UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOME CARE ASSOCIATION OF AMERICA;
INTERNATIONAL FRANCHISE ASSOCIATION;
NATIONAL ASSOCIATION FOR
HOME CARE & HOSPICE,

Plaintiffs-Appellees,

v. No. 15-5018

DAVID WEIL,
Administrator of the Wage and Hour Division,
U.S. DEPARTMENT OF LABOR;
THOMAS E. PEREZ, Secretary of Labor;
U.S. DEPARTMENT OF LABOR,

Defendants-Appellants.

MOTION OF WOMEN'S RIGHTS, CIVIL RIGHTS, AND HUMAN RIGHTS ORGANIZATIONS AND SCHOLARS FOR LEAVE TO FILE A MEMORANDUM AS *AMICI CURIAE*

The American Civil Liberties Union of the Nation's Capital, on behalf of *amici curiae* women's rights, civil rights, and human rights organizations and scholars, hereby moves for leave to file the attached brief, as *amicus curiae*, in support of Defendants-Appellants in this matter pursuant to Federal Rule of Appellate Procedure 29.

A. Consent

Defendants-Appellants consent to this motion. Plaintiffs-Appellees "consent to the filing of an amici brief by the organization(s) [*amici*] represent, provided that [*amici*] will be complying with the single brief requirement of Circuit rule 29(d)." Plaintiffs-Appellees "do not consent to separate briefs by the organizations that have requested to file *amici* briefs."

B. Interest of Amici

Amici are women's rights, civil rights, and human rights organizations and scholars who have long advocated in the courts and in the legislatures for equality of treatment and dignity for women workers and for the employment rights of immigrants and people of color. *Amici* support the Department of Labor's regulations because they remedy a historic wrong — the exclusion of predominantly low-income, minority women domestic long-term care workers from the basic labor protections that other workers take for granted. Many of *amici* submitted comments in support of the regulations at issue in this case. Individual statements of the interests of *amici* can be found in an Appendix to this brief.

C. Authorship and Funding

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that this brief was authored by *amici* and counsel listed in the brief. No party or party's

counsel authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No other person besides *amici* and their counsel contributed money that was intended to fund preparing or submitting this brief.

D. Not Practical to Join in Single Brief

Amici propose to file a brief on behalf of women's rights, civil rights, and human rights organizations and scholars explaining the history of sex stereotypes and legacy of racial bias in the 1938 FLSA that Congress and the Department of Labor intended to correct through the 1974 FLSA Amendments and 2013 regulations. These are not the issues that the parties or other *amici* in support of Defendants-Appellants seek to highlight. Upon information and belief, following coordination among the parties to ensure lack of duplication and overlap, other parties will address separate topics, including whether the proposed regulations are likely to lead to increased institutionalization; how the proposed regulations affect older care recipients and their family caregivers as well as the disproportionate number of home care workers who are themselves older; changes in the home care industry since the 1970's and the impact that labor shortages and high turnover have on patient care; how the proposed regulations will affect persons with disabilities; and other issues not addressed by the brief *amici* submit. There would be no efficiencies or synergies gained by addressing these issues in a joint brief.

In addition, *amici* do not have expertise in some of the areas the other *amici* intend to brief. Because the issues raised in this brief are not adequately addressed in the other briefings, and because the issues raised in our brief merit consideration, *amici* respectfully propose to submit this separate brief.

Conclusion

For the foregoing reasons, *amici's* motion should be granted.

Respectfully submitted,

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28.1, *Amici* certify the following:

A. Parties Appearing Before the District Court

All parties are listed in the Brief for Defendants-Appellants. There were no *amici* in district court. *Amici* filing this brief are the American Civil Liberties Union, ACLU of the Nation's Capital, Legal Momentum, Asian American Legal Defense and Education Fund, Eileen Boris, Jennifer Klein, Health and Human Rights Clinic at Indiana University McKinney School of Law, LATINOJUSTICE PRLDEF, National Center for Law and Economic Justice, National Council of La Raza, National Hispanic Leadership Agenda, National Women's Law Center, Northwest Arkansas Workers' Justice Center, Santa Clara University School of Law International Human Rights Clinic, US Human Rights Network, National Law Center on Homelessness and Poverty, Latina/Latino Critical Legal Theory, Inc., Frank Askin, Karl Klare, William P. Quigley, and Deborah M. Weissman.

There may be additional *amici* of which we are unaware.

B. Rulings Under Review

The government has appealed the December 22, 2014 opinion and order vacating the third-party employment regulation, 29 C.F.R. § 552.109 (Dkt. ## 21, 22), and the January 14, 2015 opinion and order vacating the companionship

services regulation, 29 C.F.R. § 552.6 (Dkt. ## 32, 33). The rulings were issued by the Honorable Richard J. Leon in No. 1:14-cv-00967-RJL (D.D.C.).

C. Related Cases

Counsel are not aware of any pending related cases.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel makes the following disclosure:

None of the *Amici* is a publicly held entity. None of the *Amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have any ownership in any of the *Amici*.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and attached Brief of Amici Curiae were filed upon counsel for Plaintiffs-Appellees and Defendants-Appellants via this Court's electronic filing system on this 27th day of February 2015.

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February 27, 2015

NO. 15-5018

[NOT SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOME CARE ASSOCIATION OF AMERICA; INTERNATIONAL FRANCHISE ASSOCIATION; NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, ***Plaintiffs-Appellees,***

v.

DAVID WEIL, Administrator of the Wage and Hour Division, U.S. Department of Labor; THOMAS E. PEREZ, Secretary of Labor; U.S. DEPARTMENT OF LABOR, ***Defendants-Appellants*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(No. 14-cv-967) (Hon. Richard J. Leon)

BRIEF OF WOMEN'S RIGHTS, CIVIL RIGHTS, AND HUMAN RIGHTS ORGANIZATIONS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and *Amici*

All parties are listed in the Brief for Defendants-appellants. There were no *amici* in the district court. *Amici* filing this brief are the American Civil Liberties Union, ACLU of the Nation's Capital, Legal Momentum, Asian American Legal Defense and Education Fund, Eileen Boris, Jennifer Klein, Health and Human Rights Clinic at Indiana University McKinney School of Law, LATINOJUSTICE PRLDEF, National Center for Law and Economic Justice, National Council of La Raza, National Hispanic Leadership Agenda, National Women's Law Center, Northwest Arkansas Workers' Justice Center, Santa Clara University School of Law International Human Rights Clinic, US Human Rights Network, Latina/Latino Critical Legal Theory, Inc., Frank Askin, Karl Klare, William P. Quigley, and Deborah M. Weissman.

There may be additional *amici* of which we are unaware.

B. Rulings Under Review

References to the rulings at issue appear in the brief for Defendants-appellants.

C. Related Cases

Counsel is unaware of any pending related cases.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel makes the following disclosure:

None of the *Amici* is a publicly held entity. None of the *Amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent company or publicly held company has any ownership in any of the *Amici*.

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COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29.

A. Consent to File

Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b), *amici* certify that Defendants-Appellants consent to the filing of this brief. Plaintiffs-Appellees "consent to the filing of an amici brief by the organization(s) [*amici*] represent, provided that [*amici*] will be complying with the single brief requirement of Circuit rule 29(d)." Plaintiffs-Appellees "do not consent to separate briefs by the organizations that have requested to file *amici* briefs." For this reason, this brief is accompanied by a Motion for Leave to file the instant brief.

B. Authorship and Funding

Pursuant to Fed. R. App. P. 29(c)(5), *amici* certify that this brief was authored by counsel for *amici curiae* listed on the front cover. No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than *amici* and their counsel contributed money that was intended to fund the preparation or submission of this brief.

C. Not Practical to Join in Single Brief

Pursuant to Circuit Rule 29(d), *amici* certify that it is not practicable to join all other *amici* in this case in a single brief. Pursuant to Circuit Rule 29(d), undersigned counsel for *amici curiae* women's rights, civil rights, and human rights organizations and scholars certify that a separate brief is necessary. *Amici* seek to address the history of sex stereotypes and legacy of racial bias in the 1938 FLSA that Congress and the Department of Labor intended to correct through the 1974 FLSA Amendments and 2013 regulations. These are not the issues that the parties or other *amici* in support of Defendants-Appellants seek to highlight. Upon information and belief, following coordination among the parties to ensure lack of duplication and overlap, other parties will address separate topics, including whether the proposed regulations are likely to lead to increased institutionalization; how the proposed regulations affect older care recipients and their family caregivers as well as the disproportionate number of home care workers who are themselves older; changes in the home care industry since the 1970's and the impact that labor shortages and high turnover have on patient care; how the proposed regulations will affect persons with disabilities; and other issues not addressed by the brief *amici* submit. There would be no efficiencies or synergies gained by addressing these issues in a joint brief.

In addition, *amici* do not have expertise in some of the areas the other *amici* intend to brief. Because the issues raised in this brief are not adequately addressed in the other briefings, and because the issues raised in our brief merit consideration, *amici* respectfully submit this separate brief.

Dated: February 27, 2015

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

FLSA: Fair Labor Standards Act

INTERESTS OF *AMICI CURIAE*

Amici are women's rights, civil rights, and human rights organizations and scholars who have advocated for equality of treatment and dignity for women workers and for the employment rights of immigrants and people of color. *Amici* support the Department of Labor's regulations, because they remedy a historic wrong — the exclusion of predominantly low-income, minority women domestic long-term care workers from the basic labor protections that other workers take for granted. Many of *amici* submitted comments in support of the regulations at issue in this case. Individual statements of the interests of *amici* can be found in the Appendix.

STATEMENT OF THE CASE

Amici adopt the Defendants-Appellants' Statement of the Case.

SUMMARY OF ARGUMENT

The Department of Labor regulations at issue remedy a discriminatory gap in our wages and hours law that has persisted for decades: the exclusion of long-term care domestic workers. This exclusion embodied historically prevalent gender stereotypes about the value of caregiving work performed primarily by women inside people's homes. It also codified the legacy of slavery, in which African-American women served as domestic workers. And it maintained the racially biased legacy of the New Deal era, when African-American and immigrant

workers were excluded from new federal labor protections, including the Fair Labor Standards Act (hereinafter FLSA).

For more than forty years, Congress has attempted to close these shameful gaps and bring domestic workers into the economic mainstream. In the 1960s, Congress amended the FLSA to provide protections to the women who provided long-term care to people in institutions, and in the 1970s, it amended the statute again to cover all but "casual" domestic workers. Congress's objective, particularly in amending the FLSA in 1974, was to eradicate the racially biased exclusions that left out women of color who provided most domestic service. However, the regulations issued in the wake of these amendments still were interpreted to leave out many workers who provided long-term care as their vocation.

With its 2013 regulations, the Department of Labor finally closed the remaining loopholes and brought long-term care workers within the wage and overtime protections of the FLSA. In doing so, the Department fulfilled Congress's goal of rectifying the legacy of race and sex discrimination that had excluded these workers from the protections of the Fair Labor Standards Act. The workers affected by the 2013 rule remain overwhelmingly women, predominantly women of color and immigrant women. They still toil in physically and emotionally demanding caregiving jobs for low wages. Many of those who require

long-term care now receive it at home, in contrast to the 1960s where institutionalization was an accepted norm. Thus, in addition to remedying historic race and sex biases in accordance with Congress's goals, the 2013 regulations recognize the realities of the modern home care industry, and ensure that the women typically providing the care are paid fairly.

For these reasons, *amici* respectfully ask this Court to uphold the 2013 regulations as a lawful and logical exercise of the Department of Labor's powers.

ARGUMENT

I. FOR MORE THAN FORTY YEARS, CONGRESS HAS MADE EFFORTS TO CORRECT GENDER AND RACIAL BIAS IN THE FLSA THAT LEFT WOMEN AND PEOPLE OF COLOR WITHOUT PROTECTIONS AFFORDED TO OTHER WORKERS.

It has been well documented that the 1938 Fair Labor Standards Act and its accompanying regulations codified a legal legacy of racial and gender discrimination. *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. 95, 100-03, 114-17 (2011) (collecting scholarship); Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa L. Rev. 1835, 1857 & nn. 108-109 (2007) (same). Sex stereotypes and a legacy of racial bias led our laws to treat domestic work as outside the realm of breadwinning and undeserving of the protection that "real" workers receive. *See infra Part I.A.*

When federal labor laws were enacted as part of the New Deal, Congress excluded agricultural workers, who were primarily African-American and immigrants, and domestic workers, who were, and remain, primarily women and disproportionately women of color and immigrants. *See infra Part I.B.*

Congress tried to remedy this blatant exclusion of full-time workers by the 1974 Amendments to the FLSA. Congress sought to include within the coverage of the Act "all employees whose vocation is domestic service." H.R. Rep. No. 93-913, at 36; S. Rep. No. 93-690, at 20 (1974). In 1974, the only workers Congress intended to be excluded were "not regular bread-winners or responsible for their families' support." H.R. Rep. No. 93-913, at 36; S. Rep. No. 93-690, at 20 (1974). Unfortunately, the Department of Labor's 1975 regulations did not take this legislative history into account. In the 2013 regulations at issue, the Department of Labor has taken action to effectuate Congress's goal in 1974 of remedying its past race and sex-based discrimination. The 2013 regulations finally acknowledge that domestic workers — including those who provide in-home long-term care — must be treated the same as other full-time breadwinners and receive minimum wages and overtime for their work.

A. Gender Stereotypes and Racial Biases Underlie Long-Held Assumptions that Domestic Caregiving Work is Unworthy of Labor Law Protections.

The low value traditionally placed on women's caregiving labor, including the lack of formal legal protections, is rooted in sex stereotypes about domestic work and in the legacy of slavery and Jim Crow. The domestic care provided by women of color, to other peoples' families, has historically been devalued and excluded from labor protections. *See infra Part I.B.* This exclusion is based on gendered norms about the intimacy of care provided within the home, and on racialized notions about the rights of employers to determine the wages of domestic workers. *See* Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor* 2, 3, 6, 16-18, 32-33, Signs vol. 18, no. 1 (Fall 1992), *available at* http://www.jstor.org/stable/3174725.

The Supreme Court has repeatedly discussed the "pervasive sex-role stereotype" that regards caregiving for family members as "women's work" that need not be compensated. This stereotype has shaped our national consciousness. *See Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1334 (2012) (quoting *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003)); *see infra* for a discussion of how the Supreme Court has also invalidated laws that rely on these stereotypes. It informed the "perception that domestic work," even when performed outside of one's own family, "was temporary, easy, and less dangerous than other types of female employment, especially for white women who worked

only until marriage." Domestic work was considered "safely inside the private sphere of the household, rather than in the rough and tumble public sphere of the market." 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).

Intersecting racial 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." *Id.* This view of Black women's domestic labor is a legacy of the role of Black women as domestic slaves caring for white families. Following slavery and emancipation, the Jim Crow era was characterized by repression in which "[w]hole industries and categories of the best-paying jobs were reserved for whites." Roy L. Brooks, *American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J. L. & Soc. Challenges 1, 17-18 (2005). "Jim Crow forced the former slaves and their descendants, who had little or no resources to begin with, into the worst jobs," and "'African Americans, even if they were college-educated, worked as bellboys, porters and domestics.'" *Id.* at 17-18 & n.61 (2005) (quoting Affirmative Action: History and Rationale, at http://www.whitehouse.gov/WH/EOP/OP/html/aa02.html (available June 22, 1999)). "Domestic service was part of the racial caste system," and "the racist stereotype

of Mammy is the quintessential embodiment of the ideal of the Black woman in service to" white households at the expense of her own family. 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).

Home care originated as a distinct occupation in New Deal relief measures for unemployed Black domestic workers. These measures built upon family welfare programs in which a caregiver would be sent into a home when the mother was absent. *See generally* Eileen Boris & Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* 4-18, 22-39 (2012). Later such visiting housekeeping services were provided to people with disabilities and elderly people. *Id.*

Long-term home care workers have been excluded from labor protections as a result of these intersecting forms of bias and the discriminatory treatment accorded Black domestic workers.

> Racially-coded gender stereotypes play a strong role in keeping wages low and working conditions poor. As a subset of domestic workers, long term care workers suffer from being too far inside the private (feminine) sphere to be regulated. Long term care work … is not perceived as productive work; it is not work that enriches capital. Long term care workers perform "emotional work" that is underpaid because, like in other female-dominated professions such as teaching or child care, the work is supposed to carry its own rewards.

Kraiem, *Consumer Direction in Medicaid Long Term Care*, *supra*, at 671, 685-86 (footnotes omitted).

The Supreme Court has made clear that the categorization of caregiving as "women's work" is no longer an acceptable ground for overt discrimination or exclusion. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (invalidating a nursing school policy that excluded men, because such policies "perpetuate the stereotyped view of nursing as an exclusively women's job"). Paternalistic attitudes towards women workers have been recognized as leading to the unequal treatment of women. "Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (requiring military to grant same employment benefits to dependents of male and female workers). Yet this unequal treatment was deeply entrenched in our legal regime, including our labor laws.

B. The 1938 Fair Labor Standards Act Codified Racial and Gender Biases in a Legal Regime that Undervalued the Labor of Paid Caregivers.

Although the FLSA "legitimated and institutionalized the idea that living standards and workers' needs matter in setting wages," Ellen Mutari, *Brothers and Breadwinners: Legislating Living Wages in the Fair Labor Standards Act of 1938*, 62 Rev. of Soc. Econ. 129 (2004), Congress excluded many low-wage workers

from its safety net. Sections 6 and 7 of the FLSA created minimum wage and overtime protections only for workers "engaged in commerce or in the production of goods for commerce." Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 206-207(2007)). "Commerce" was defined, generally at the time and particularly in the FLSA, as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 203(b)(2006)). This standard was interpreted for years to exclude domestic service workers, even though the statute did not expressly exclude this work. Agricultural workers, on the other hand, were excluded from these protections explicitly. Fair Labor Standards Act of 1938, 52 Stat. at 1067 § 13(a)(6) (codified as amended at 29 U.S.C. § 213(a)(6)(2014)).

This exclusion of domestic service and agricultural workers from FLSA's minimum wage and overtime protections emerged from the gender and racial biases described in Part I.A., *supra*. FLSA's coverage only of workers engaged in interstate commerce or the production of goods intended for interstate commerce privileged traditionally male industrial production jobs. It left out predominantly female occupations of the time, "including hotel workers, such as waitresses and chambermaids, retail clerks performing customer service, and janitors and nurses

in hospitals." William P. Quigley, *'A Fair Day's Pay For a Fair Day's Work': Time to Raise and Index the Minimum Wage*, 27 St. Mary's L. J. 513, 533 (1996).

The exclusion of home care workers from the Fair Labor Standards Act was part of this broader exclusion. Household work was viewed as personal, not part of the commercial economy and, as such, "New Deal labor law refused to recognize the home as a workplace." Eileen Boris & Jennifer Klein, *Organizing Home Care: Low-Waged Workers in the Welfare State*, Politics & Soc'y vol. 34, No. 1, 81, 84 (March 2006). Even statutes protecting women workers in industrial settings exempted domestic workers. *See* Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 Am. U. L. Rev. 851, 853-55, 880-918 (1999).

The FLSA codified the system of protections for white workers and exclusions of African-American workers that held sway in the New Deal era. In the 1930's, "half or more of the nation's farms and farm population were in the South," and 55% of agricultural workers in the former Confederate states were nonwhite. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1343-44 (1987). Nationally, in 1930 almost half of all paid household workers were African-American women. Smith, *Regulating Paid Household Work*, *supra*, at 915 n.392.

In the 1930's New Deal Congress, Southerners controlled most leadership positions and more than half of committee chairmanships; they also voted as a bloc. Perea, *Echoes of Slavery*, *supra*, at 102. These politicians maintained an agenda of maintaining a cheap African-American labor supply, as well as "preserving the status quo of white domination." Smith, *Aging and Caring in the Home*, *supra*, at 1857 ; Perea, *Echoes of Slavery*, *supra*, at 102, 104-05.

No legislation could pass without Southern support. So, even the earliest versions of the FLSA excluded domestic and agricultural workers. *Id.* at 114. Members of Congress stood during the FLSA debates to say that "you cannot prescribe the same wages for the black man as for the white man" and "[y]ou cannot put the Negro and the white man on the same basis and get away with it." *Id.* at 115-16. For the same reasons, agricultural and domestic service workers were also excluded from coverage under the National Labor Relations Act and the Social Security Act. National Labor Relations Act of 1935, 49 Stat. 449 (1935)(codified at 29 U.S.C. §§ 151-169(2014)); Social Security Act of 1935, Pub. L. No. 92-603, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 1381-1385 (2013)). These exclusions of traditionally African-American sectors from labor protections have no place in our laws and defy Congress's more recent wishes to remedy past discrimination and unfair exclusion from the FLSA.

II. CONGRESS AMENDED THE FLSA IN 1961, 1966, AND 1974 WITH THE INTENTION OF COVERING THE FEMALE DOMESTIC WORKERS ORIGINALLY EXCLUDED BY THE STATUTE.

A. The 1961 and 1966 Amendments to the FLSA Reflected Congress's Intent to Properly Compensate Caregiver Working in Institutional Settings.

After 1960, Congress and the Labor Department made ongoing efforts to eliminate the legal structures in the FLSA that undervalued the caregiving work typically performed by women. 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 (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 the sick, the aged, the mentally ill, 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. Congress's efforts to rectify gaps for women would continue in 1974.

B. Congress's 1974 FLSA Amendments Remedied Historic Discrimination by Bringing All But "Casual" Domestic Workers into the Economic Mainstream.

In enacting the Fair Labor Standards Amendments of 1974 (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 (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. *See generally* Phyllis Palmer, *Outside the Law: Agricultural Workers and Domestic Workers Under the Fair Labor Standards Act*, J. of Pol'y Hist., vol. 7, no. 4, 419-440 (1995).

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. 18,341 (1973) (statement of Rep. Griffiths) ("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 "defined and delimited by regulations of the Secretary."[1] *Id.* These exemptions were intended to be applied only to "casual" babysitters and "companions" or "elder sitters" for the elderly or infirm. § 7(b)(3); 119 Cong. Rec.

[1] 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)).

S24801 (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 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, 2837; S. Rep. No. 93-690, at 20 (1974).

In other words, professional nannies were covered by the 1974 Amendments. Occasional teenage babysitters were not. Similarly, professional companions to the elderly or infirm were covered, while caregivers providing services on an incidental basis were not. The 1974 Amendments, however, must be viewed in the context of the 1970's, when "individuals who had significant care needs went into institutional settings." Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,458 (Oct. 1, 2013) (codified at 29 C.F.R. Part 552); Boris & Klein, *Organizing Home Care*, *supra*, at 95 (describing how "an extraordinarily high percentage of elders were institutionalized" in Oregon after 1965); *see also* Boris & Klein, "Making Home Care: Law and Social Policy in the U.S. Welfare State," in *Intimate Labors: Cultures, Technologies, and the Politics of Care* (Eileen Boris & Rhacel Salazar

Parrenas eds., 2010) ; Eileen Boris & Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* ch. 5 (2012). Anyone needing more than the casual care envisioned by section 7(b)(3) of the 1974 Amendments would likely have been in an institution, cared for by workers who were already protected by FLSA following the 1966 Amendments.

That is no longer the case, as a result of a cultural shift away from institutionalization; many individuals in need of constant care remain at home. The DOL recognized that the 1974 rules need greater clarification to reflect the realities of a changing workforce. *See* Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5,481, 5,484 (January 19, 2001) ("[b]ecause many individuals who were formerly institutionalized or moved to nursing homes are able, with assistance, to stay in their homes, home care providers have taken on a broader range of medically-related duties.").

In 1975, the Department of Labor issued additional regulations in an unsuccessful effort to clarify what it meant by "casual" babysitter and companion worker. Application of the Fair Labor Standards Act to Domestic Service, 40 Fed. Reg. 7404 (Feb. 20, 1975) (codified as amended at 29 C.F.R. Part 552). These regulations never provided a satisfactory task-based distinction between domestic service workers and companion workers. The Department defined "companionship services" as the provision of "fellowship, care, and protection for

a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." 40 Fed. Reg. 7,404, 7,405 (codified as amended at 29 C.F.R. § 552.2-552.6). Companionship services could include meal preparation, bed making, laundry, and "the performance of general household work" if it did not include more than 20% of total weekly hours, *id.*, — the very work typically performed by the domestic services workers and full-time nannies that the 1974 Amendments were intended to bring within FLSA's coverage.

The more useful line between those who were intended to be covered by wage protections and those who were not is found in the relevant House and Senate Committees reports, which distinguished between "employees whose vocation is domestic service" and those who are "not regular bread-winners or responsible for their families' support." H.R. Rep. No. 93-913, at 36 (1974); S. Rep. No. 93-690, at 20 (1974). At the time, Congress saw this distinction as coinciding with the distinction between companion workers employed in institutions and those employed in private homes.

Confusion about who should remain beyond the statute's reach is echoed in the Department of Labor's indecision in 1974 regarding whether wage and hour protections applied to domestic companionship services workers employed by third parties. The Department's initial proposal was that the wage and hour exemptions could not be applied to companion workers employed by an agency or employer

other than the family or household using their services. Employment of Domestic Service Employees, 39 Fed. Reg. 35,382-85 (proposed Oct. 1, 1974). Seeking placement in a home through an agency (rather than an informal social recommendation) certainly suggested that a worker's vocation was domestic service and therefore that FLSA protections should apply. However, the final rule was that all companion workers were exempt, regardless of who hired them, because the text of the statute referred to "any employee employed in domestic service employment to provide companionship services." Extension to Domestic Service Employees, 40 Fed. Reg. 7404 (proposed February 20, 1975) (codified as amended at 29 C.F.R. § 552.109 (2015)).

These rules were criticized for leaving out large numbers of full-time workers providing long-term care. *See, e.g.*, Dianne Avery & Martha T. McCluskey, *When Caring is Work: Home, Health, and the Invisible Workforce Introduction*, 61 Buff. L. Rev. 253, 257-58 (2013) (summarizing lectures critical of the rules as "undermin[ing] the viability of home care work as a decent job at a time when the number of informal caregivers is dwindling and the need for access to care for the elderly is growing").

These tensions and contradictions came to a head when the regulations were challenged in litigation by Evelyn Coke, a long-term care worker. In *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), the Supreme Court upheld the

regulations and ruled that it was up to the Department to resolve the interpretive issues. The Court noted that the statute's text did "not expressly answer the third-party employment question," instead "expressly instruct[ing] the agency to work out the details of th[e] broad definitions" given in the FLSA. *Id.* at 167.

By the time the Department proposed revisions in 2011, it was clear that the old regulations, even if lawful, had become untenable, perpetuated historic discrimination, and were woefully out of date. The 2013 regulations at last bring the regulatory regime into line with the statutory scheme's distinction between casual companions and workers whose vocation is long-term care.

III. THE 2013 REGULATIONS FURTHER THE PURPOSES OF THE 1974 FLSA AMENDMENTS TO EXTEND WAGE PROTECTIONS TO WORKERS WHO PROVIDE LONG-TERM CARE FOR A LIVING, WHO REMAIN PRIMARILY WOMEN — DISPROPORTIONATELY WOMEN OF COLOR.

The Department of Labor's 2013 regulations further Congress's intent in its 1966 and 1974 Amendments to rectify sexual and racial discrimination, and to protect workers trying to support their families. The regulations also bring the statutory scheme into line with the realities of the home care industry, in which a professional workforce earns a living and supports families by providing in-home care to a growing population.

Under the Department's new rule, effective January 1, 2015, third-party employers of home care workers could no longer avail themselves of the section

213(a)(15) wage and hour exemption. Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (codified at 29 C.F.R. pt. 552). Accordingly, third-party employers of such workers must pay them minimum wages and overtime. *See* 78 Fed. Reg. at 60,557 (codified as amended at 29 C.F.R. § 552.109).

The Department also 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* 78 Fed. Reg. at 60,556-57 (Oct., 1, 2013) (codified as amended at 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* 78 Fed. Reg. at 60,556-57 (Oct. 1, 2013) (codified as amended at 29 C.F.R. § 552.6(b)). Medically related services for the person being care for are not included, and domestic services for the benefit of other members of the household are not included. *See* 78 Fed. Reg. at 60,556-57 (codified as amended at 29 C.F.R. § 552.6(c), (d)). These rules take into account Congress's intent in 1974 to protect vocational caregivers, and they reflect the context of today's care industry.

A. The 2013 Regulations Apply FLSA to Modern Realities in which a Large and Growing Client Population is Most Often Cared for at Home.

Today most long-term care "workers care for clients in private homes," not in residential-care institutions. Smith, *Aging and Caring in the Home*, *supra*, at 1846 (2007). 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)); 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).

Accordingly, for long-term care workers employed in homes, the distinction between workers providing domestic services (covered by FLSA), nursing and medical care (covered by FLSA), and casual domestic companions (exempt from FLSA) is incoherent. Companion 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 skilled and professional than that of someone performing 'elder sitting.'" Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,458 (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 12.8% in 2009. Laura B. Shrestha, Congressional Research Service, *The Changing Demographic Profile of the United States* 13 (2006), *available at* https://www.fas.org/sgp/crs/misc/RL32701.pdf (last visited Feb. 23, 2015). It is expected to grow to 20.2% in 2050. *Id.* As a result, "the expanding need for long-term care has transformed home care into one of the fastest growing occupations in the country." Smith, *Aging and Caring in the Home*, *supra*, at 1846. Personal care aides are projected to have the fastest employment growth rate in the United States. National Council of La Raza, *Hispanic Home Care Workers* 1, 3, Monthly Latino Employment Report (July 8, 2013) (citing U.S. Bureau of Labor Statistics, "Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, 2012 Annual Averages," *Current Population Survey*, http://www.bls.gov/cps/cpsaat11.htm). The Department's 2013 regulations

appropriately recognize 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.

B. The 2013 Regulations Were Intended to Remedy Racial and Gender Bias and Cover Home Care Workers, Who Remain Disproportionately Minority, Low-Income Women Who Provide Long-Term Care for a Living.

Caregiving jobs have been and continue to be held predominantly by women, with women of color and women from marginalized immigrant groups disproportionately represented. Scott Martelle, *Confronting the Gloves-Off Economy* 15 (Annette Bernhardt et al. eds., 2009), *available at* http://nelp.3cdn.net/0f16d12cb9c05e6aa4_bvm6i2w2o.pdf. Indeed, the home health care workers covered by the Department of Labor's regulation remain the overwhelmingly female, disproportionately minority workforce that was intended to be brought into the labor laws' purview by the 1974 Amendments. According to U.S. Census Bureau data, 88% of home care workers are women; 30% of these women are African American and 20% are Hispanic.[2]

[2] "Home care workers" are defined here as people in the occupations "personal care aides" and "nursing, psychiatric and home health aides" working in the "home health care services" or "individual and family services" industries. Nat'l Women's Law Center calculations based on U.S. Census Bureau, 2013 American Community Survey, analyzed using Steven Ruggles et al., *Integrated Public Use Microdata Series: Version 5.0* [Machine-readable database] (Minneapolis: Univ. of Minnesota, 2010). Similarly, a 2011 study found that home health aides are 95% women, 34% African American, 14.5% immigrants. Galina Khatustsky, et al.,

Home care workers continue to be low-income. When the Department promulgated its 2013 rule, home care workers who are primary earners for their families continued to struggle to survive on median annual wages of less than $22,000 for full-time work, below the Federal Poverty Guideline for a family of four. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment & Wages, May 2013, 31-1011: Home Health Aides, http://www.bls.gov/oes/current/oes311011.htm (reporting median annual wages of $21,020), *and* 39-9021: Personal Care Aides, http://www.bls.gov/oes/current/oes399021.htm (reporting median annual wages of $20,100); U.S. Dep't of Health & Human Services, 2013 Federal Poverty Guidelines, http://aspe.hhs.gov/poverty/13poverty.cfm. Nearly one-third of women in the home care workforce are raising children, and 23% live below the poverty line. Nat'l Women's Law Ctr. calculations based on U.S. Census Bureau, 2013 American Community Survey, *supra* note 2.

Wages for personal care aides and home care aides have remained stagnant, even as revenues in the for-profit care industry have doubled in the last 30 years.

U.S. Dep't of Health and Human Services, *Understanding Direct Care Workers: A Snapshot of Two of America's Most Important Jobs* 4 (2011), *available at* http://aspe.hhs.gov/daltcp/reports/2011/CNAchart.pdf. According to a 2013 report, the home care workforce employs 227,000 Latinos. 21.2% of personal care aides are Latino. Nat'l Council of La Raza, *Hispanic Home Care Workers*, *supra*, at 2.

Nat'l Council of La Raza, *Hispanic Home Care Workers* 3, Monthly Latino Emp't Rep. (July 8, 2013), *available at* http://www.nclr.org/images/uploads/publications/july2013_employmentreport_homecareworkers.pdf (citing Paraprofessional Healthcare Institute, *Who are Direct-Care Workers?* Facts no. 3, at 3 (Feb. 2011), *available at* www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf[3]. Despite performing stressful and physically demanding jobs requiring specialized skills, these workers have not been protected by the federal minimum wage and overtime laws available to other workers.

Long-term care workers struggle to retain decent housing and financial stability on low wages. One account describes a caregiver's fight to stay in her home and explains:

> Poor black women like [the woman featured] have long cared for the elderly, ill, and disabled – whether in their own homes or in the residences of others….Often, it is the best job they can find….Latinas and other recent immigrants make up a third of those who perform daily tasks – bathing bodies, brushing teeth, putting on clothes, cooking meals – that enable people to live decently in their own homes.

[3] The plight of home care workers in this respect mirrors the problem that women's concentration in the low-wage workforce more broadly increased by more than 6%between 2007 and 2012. Women make up 2/3 of the low-wage workforce, working in jobs that typically pay $10.10 per hour or less. National Women's Law Ctr.,*Underpaid & Overloaded: Women in Low-Wage Jobs* 1 (2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_lowwagereport2014.pdf.

Eileen Boris & Jennifer Klein, *Frontline Caregivers: Still Struggling*, Dissent vol. 59, no. 1, 46, 46 (Winter 2012).

The gender stereotypes that formed the basis for the original exclusion of domestic work from labor protections, such as that women work for pin money, H.R. Rep. 93-913, at 34, are inaccurate and anachronistic. Most families rely on women for critical household income and depend on that money to keep the family afloat. Sarah Jane Glynn, *The New Breadwinners: 2010 Update* 3, Center for American Progress(April 2012), http://cdn.americanprogress.org/wp-content/uploads/issues/ 2012/04/pdf/breadwinners.pdf. In families in the bottom fifth of income distribution, 70% of working wives earn as much or more than their husbands. *Id.*

Women's roles as breadwinners are even more pronounced among home care workers. 81% of home care workers are primary earners for their families, according to one survey in New York City survey. 76 Fed. Reg. No. 81,190, 81,197 (Dec. 27, 2011) (citing Lenora Gilbert, *Home Care Workers: The New York City Experience*, Encyclopedia of Occupational Safety and Health, vol. 3 (4th ed. International Labor Organization 1998). Thus, moving home care workers from the category of "casual" elder-sitters to the formal protections accorded breadwinners was entirely appropriate and based in the empirical reality of the home care workforce.

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The stubborn persistence of long-term care workers' exclusion from the labor protections enjoyed by most workers has been based upon the now-discredited "presumption that the intimate labor of caregiving should be the loving and unpaid duty of wives, mothers, and daughters." Boris & Klein, *Frontline Caregivers*, *supra*, at 47. As with other domestic work, this

> paradox hinges heavily on the gendered construction of the work and its location within the private home. Domestic service is devalued and undervalued because of its close association with women's unpaid work in the home. Regarded as women's work, domestic service suffers from the perception that its successful performance depends not on skill but on a woman's innate ability.

Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 Emp. Rts. & Emp Pol'y J. 159, 161 (2011).

The Department's 2013 regulations extending these protections to a field dominated by low-income women will help those women lift their families out of poverty, reduce the persistent pay disparities between men and women, and help women who work full-time avoid needing public assistance.

CONCLUSION

In 2013, the Department of Labor took action to ensure that the FLSA protected workers who had been previously excluded under the statute, either inadvertently or by design. These regulations properly recognize that the intent of

the 1974 FLSA Amendments would be better effectuated through regulations covering all domestic service workers employed by third-party employers. The 2013 regulations are not isolated standards. They are part of an effort more than forty years in the making to close loopholes in the FLSA that either inadvertently or purposefully excluded full-time, breadwinning domestic care workers whom Congress repeatedly attempted to include. The Court should therefore reverse the judgment of the District Court invalidating the regulations.

Respectfully submitted,

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February 27, 2015

INTERESTS OF *AMICI CURIAE*

Amici are women's rights, civil rights, and human rights organizations and scholars who have advocated for equality of treatment and dignity for women workers and for the employment rights of immigrants and people of color. *Amici* support the Department of Labor's regulations because they remedy a historic wrong — the exclusion of predominantly low-income, minority women domestic long-term care workers from the basic labor protections that other workers take for granted. Many of *amici* submitted comments in support of the regulations at issue in this case. Individual statements of the interests of *amici* can be found below.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than a million members, activists, and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of the Nation's Capital is the Washington, D.C., affiliate of the ACLU. Through its Women's Rights Project, Washington Legislative Office, and affiliates, the ACLU has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace, with a particular focus on discrimination that affects low-income women of color and immigrant women workers. The ACLU submitted comments and related advocacy in support of the long-term care regulations at issue in this case.

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); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007). Legal Momentum has consistently advocated for the extension of Fair Labor Standards Act protections to home care workers and submitted comments in support of the Department of Labor regulations at issue in this case.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, 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 has represented several home health care aids and has supported the regulations challenged in this matter.

Eileen Boris and Jennifer Klein, the first scholars to write the history of home care over the course of the twentieth century, co-authored Caring for

America: Home Health Workers in the Shadow of the Welfare State (Oxford University Press, 2012). Eileen Boris holds the Hull Endowed Professorship of Feminist Studies and is Professor of History, Black Studies, and Global Studies at the University of California, Santa Barbara. She is a historian of women's work and the history of social and labor policy, including the legal and political histories of home labors. Jennifer Klein is Professor of History at Yale, specializing in twentieth-century U.S. history. They join this brief out of the belief that the historical record illuminates the questions under consideration by this Court.

Students in the Health and Human Rights Clinic at Indiana University McKinney School of Law engage in human rights advocacy and litigation addressing the social determinants of health. Students directly represent, under faculty supervision, low-income clients, especially workers who have been wrongfully denied their earned wages or are appealing a challenge to their access to unemployment benefits. On issues including workers' rights, students engage in advocacy in the form of appellate briefs, investigations and reports, and public education, some of it in the context of international human rights issues.

LATINOJUSTICE PRLDEF, formerly known as the Puerto Rican Legal Defense & Education Fund, champions an equitable society by using the power of the law together with advocacy and education. Since being founded in 1972, LATINOJUSTICE PRLDEF has advocated for and defended the constitutional rights

and the equal protection of all Latinos under the law, including litigating numerous landmark cases. Through its Latinas at Work (LAW) Workplace Justice Project, LATINOJUSTICE PRLDEF has successfully challenged wage theft, discriminatory practices and unfair workplace conditions, and English-only language policies that limit the rights of Latina/o immigrants to secure equal employment opportunities in the workplace.

Latina/Latino Critical Legal Theory, Inc. (LatCrit) is dedicated to the production of critical and interdisciplinary "outsider jurisprudence"; the promotion of social transformation; the expansion and interconnection of antisubordination struggles; and the cultivation of community and coalition among outsider scholar activists, social justice lawyers, law students, and others. LatCrit's membership includes academics and advocates, and LatCrit's theory seeks to elucidate intra- and inter-group diversities across multiple identity axes, including those based on perspective and discipline, to ensure that African American, Asian American, Latina/o, Native American, Feminist, Queer and other OutCrit subjectivities are considered under the law.

The National Law Center on Homelessness & Poverty is the only national organization dedicated solely to using the power of the law to prevent and end homelessness in America. With the support of an extensive network of pro bono lawyers, we use our legal expertise to help pass, implement and enforce laws

addressing the immediate and long-term needs of those who are homeless or at risk. In partnership with state and local advocates, we work towards strengthening the social safety net through advocacy and advocacy training, public education, and impact litigation. The Law Center promotes laws that ensure everyone can afford safe, adequate housing, including those that ensure a living wage, particularly for historical marginalized populations.

Founded in 1965, the National Center for Law and Economic Justice is a national law office that advocates on behalf of low-income individuals to ensure their access to work supports, protect their civil rights, and improve their opportunities to move out of poverty, including access to living-wage employment. NCLEJ has litigated critical cases establishing the rights of low-wage workers in the federal and state courts.

The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. Given their overrepresentation in the home care workforce, Latinos, mostly women, are disproportionately harmed by the historical exclusion of home care workers from protection under the Fair Labor Standards Act. NCLR submitted public comments

in support of the U.S. Department of Labor's proposed rule to extend minimum wage and overtime protections to home care workers.

The National Hispanic Leadership Agenda (NHLA) was established in 1991 as a nonpartisan association of major Hispanic national organizations and distinguished Hispanic leaders from all over the nation. NHLA brings together Hispanic leaders to establish policy priorities that address, and raise public awareness of, the major issues affecting the Latino community and the nation as a whole. NHLA is composed of 39 of the leading national and regional Hispanic civil rights and public policy organizations and other elected officials, and prominent Hispanic Americans. NHLA coalition members represent the diversity of the Latino community – Mexican Americans, Puerto Ricans, Cubans, and other Hispanic Americans.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities, with special attention to the needs of low-income women. Since 1972, the Center has worked to promote economic security for women and their families and secure equal opportunity in the workplace by supporting the full enforcement and strengthening of laws promoting workplace fairness, and has represented petitioners and prepared or participated in numerous amicus briefs before the federal courts of appeal and the Supreme Court. The Center has

consistently advocated for the extension of Fair Labor Standards Act protections to home care workers and submitted comments in support of the Department of Labor regulations at issue in this case.

The Northwest Arkansas Workers' Justice Center is a non-profit organization that serves low-wage workers by providing representation, advocacy, case management, training and education on labor related issues they may face. The majority of our members are Hispanic or Marshallese working at entry level, low-skill jobs. Our mission is to improve conditions of employment for low-wage workers in northwest Arkansas by educating, organizing, and mobilizing them, and calling on people of faith and the wider region to publicly support the workers' efforts.

The Santa Clara University School of Law International Human Rights Clinic provides law students with an opportunity to work on cases involving a wide range of cutting-edge legal issues, including human trafficking, labor rights, disability rights, human rights and the environment, LGBT rights, immigrants' rights, and equal protection. Students draft and file complex legal briefs in contentious cases before international courts, research and submit advocacy reports to U.S. federal government agencies, the United Nations and the Organization of American States, and produce other sophisticated legal work product for clients and partners.

The US Human Rights Network (USHRN) is a national network of organizations and individuals working to strengthen a human rights movement and culture within the United States led by those most impacted by human rights violations. USHRN serves as an anchor to build the collective power of communities across the country and to expand the base of a bold, vibrant, and broad-based people-centered human rights movement. USHRN is the primary organization coordinating the participation of social justice and human rights groups in using the international human rights mechanisms to hold the United States government accountable.

Frank Askin is Distinguished Professor of Law and Director of the Constitutional Rights Clinic, Rutgers School of Law-Newark.

Karl Klare is the George J. & Kathleen Waters Matthews Distinguished University Professor School of Law at Northeastern University (institution listed for identification purposes only).

William P. Quigley is Professor of Law at Loyola University New Orleans.

Deborah M. Weissman is the Reef Ivey II Distinguished Professor of Law who has addressed the issue of women's economy, labor, and equality in the domestic and international realm.

ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the Brief for Defendants-Appellants.

Table of Contents

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)) i

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)) iii

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)) iv

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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))

> (c) Section 3 of such [Fair Labor Standards] Act is further amended by adding at the end thereof the following new paragraphs:
> "(r) 'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or

advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

" (s) 'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

" (1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

"(2) any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated;

"(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;

"(4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than $350,000;

"(5) any gasoline service establishment if the annual gross volume of sales of such establishment is not less than $250,000, exclusive of excise taxes at the retail level which are separately stated:

Provided, That an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner thereof or persons standing in the relationship of parent, spouse, or child of such owner."

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))

SEC. 102. (a) Section 3(r) of such Act is amended by adding at the end thereof the following: "For purposes of this subsection, the activities performed by any person or persons—

"(1) 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, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

"(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit),

shall be deemed to be activities performed for a business purpose."

. . .

(c) Section 3 (s) of such Act is amended to read as follows:

" (s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1,1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

"(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

> "(3) is engaged in the business of construction or reconstruction, or both; or
> "(4) is engaged in 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, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).
>
> Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection."

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))

> SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce."

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(A)(7)(B)(iii), as counted by the word-count function of Microsoft Word 2010 for Windows .

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman.

Dated: February 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amici Curiae* was filed upon counsel for Plaintiffs-Appellees and Defendants-Appellants via this Court's electronic filing system on this 27th day of February, 2015.

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Case Caption: Home Health Care Ass'n of America

v.

David Weil

Case No: 15-5018

ENTRY OF APPEARANCE

Party Information

The Clerk shall enter my appearance as counsel for the following parties:
(List each party represented individually. Use an additional blank sheet as necessary)

○ Appellant(s)/Petitioner(s) ○ Appellee(s)/Respondent(s) ○ Intervenor(s) ◉ Amicus Curiae

American Civil Liberties Union, et al.

See attached sheet for full list.

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Names of non-member attorneys listed above will not be entered on the court's docket.
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ATTACHMENT TO ENTRY OF APPEARANCE

No. 15-5018

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