implausible in the abstract becomes utterly untenable when the statute identified as the source of agency power here – the 1974 Amendments – is examined.

The text, structure, and history of that enactment preclude reading § 213(a)(15) as authorizing withdrawal of FLSA coverage for previously protected workers. Congress's only aim with respect to domestic service workers was to extend coverage to those whom the Act had previously left out, and it intended § 213(a)(15) as setting an outer limit on the most far-reaching applications of that extension, with the required DOL regulations laying down the precise metes and bounds. There simply is no evidence of some freestanding authorization to exempt large, profit-making employers whose economic activities are at the heartland of Congress's legislative jurisdiction. Even the sentiments expressed by ardent opponents of "domestic service" coverage confirm this understanding: these legislators invoked the need to protect the interests of "private households," not businesses, and no Act opponent proposed revisiting, let alone repealing, enterprise coverage for firms providing domestic services.

Petitioners' only real response is a curious claim that invalidating § 552.109(a) would itself precipitate a coverage gap, leaving domestic service workers whose employers have not attained the "enterprise" threshold without congressionally-intended protections. But this "danger" (which was not even mentioned by the agency when it acted in 1975 or 2002) is a chimera. This case concerns only the meaning of the § 213 exemption – not the statute's coverage provisions. If, as all parties appear to agree, Congress meant for all (non-companion, non-babysitter) domestic employees to be paid the minimum wage, no principle of statutory construction or administrative law would require DOL to adopt an interpretation contrary to that intent.

The reasons relied on below and general statutory

interpretation principles fully suffice to render the DOL policy unenforceable, but the jarring inconsistency between the administratively-created third-party exemption and the policy judgments and purposes reflected in the FLSA – and the 1974 Amendments, in particular – are further grounds for rejecting § 552.109(a).

The rule petitioners ask the Court to approve – which seeks to use power conferred in legislation that reached inside the household to safeguard vulnerable workers to relieve commercial enterprises of a preexisting obligation to pay minimum wages – is unreasonable on its face, and it is especially so in light of the distinct and special concerns that led Congress to act in 1974. In cases interpreting the FLSA, this Court has repeatedly and properly highlighted the statute's "remedial" character. The purposes of the 1974 coverage Amendments were also "remedial" in a further sense. Congress viewed them not only as improving the material well-being of domestic service employees and their families, but as a conscious recognition of the equal status of these minority women and of the full dignity of their work. Against this background, petitioners' "policy" arguments for the rule – that paying sub-minimum wages to direct care workers would help keep health care costs down or that giving effect to the principle reflected in § 552.3 will abridge their "freedom" to work long hours without overtime pay – only serve to highlight its incompatibility with the FLSA.

ARGUMENT

I. The Labor Department's Rule Purporting to Relieve All Third Party Employers of Companions of Their FLSA Duties Is Not a Lawful Exercise of Any Power Delegated By Congress

Petitioners argue that the policy denying coverage to all workers providing companionship services, even those employed by "enterprises" within the meaning of § 203(s)(1), represents a valid, legally binding exercise of authority

conferred by the 1974 Act. This argument fails, however, because (1) the DOL did not in fact exercise its rule-making authority in issuing § 552.109(a) and, more important, (2) the 1974 Act gave it no such authority to withdraw FLSA coverage from workers Congress had acted to protect.

As the Second Circuit explained, there is no need to decide whether an exemption like the one on which petitioners rely lawfully *could have been* adopted pursuant to the § 213(a)(15) delegation, but see *infra*, because it is clear that the agency interpretation was not in fact "'promulgated in the exercise of that authority.'" Pet. App. 26a (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). And as respondent shows (Br. 24-34), petitioners' efforts to construct a revisionist account of the 1975 agency proceedings – and their academic arguments about when *Chevron* deference does and does not attach – depend on the Court's ignoring this central fact: that the Department *did* explicitly (and properly) take up the responsibility of "defin[ing] and delimit[ing] the * * * terms" at issue here, when it promulgated § 552.3. See 29 C.F.R. § 552.2(c) ("The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6"). The express terms of that regulation respect the distinction between companions employed *by* households and those performing services *in* households in the employ of third parties: "As used in section 13(a)(15) of the Act, the term 'domestic service employment' refers to services * * * performed * * * in or about a private home * * * of the person by whom he or she is employed." As the decision below and respondent's brief both highlight, petitioners' extravagant claims for § 552.109(a) must be evaluated – and rejected – in light of the universal agreement that § 552.3 does have the "force of law," Pet. Br. 10.[8]

[8]Nor is the analysis affected in any way by the grant of authority to "prescribe necessary rules, regulations, and orders with regard to the amendments made by [the 1974] Act." Pub. L. 92-259, § 29(b). That provision does not make § 552.3 less valid or binding, nor does the generic grant mitigate the fundamental, substantive defect in § 552.109(a) discussed

Even leaving § 552.3 aside, the broad "interpretation" of § 213(a)(15) advanced in § 552.109(a) would be deeply suspect. Even employment statutes that include express exemptions generally do not allow otherwise-covered, third-party employers to stand in their (exempt) customers' shoes. See, *e.g.*, *Shore Club Condo. Ass'n v. NLRB*, 408 F.3d 1336, 1340 (11th Cir. 2005) (condominium association could not rely on NLRA's exclusion of "domestic employees" to defeat claims by its employees providing housekeeping services); see also *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516-17 (1973) (employer's size, not that of its customers, determines FLSA "enterprise" coverage). An "interpretation" that allows for-profit businesses to pay hard-working employees at the bottom rung of the ladder sub-minimum wages would be both at odds with the long recognized purposes of the FLSA, see, *e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985), and out of alignment with the the Act's other exemption provisions and with the interpretation given the other clause in the same provision, see *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps").[9] As respondent explains (Br. 5-10), the DOL interpretation hardly falls "unmistakably within [the] terms and spirit," of the congressionally-enacted exemption, *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). See pp. 21-26, *infra* (discussing applicability of narrow construction canon). Indeed, the terms of § 213(a)(15) point to an exclusive focus on household employers. See § 552.101(a) (explaining that "domestic service *employment*" had an "accepted meaning") (emphasis added); 26 U.S.C. § 3510.

---

infra. Cf. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88 (2002) (a regulation is not "necessary" if contrary to a law's purpose and design).

[9]DOL policy treats employment of a babysitter "by [an] agency other than the family or household using their services" as categorically beyond the reach of the exemption that is paired with "companion[ship]" in § 213(a)(15) on the ground that "such employees are engaged in this occupation *as a vocation*." See 29 C.F.R. § 552.103(b) (emphasis added).

But the problems with the administratively-created exemption on which petitioners rely go beyond having "drawn the line" between newly-included and still-unprotected workers in the wrong place. Cf. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting "interstitial" character of legal questions resolved by agency). Rather, because it is beyond dispute that home health care workers (and other domestic service workers) employed by substantial enterprises were protected under the FLSA at the time of the 1974 Amendments, petitioners' defense of § 552.109(a) depends on showing that Congress delegated to the agency the power to withdraw previously provided coverage. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); *Board of Govs., Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 & n.6 (1986) (an agency's enforcement authority "only permits [it] to police within the boundaries of the Act; it does not permit the [agency] to expand its jurisdiction beyond the boundaries established by Congress"); accord *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). By ignoring this threshold requirement, it is petitioners who "put[] the cart before the horse," Pet. Br. 23.

It is common ground that, had the 1974 Amendments never been enacted, the FLSA would entitle home health care workers employed by substantial businesses to minimum wage and overtime pay. The DOL repeatedly relied on the 1961 and 1966 Amendments, which provided for FLSA coverage on an "enterprise" basis, to enforce the Act's wage and hour requirements against third-party home care and domestic staffing agencies, see *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362 (5th Cir. 1973); *Homemakers Home & Health Care Servs., Inc. v. Carden*, 538 F.2d 98 (6th Cir. 1976) (employees of firm providing domestic worker and health care

services); Wage and Hour Opinion Letter 174, 1972 WL 34917 (Aug. 20, 1972) (rejecting argument that "retail establishment" exemption formerly codified at § 213(a)(2) excused firm employing "domestics, babysitters, live-in companions * * * and home health aid[e]s" from paying FLSA wages); Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971) (affirming that employees of enterprise "engaged in the business of providing temporary help in the home and health care field" were covered).[10]

In both 1974 and 2001, DOL recognized that domestic workers employed by qualifying "enterprises" had been covered before the Amendments, see 39 Fed. Reg. 35,385 (1974); 66 Fed. Reg. 5,485. Although, on both occasions, the Department later retreated from the logical conclusion that "denial of the Act's protection to previously covered * * * employees" "was not the purpose of those Amendments," 39 Fed. Reg. 35,385, neither DOL nor petitioners dispute that many of the employees they seek to exclude under the administratively-created "exemption" would be entitled to minimum wage and overtime pay had the 1974 Amendments not been enacted into law.

The notion that Congress conferred power to withdraw coverage from workers whose employment already entitled them to FLSA protections suffers from a series of grave difficulties. First, as this Court's cases have long recognized, the general rules of statutory construction disfavoring repeals by implication apply with special vigor to laws enacted, as the 1974 statute undeniably was, for the purpose of extending a statute's reach. Thus, in *Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 133-34 (2003), the Court rejected a claim of municipal immunity from suit under the False Claims Act that was grounded on statutory amendments whose "basic purpose" had been "to make that law a 'more useful tool'" (citation

[10]The provision on which these employers (unsuccessfully) claimed exemption was *narrowed* by Congress 1974, see *Homemakers*, 538 F.2d at 101 n.4, and repealed entirely in 1989. See Pub. L. No. 101-157 § 3.

omitted)). "It is simply not plausible," *Chandler* explained, "that Congress intended to repeal municipal liability sub silentio by the very Act it passed to strengthen the Government's hand." *Id.* Accord *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (refusing to treat "representative" as a term of limitation when Congress had amended the Voting Rights Act to expand its coverage).

Likewise, in *Director, Office of Workers Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 319 (1983), the Court rejected an argument that a provision included in a statute enacted to expand the coverage of the Longshore and Harbor Workers' Compensation Act could be read as authorizing exclusion of workers who qualified for protection under that law's pre-amendment "situs" test. Explaining that the newly included "status" test was meant to delimit the class of newly-protected workers, the Court held the added language could not be read "to affect adversely the pre-1972 coverage." *Id.* at 323. Cf. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62-63 (2004).

The contraction Congress is claimed to have authorized here, involving a class of employment relationships that are within the heartland of Congress's Commerce Clause jurisdiction (and lack any attributes that made extending the FLSA to household employers controversial), is substantively implausible. See *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 245 n.9 (2002) (rejecting interpretation that would leave regulatory "gaps * ** plainly inconsistent with the purpose of the [Occupational Safety and Health] Act"). That such contraction would be accomplished through the oblique means of the § 213(a)(15) delegation would be unusual in itself. *See MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 (1994).

The mounting implausibility of petitioners' defense of § 552.109(a) achieves effective impossibility when the law that is claimed to be the source of this power – the 1974 Act – is examined. As with the "[i]nterpretive Rule" rejected in

Gonzales v. Oregon, 126 S. Ct. 904 (2006), the one disputed here "is persuasive only to the extent one scrutinizes the [ostensible authorizing] provision without the illumination of the rest of the statute." *Id.* at 925 (citing *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989)). See *Corning Glass Works v. Brennan*, 417 U.S. 188, 198 (1974) ("The Fair Labor Standards Act, [should be read with] 'regard for the specific history of the legislative process that culminated in the Act'" before the Court) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

The difficulty of inferring an intent to contract coverage (or to authorize agency contraction) from the 1974 Amendments begins with the statute's preamble, declaring Congress's aim "to expand coverage of the [FLSA]," Pub. L. 93-259, and section after section of the 1974 measure extends coverage to previously unprotected workers. Moreover, it expands the very "enterprise" provisions the Department claims power to narrow. See *id.* § 6 (extending Act to employees of state and local governments).[11] The House Committee Report includes a lengthy historical account of the FLSA's evolution, which begins by lamenting the statute's failure to attain or even approach "'substantial universality'" in coverage, see H.R. Rep. 93-913 at 7 (quoting *Powell*, 339 U.S. at 516), and – after quoting pleas and proposals for expanded coverage by Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson – concludes with a declaration of intent "to exten[d] the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as is presently practicable." *Id.*[12]

---

[11]As noted above, the 1974 Act narrowed the one exemption – since repealed altogether – that businesses employing home health care workers had cited, unsuccessfully, as allowing them to pay employees below-minimum wages.

[12]On the rare occasions when Congress has decided to reduce coverage, it has made its intent explicit. See, *e.g.*, Pub. L. 85-231 (1957) ("sections 6, 7, 11, and 12 shall not apply with respect to any employee whose services * * * are performed in a workplace within a foreign country" or other

Congress's intent that the § 213(a)(15) exemption operate only as a limitation on the newly extended reach is evident from the structure of the statute, which included within a single section, the new basis for federal regulation – the congressional finding that "domestic service affects commerce," See Pub. L. 93-259 § 7(a) – the provisions extending coverage to domestic service employees, *id.* § 7(b)(1)(2), and the exemption, *id.* § 7(b)(3). The enactment history, committee reports and the DOL regulations all confirm the understanding that § 213(a)(15) was not meant to reach beyond the class of previously-unprotected workers. See S. Rep. No. 93-300, at 20 (describing proposal as "bring[ing] under the * * * the Act all employees in private household domestic service earning 'wages' * * * for purpose of the Social Security Act, except babysitters"); *id.* at 22 (describing "such activities as babysitting or acting as a companion" as not included "within the term 'domestic service'"). The text of the regulations is similarly explicit in linking § 213(a)(15) to §§ 6(f) and 7(*l*). See 29 C.F.R. § 552.2.

This understanding is evident in the congressional debates, in which the circumstances of household-employed "companions" and babysitters were repeatedly described as being at (or beyond) the margins of the newly asserted congressional power, because they were casual employees working on an itinerant basis and not to support their families. See H.R. Rep. No. 93-913 at 36 (employees in excluded categories were not "regular bread-winners or responsible for their families support"); S. Rep. No. 93-358 at 27 (same). See also 119 Cong. Rec. 24,801 (1973) (Sen. Burdick) (observing that, unlike "the professional domestic who does this as a living," many individuals pay a "neighbor [who] comes in and

---

enumerated U.S. jurisdictions).

sits with" an elderly parent).[13] Congress understood that the exemption codified at § 213(a)(15) to be consistent with the Act's objective, "to include within the coverage of the Act *all employees whose vocation is domestic service*." S. Rep. No. 93-690 at 20 (emphasis added).

Without any affirmative basis for claiming that the Ninety-third Congress sanctioned relieving third-party commercial employers of their existing FLSA obligations, petitioners and their *amici* construct a circuitous argument, designed to depict § 552.109(a) as the lesser of two evils. Interpreting § 213(a)(15) as excusing only household employers of companions of their FLSA obligations, they insist, would itself lead to a gap in coverage – with other domestic service employees of non-enterprise third parties losing out on wage and hour protection. See Pet. Br. 32, 36; U.S. Br. 28.

The "danger" these parties claim to have averted is one entirely of their own invention. By its own terms, the definition of "domestic service employment" in § 552.3 (like the 552.109(a) "interpretation") applies *only* to the statutory exemption provision. And, given that (as all parties agree) Congress meant for the (non-companion) domestic employees in question to be covered under §§ 206 and 207, no known principle of statutory construction or administrative law would compel the agency to adopt an "interpretation" of those provisions contrary to its understanding of Congress's specific intent. Nor does the fact that the words "domestic service" appear in both the coverage and the exemption provisions make the "threat" credible. The rule of construction to which these arguments appeal – that identical words used in a statute are generally intended to have the same meaning – is hardly an absolute, see, *e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342

[13] In their efforts to exclude *all* domestic workers employed by householders from coverage under the Act, opponents sought to portray a teenage neighbor's mowing the lawn as representative of the kind of work that would be regulated. See, *e.g.*, 119 Cong. Rec. 24,797 (Sen. Dominick).

(1996) (interpreting "employee" differently in different parts of Title VII), but its only application is to situations where terms are in fact *identical*, which "[d]omestic service" and "domestic service employment" are not. When, as here, provisions use similar-sounding, but *non*-identical terms, very different canons come into play – those requiring that "every word" in a statute be given "some operative effect," *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992), and that differences in wording should be treated as legally meaningful, see, *e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (broadly construing the phrase "involving commerce" in the coverage provision of the Federal Arbitration Act, while giving the phrase "'engaged in * * * commerce,'" which appears in the law's exemption provision, a narrow reading). These rules of construction resonate here because, as respondent shows (Br. 8), the phrase "domestic service employment" is in fact a term of art, with a distinct, settled meaning.

II. Exemptions With Respect to Domestic Workers Must Be Construed In Light Of the Historic, Remedial Purposes of The 1974 Amendments

As explained above, this case may be resolved without reaching the stage when the canon requiring that FLSA exemptions be construed narrowly would be operative, see, *e.g.*, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), but application of that rule would surely invalidate § 552.109(a). Congress did not "unmistakably" indicate that third-party employers of companions should be exempt from FLSA obligations. See *A.H. Phillips*, 324 U.S. at 493. As discussed, it did not intend such a regime at all, and the text of § 213(a)(15) does not support that interpretation.

Not surprisingly, therefore, petitioners and *amici* do not assert that they can prevail under the normal rules applied to FLSA exemptions. Rather, they claim (Pet. Br. 32 & n.12) that such canons are inapplicable on the basis of the inventive "gap-

avoidance" theory – their claim that Congress's acknowledged purpose of "'includ[ing] within the coverage of the Act all employees whose vocation is domestic service,'" U.S. Br. 28 (quoting S. Rep. No. 93-690 at 20), is advanced by interpreting § 213(a)(15) to broadly *exclude* large numbers of such employees, including respondent. As discussed above, the purported need to avoid this gap is wholly contrived and is thus no impediment to applying the normal rule that exemptions to the FLSA are to be construed narrowly and against the employer. See *Arnold*, 361 U.S. at 392; *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959).

In fact, the reasons for applying such a rule have special force here. First, as this Court has explained, the principal rationale is that FLSA is "remedial legislation," see *A.H. Phillips*, 324 U.S. at 493; *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989), intended to address labor conditions that Congress found intolerable. See H.R. Rep. No. 93-913 at 8 (quoting President Roosevelt's description of the wage and hour provisions as "the minimum standards of free labor" and his assertion that "goods produced under conditions which do not meet [these] rudimentary standards of decency should be regarded as contraband"). The overarching policy judgment animating FLSA – that those who work full-time should not live in poverty – was central to the 1974 Act:

> Many American workers whose employment is clearly within the reach of this law have never enjoyed its benefits. Unfortunately, these workers are generally in the lowest wage groups and most in need of wage and hour protection. We must extend minimum wage and overtime protection to them.
>
> It is the committee's intention to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as is presently practicable and to raise the minimum wage to a level which will prevent the disgraceful and intolerable situation of workers and their

families dwelling in poverty.

Id. at 9.

Second, the 1974 Amendments (the purported source of the administrative power here) were remedial in a further sense, as part of the broader congressional effort to address problems of race and gender discrimination. As described above, the historical record strongly supports the conclusion that the disfavored treatment of domestic service workers under the FLSA and other contemporaneous welfare and labor statutes was *not* the unintended result of purely race-neutral governmental decision-making. Cf. *Jefferson v. Hackney*, 406 U.S. 535 (1972). Whatever role concerns about potential judicial invalidation played in shaping the law's initial coverage limitations, racial discrimination was very much on Congress's agenda when it passed the FLSA. Southern Senators made clear that they would not abide legislation that "interfered with" the Jim Crow system, *i.e.*, by paying workers equally. See Linder, 65 TEX. L. REV. at 1351, 1374-75 (1987).

The interest in keeping black women in the South in domestic service at low wages was a motivating factor in the drafting and administration of much New Deal social legislation. See, *e.g.*, M. POOLE, THE SEGREGATED ORIGINS OF SOCIAL SECURITY 38 (2006); SITKOFF, *supra*, at 36. As Southern legislators and their constituents emphasized, relief programs that diminished black women's economic need to work as "servants"; that afforded them alternate employment opportunities; or that held out the possibility of the federal government's acting as guarantor of equal treatment at the local level would not be – and in fact were not – enacted. Katznelson, *et al.*, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 180 POL. SCI. Q. 283, 297 (1993) ("President Roosevelt and congressional leaders tailored New Deal legislation to southern preferences * * * * [S]ponsors fashioned key bills to avoid disturbing the region's racial civilization by employing two main policy instruments: the

exclusion of agricultural and domestic labor, the principal occupational categories of blacks, from legislation * * * and decentralized administration"); see DOMESTICITY AND DIRT, *supra*, at 108-110 (describing National Youth Administration program that trained black girls to be domestic servants). Thus, while President Roosevelt appealed to the "[f]ree labor" ideal inextricably associated with the Thirteenth and Fourteenth Amendments, see H.R. Rep. 93-913 at 8, in calling for the FLSA, the law that resulted fortified a very different system. See generally Linder, 65 TEX. L. REV. at 1372-80.

Although those who championed the 1974 Amendments did not focus on this governmental discrimination, considerations of racial justice and gender equality were a central theme of their argument for covering domestic service employees. These proponents not only viewed the law as ameliorating the economic hardships faced by workers who were "overwhelmingly female and members of minority groups," 119 Cong. Rec. 24,799 (1973) (Sen. Williams), they saw FLSA coverage as an expression of respect for these women's dignity and equality and the importance of the work they performed, and a rejection of the stereotype-laden societal perceptions about such work. Senator Williams, Chair of the Labor Subcommittee and co-sponsor of the 1974 Amendments, recognized that "many who watch our legislative activities view the coverage of domestics as an effort to remedy racial and sexual discrimination," and he situated the provision in broader social and historical context:

> Many domestics are treated just as they were 150 years ago – that is, as slaves. Two-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 employer's children as "ma'am" or "sir" or "Miss Jane."

Id. See also Shabecoff, "To Domestics, A Minimum Wage is

a Raise," N.Y. Times, June 6, 1973 (quoting Alabama affiliate of the National Committee on Household Employment explaining: "Many employers still tend to maintain the old white superiority-black inferiority relationship in what should be a neutral employer-employee relationship"). As did numerous proponents, Senator Williams explicitly connected the FLSA extension to other federal efforts to promote sex equality: "Now that Congress has sent to the States the constitutional amendment guaranteeing equal rights to women, it would be hypocritical in the extreme to deny an appreciable segment of the female workforce, earning low wages, an opportunity to share in the rewards of the more meaningful employment under the protection of the Fair Labor Standards Act." 119 Cong. Rec. 24,800 (1973).

In the House, Representative Shirley Chisholm led the effort to extend the FLSA to cover domestic workers, mustering evidence to show the predominantly male Congress that domestic workers engaged in difficult labor. See, *e.g.*, Tolchin, *Mrs. Chisholm Led Fight for Domestics' Base Pay*, N.Y. Times, June 21, 1973. And in a letter reproduced in the Committee Report, 17 of the 19 women then serving in Congress, representing both political parties, explained:

> We have heard rumors that your Subcommittee is under pressure to drop the extension of minimum wage coverage to domestic workers. As women legislators, this is of great concern to us.
>
> As you know, women are at the bottom of the economic ladder* * * * * Contrary 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* * * *

H.R. Rep. 93-913 at 34.

These proponents repeatedly described their intention that extending FLSA coverage would be a catalyst for change in

societal attitudes toward home-based employment. Given the special significance that the Ninety-third Congress attached to inclusion within the Act – its view of FLSA coverage as an affirmation of the dignity and equality of working minority women, and a recognition of the social and economic importance of domestic work – it would be morally obtuse, as well as legally unjustifiable, to give the usual rule for construing FLSA exemptions less than full force.

III. No Legitimate Policy of the FLSA Is Served By Allowing Commercial Employers To Pay Home Health Care Workers Below-Minimum Wages

Petitioners and their *amici* suggest that even if the Court properly denies § 552.109(a) binding effect, it should sustain it as a "reasonable" interpretation of the statute. Keeping health care worker wages below the federal minimum, they variously contend: (1) advances the affordability of home health care to needy families with modest means; (2) safeguards the public fisc; and (3) benefits workers in respondent's position, by making it less likely that a cost-conscious employer will limit them to 40 weekly hours of work.

Of course, the Labor Department did not allude to any of these rationales when it announced the third-party exemption policy in 1975. The Notice of Final Rulemaking, the agency's first and only contemporaneous explanation of its action, indicated that the Department had been guided by its (mistaken) view of the statutory language, and they did not play any role in Congress's enactment of § 213(a)(15).[14] But these newly imputed regulatory "purposes" not only are unsupported in the legislative and regulatory history, they are in obvious, positive conflict with the specific congressional policy judgments codified in the FLSA and the 1974 Amendments.

---

[14]As the decision below recognized, the DOL's "plain language" rationale relied on a casual paraphrase of the congressionally-enacted language – one that did not even remark upon the phrase "domestic service employment" in § 213(a)(15), let alone reckon with its meaning. Pet. App. 32a.

The claim that § 213(a)(15) should be read broadly, so as to expand workers' "freedom" to work more than 40-hour weeks without the employer-deterring overtime pay obligation, see NYC Br. 29, is less an argument *about* the FLSA than an argument *against* the statute. The "danger" that the minimum wage and maximum hours regulations will adversely affect employee earnings is one that has been presented to Congress since the first debates over the FLSA (almost invariably, as here, by employ*ers*, cf. *Tony & Susan Alamo,* 471 U.S. at 302), and it has been rejected for just as long. The congressional findings identify wages below the statutory minimum as "detrimental to the * * * well-being of workers," and, as explained above, the Ninety-third Congress was not agnostic whether being within the Act's coverage was a boon or a bane for employees.[15]

In addition to the argument that workers are better off by being exempted, petitioners and *amici* attempt to derive the right to pay sub-minimum wages from the modest means of (some of) the clients workers care for.[16] As with efforts to assert employees' interests, *amici*'s and petitioners' claims to speak on *clients*' behalf suffer from a series of embarrassments. There is, again, not the slightest indication that DOL adopted the rule for this reason, and those, like *amicus* AARP, who have a direct and un-conflicted interest in improving the quality of home care have weighed in on *employees*' side here, as they did

[15]Nothing in § 213(a)(15) remotely suggests that Congress believed that casual babysitters and companions were an exception to its general view that workers are better off with statutory coverage. These workers were left unprotected, not because they were seen as better positioned than others to bargain with employers, see 119 Cong. Rec. 24,801 (1973), but because they were not perceived as "bread-winners." H.R. Rep. 93-913 at 36.

[16] Of course, many of those who receive health care at home are well-off in absolute terms; many more, obviously, are better off than the workers whose wages are at stake, who would be guaranteed to $5.15 (and $7.67 for overtime hours) were respondent *to prevail – i.e.,* $10,300 in wages for a year of full-time work. And those who are less well off almost surely qualify for government assistance, see *infra.*

in the court below – and in policy discussions across the country. As their direct experience and intensive research has led them to conclude, low wages pose a far more real threat to client well-being than do "high" – *i.e.*, minimum – wages.[17]

The notion that Congress meant § 213(a)(15) as a health care cost-containment provision is not only at war with the general thrust of FLSA, but belied by the specific legislative policy judgments embodied in the 1974 Act. The first premise of the statute is that the "balance" between workers' earnings and other worthwhile public objectives is not to be struck below the minimum wage, see H.R. Rep. No. 93-913 at 8 ("'A self-supporting and self-respecting democracy can plead * * * no economic reason for chiseling workers' wages or stretching workers' hours'") (quoting President Roosevelt), and, true to that judgment, Congress has broadly covered health care workers, as well as those who work for non-profit and charitable employers. The 1974 Amendments — in addition to raising the minimum wage for health care and other workers – substantially repealed the overtime exemption for nursing home employees (modeled on the extension for State-owned hospitals enacted in 1966, see *Maryland v. Wirtz*, 392 U.S. 183 (1968)). And a Congress intent on using low wages to keep direct care costs down would not likely require households to pay FLSA wages to home *nurses*, see 29 C.F.R. § 552.6 – let alone to companions who spend more than 20 percent of their time on housekeeping, see *id.* § 552.6.

In fact, not even the solitary strand of contemporaneous evidence from which petitioners and *amici* spin out their

---

[17]To take one example, while *amici* assert that "continuity of care" would be jeopardized if employers had an incentive to cap workers at 40-hour weeks, there is no indication that this has occurred in States where home health workers are covered by State wage and hour laws, and turnover induced by low wages and poor working conditions is surely a more serious threat to continuity than are the hypothesized caps. See also Occupational Outlook Handbook at 351(average worker visits five different clients in the course of a work day).

elaborate health policy argument actually supports § 552.109(a). Although the Senate floor debates referenced a letter received from a "single lady employed as a secretary" objecting to coverage of the woman who cared for her aged mother during her work day, 119 Cong. Rec. 24,797 (1973), that complaint was highlighted (by opponents of the *entire* coverage extension) to illustrate the allegedly excessive *administrative* burdens they warned extension would bring. Worse still for petitioners, however, the complaint, involving a companion employed by the household, says literally nothing about whether corporate employers should be made exempt. See *Arnheim & Neely*, 410 U.S. at 519 (rejecting employer's effort to rely on its clients' entitlement to a de facto small-enterprise exception).

Nor, for similar reasons, are the warnings about the adverse effects on public budgets valid *FLSA* arguments. These dire forecasts are surely overdrawn – no small number of home health care workers receive wages that are (as a result of market forces or State and local legislation) in line with what FLSA prescribes. And while the evidence of home-care promotion purpose for the 1974 Act is insubstantial, the evidence of a congressional purpose to spare governments reimbursement costs associated with providers' wage and overtime responsibilities is nonexistent. On the contrary, as landmark decisions of this Court attest, Congress carefully considered, but rejected, States' fiscal – and other – interests when it decided in 1966 and again in 1974 to require State and local agencies (and the federal government) pay *their own* employees minimum wages and overtime pay, in accordance with the FLSA. See *National League of Cities v. Usery*, 426 U.S. 833, 835-39 (1976), *overruled*, *Garcia*, 469 U.S. at 537-47. As the Court noted, the States were active participants in the legislative process, see *Garcia*, 469 U.S. at 554 n.17, though they had only minor success in retaining any special, favorable treatment. It would be truly capricious to reinterpret § 213(a)(15) as

protecting States from *indirect* costs associated with bringing third-parties' costs in line with minimum federal requirements when the same Congress rejected pleas – grounded in State sovereignty and public safety, as well as fiscal necessity – advanced by governments as direct employers.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

MOLLY K. BIKLEN
RAYMOND H. BRESCIA
Urban Justice Center
666 Broadway, 10th Fl.
New York, N.Y. 10012

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

PAUL K. SONN
RAJESH D. NAYAK
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas,
12th Floor
New York, N.Y. 10013

Attorneys for *Amici Curiae*

MARCH 2007

DESCRIPTION OF *AMICI* ORGANIZATIONS

Urban Justice Center

Founded in 1984, the Urban Justice Center is a New York City-based nonprofit organization that serves the City's most vulnerable residents. Through legal representation, advocacy, research and education, the Community Development Project of the Urban Justice Center works with low-income communities, particularly communities of color, to secure the benefits of economic security for all. The Community Development Project advocates on behalf of low-wage workers in New York, including workers engaged in caregiving, and has a substantial interest in ensuring that these workers are entitled to the basic provisions of the federal wage and hour law.

Brennan Center for Justice

The Brennan Center for Justice at New York University School of Law is a non-partisan law and public policy institute dedicated to a vision of effective and inclusive democracy. Through legal representation, research and legislative advocacy, the Brennan Center promotes public policies that enable all residents to participate in the civic and economic life of our nation. For nearly a decade, the Brennan Center has worked at the federal, state and local levels to raise and strengthen the minimum wage for low-income families, particularly caregivers who for too long have been denied many basic protections. Having successfully extended minimum wage laws to include caregivers in some of the states, the Brennan Center has a substantial interest in ensuring that the federal minimum wage law is interpreted correctly to end this outmoded exclusion nationwide.

Asian American Legal Defense and Education Fund

Founded in 1974, the Asian American Legal Defense and Education Fund (AALDEF) is a national organization that protects and promotes the civil rights of Asian Americans. By

combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF advocates on behalf of low-wage Asian American workers to secure fair treatment in the workplace and has an interest in ensuring that our nation's wage and overtime laws protect all low-wage workers.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has represented Latino interests in employment discrimination and wage and hour cases throughout the country. MALDEF's mission includes a commitment to pursuing equity and opportunity in the workplace through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

Puerto Rican Legal Defense and Education Fund

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF), based in New York, is a non-profit civil rights impact litigation and advocacy organization that has promoted the civil rights and equal protection of Latinos for the past 34 years through litigation involving constitutional law, federal voting rights, employment and housing discrimination, language rights, educational access, and immigrant rights.

PRLDEF is deeply concerned about the recurring issues that are raised in this case which affect thousands of Latinos, immigrants and other minority employees in the expanding home care industry in the U.S. Many of these domestic workers are disproportionately impacted by substandard and unfair working conditions and face wage inequities under the existing laws.

National Women's Law Center

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the promotion of economic security for women and their families. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement and strengthening of anti-discrimination laws and other laws promoting workplace fairness, and has represented petitioners and prepared or participated in numerous *amicus* briefs before this Court and the federal courts of appeal.

National Partnership for Women & Families

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

Legal Momentum

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. With the goal of promoting economic security for women, Legal Momentum has litigated cases to address interpretations of federal employment protections that particularly disadvantage women workers, including *United States and Colon v. City of New York*, 359 F.3d 83 (2d Cir. 2004), and has participated as *amicus curiae* in leading cases addressing sex discrimination in the workplace, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). This case is of particular interest to Legal Momentum because home care workers are nearly all female, and because the original exemption of domestic workers from the Fair Labor Standards Act was based on stereotypes that demean the value of domestic work and women workers.

Washington Lawyers' Committee for Civil Rights and Urban Affairs

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, a non-profit, public interest organization, seeks to eradicate discrimination and fully enforce the nation's civil rights laws through the provision of legal assistance. The Committee was formed in 1968 in response to both a national report issued by the National Advisory Commission on Civil Disorders identifying discrimination and poverty as the root causes of the recent social unrest, and a related call from members of the private bar to mobilize to meet the legal needs of underserved populations. In the Committee's almost 40-year history, its attorneys have represented thousands of individuals who have alleged discrimination in cases brought under both federal civil rights statutes and state and local civil rights laws, as well as individuals who have alleged violations of federal and state fair labor laws. The largest and oldest of the Committee's projects is the Equal Employment Opportunity Project, which represents victims of employment discrimination and wage and hour violations in individual cases and class actions against both government agencies and private employers. From these and other cases, the Washington Lawyers' Committee has amassed expertise in the issues of law and public policy that have been raised in the present matter.

American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this

nation's civil rights laws. Through its Women's Rights Project and Racial Justice Program, the ACLU has worked for decades to eliminate the barriers to full equality for women and communities of color. As documented in this brief, the challenged exclusion of caregivers from minimum wage protection has a disproportionate impact on women of color and reflects an historical undervaluing of work traditionally associated with women. The proper resolution of this case is therefore a matter of substantial interest to the ACLU and its members.