No. 15-683

In the Supreme Court of the United States

HOME CARE ASSOCIATION OF AMERICA, ET AL.,
PETITIONERS

v.

DAVID WEIL, ADMINISTRATOR, WAGE AND HOUR
DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

A Fair Labor Standards Act regulation promulgated by the Department of Labor pursuant to delegated rulemaking authority provides that third-party employers may not avail themselves of exemptions from minimum wage and overtime protections for employees who provide companionship services or live-in domestic services. 29 C.F.R. 552.109.

The question presented is whether the court of appeals correctly rejected the argument that 29 C.F.R. 552.109 is contrary to law, unreasonable, and arbitrary and capricious.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 799 F.3d 1084. The relevant opinion of the district court (Pet. App. 27a-45a) is reported at 76 F. Supp. 3d 138.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2015. A petition for a writ of certiorari was filed on November 18, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay a minimum hourly wage and, for hours of work exceeding 40 in a work week, overtime compensation at a rate of one and one-half times the em-

ployee's regular rate of pay. 29 U.S.C. 206(a) (2012 & Supp. II 2015); 29 U.S.C. 207(a)(1). Before 1974, domestic service employees were not covered by these provisions unless the workers were "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. 206(a), 207(a)(1) (1970).

The Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, extended the FLSA's minimum wage and overtime protections to domestic service employees, 29 U.S.C. 206(f), 207(*l*), but exempted from both protections "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 (as such terms are defined and delimited by regulations of the Secretary [of Labor])." 29 U.S.C. 213(a)(15). The 1974 Amendments also exempted from only the overtime requirement any domestic service employee who lives in the household. 29 U.S.C. 213(b)(21).

In addition to the specific authority to "define[] and delimit[]" the companionship services exemption, 29 U.S.C. 213(a)(15), the 1974 Amendments vested the Department of Labor (Department or DOL) with the broad general authority "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 1974 Amendments § 29(b), 88 Stat. 76. The Department exercised its rulemaking authority in 1975 by promulgating a regulation that provided that the exemptions for companionship services and live-in domestic service employees could be claimed not only by an individual or family member who hired a worker directly, but also by third-party

employers who assigned members of their workforce to particular homes. 40 Fed. Reg. 7404, 7407 (Feb. 20, 1975) (29 C.F.R. 552.109 (1975)). At the time the third-party employment regulation was promulgated, the "vast majority" of "private household workers were employed directly by a member of [the] household," rather than by a third-party employer. Emp't Standard Admin., U.S. Dep't of Labor, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act* 28 (Jan. 19, 1973), http://www.dol.gov/whd/homecare/1973-report.pdf (reporting that "no more than two percent of the workers within the scope of the survey were in the employ of a household service business").

Over the ensuing decades, the home care industry changed dramatically, transforming into a multi-billion dollar sector of the economy with a professional workforce. In response to those developments, DOL proposed to amend the third-party employment regulation in 1993, 1995, and 2001. See 58 Fed. Reg. 69,310 (Dec. 30, 1993); 60 Fed. Reg. 46,797 (Sept. 8, 1995); 66 Fed. Reg. 5481 (Jan. 19, 2001). DOL ultimately did not finalize those proposals.

2. In 2007, this Court considered a challenge to the third-party employment regulation brought by an employee of a home care agency who contended that she was entitled to minimum wage and overtime protections. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 164 (2007). The employee in *Coke* argued that DOL had no authority to permit third-party employers to benefit from the companionship services exemption because, according to the employee, the text of the statute "limit[ed] the provision's scope to those workers employed by persons who themselves

receive the services (or are part of that person's household) and exclude those who are employed by 'third parties.'" *Id.* at 166.

The *Coke* Court rejected that argument. Applying the framework established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that "the text of the FLSA does not expressly answer the third-party-employment question," "[n]or can one find any clear answer in the statute's legislative history." *Coke*, 551 U.S. at 168. Instead, the Court stated, the FLSA "expressly instructs the agency to work out the details of th[e] broad definitions" of domestic service employment and companionship services—and "whether to include workers paid by third parties within the scope of the definitions is one of those details." *Id.* at 167. The Court recognized that "whether, or how, the definition should apply to workers paid by third parties raises a set of complex questions," and that "[s]atisfactory answers to such questions may well turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses." *Id.* at 167-168. The Court concluded that it is "consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions." *Id.* at 168. Because DOL's third-party employment regulation fell "within the statutory grant of authority" and was "reasonable," the Court rejected the employee's challenge. *Id.* at 173; see *id.* at 174.

3. In 2013, after notice-and-comment rulemaking, the Department amended its third-party employment

regulation to respond to the "dramatic expansion and transformation" of the home care industry that had occurred since the 1970s. 78 Fed. Reg. 60,455 (Oct. 1, 2013). The amended regulation provides that third-party employers may not avail themselves of the FLSA's exemptions from minimum wage and overtime protections for employees who provide companionship services or live-in domestic service. *Id.* at 60,557 (29 C.F.R. 552.109).

In promulgating the amended regulation, DOL "observe[d] that it [wa]s exercising its expressly delegated rulemaking authority" to fill the statutory gaps concerning "the meaning and scope of the" exemptions for companionship services and live-in domestic service employees. 78 Fed. Reg. at 60,481. The Department recognized that it was "changing its position as to the proper treatment of third party employers," but it explained that the change was warranted in light of "the purpose and objectives of the [1974 Amendments] as a whole," the "legislative history," and "the state of the home care industry" as it had developed over the previous decades. *Id.* at 60,482. The Department observed that home care workers employed by third parties in the industry today are "engaged in a formal, professional occupation" and that they "may well be the primary 'bread-winner[s]' for [their] famil[ies]." *Ibid.* DOL explained that it had accordingly concluded that "employees providing home care services who are employed by third parties should have the same minimum wage and overtime protections that other domestic service and other workers enjoy." *Ibid.*

Based on a comprehensive analysis of the effects of the regulatory changes, including a robust economic

impact analysis, the Department determined that the final rule would benefit not only workers "but also consumers[,] because supporting and stabilizing the direct care workforce will result in better qualified employees, lower turnover, and a higher quality of care." 78 Fed. Reg. at 60,459-60,460. The Department observed that some States already provide minimum wage and overtime protections to home care workers employed by third parties, which "diminishes the force of objections regarding the feasibility and expense of prohibiting third parties from claiming the companionship services and live-in domestic service worker exemptions." *Id.* at 60,483; see *id.* at 60,482. DOL further noted that the comments it had received on the proposed amended regulation "did not point to any reliable data indicating that state minimum wage or overtime laws had led to increased institutionalization or stagnant growth in the home care industry." *Id.* at 60,483. The Department concluded that, by "bring[ing] more workers under the FLSA's protections," the amended regulation would "create a more stable workforce" that would benefit workers and consumers alike. *Ibid.*

4. Petitioners are trade associations representing businesses that employ home care workers. They filed this suit challenging the amended third-party employment regulation under the Administrative Procedure Act, 5 U.S.C. 500 *et seq.* On cross motions for summary judgment, the district court ruled that the regulation is contrary to the FLSA's plain text and declared it invalid at step one of the *Chevron* framework. Pet. App. 27a-45a.[1]

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[1] In a separate ruling, the district court also declared that DOL's regulation revising the definition of companionship services, 29

5. The court of appeals reversed. Pet. App. 1a-26a. The court rejected petitioners' argument that "the FLSA does not delegate to the Department the authority to exclude a class of employers from the Act's companionship-services and live-in worker exemptions," reasoning that the argument was "foreclosed by [this Court's] decision in *Coke*." *Id.* at 12a. *Coke*, the court of appeals explained, had "held that 'the text of the FLSA does not expressly answer the third-party-employment question' and that there [wa]s also no 'clear answer in the statute's legislative history.'" *Id.* at 13a (quoting 551 U.S. at 168). Instead, *Coke* concluded that "the treatment of third-party employers under the exemption * * * had been 'entrusted [to] the agency.'" *Ibid.* (brackets in original) (quoting 551 U.S. at 165). Because "[t]he Department has the authority to 'work out the details' of the companionship-services and live-in worker exemptions, and the treatment of third-party-employed workers is one such detail," the court "reject[ed] [petitioners'] challenge to the regulations at *Chevron* step one." *Id.* at 17a (quoting *Coke*, 551 U.S. at 167).

The court of appeals also rejected petitioners' contention at step two of the *Chevron* framework that the third-party employment regulation is unreasonable. The court explained that the amended regulation is "consistent with Congress's evident intention to 'include within the coverage of the Act all employees

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C.F.R. 552.6, is contrary to the FLSA's plain text. Pet. App. 48a-63a. The court of appeals reversed that judgment on the ground that petitioners lacked standing to challenge that provision. *Id.* at 25a-26a. The amended definition of companionship services is not the subject of the petition for a writ of certiorari.

whose vocation is domestic service.'" Pet. App. 19a (quoting S. Rep. No. 690, 93d Cong., 2d Sess. 20 (1974) (Senate Report)). The court observed that "the home care workers of today who are employed by third-party agencies" typically "are professional caregivers, often with training or certification, who work for agencies that profit from the employees' services." *Id.* at 20a. It was "fully reasonable," the court observed, for DOL to conclude that the FLSA's protections should apply "to workers for whom such employment is a vocation." *Ibid.* (internal quotation marks omitted). The court of appeals further noted that this Court in *Coke* had anticipated that the statute could be construed in that manner by ruling that Congress had left it "to the Department to determine whether the FLSA should apply to 'all,' 'some,' or 'none' of the home care workers paid by third parties." *Id.* at 18a (quoting 551 U.S. at 167).

Finally, the court of appeals rejected petitioners' claim that the amended third-party employment regulation is arbitrary and capricious. Pet. App. 20a-25a. Although petitioners maintained that the amended regulation would make home care less affordable and increase institutionalization of elderly individuals, the court found "ample support" in the administrative record for the Department's contrary determination that the recipients of home care would be benefitted rather than harmed by the final rule. *Id.* at 23a. The court noted that commenters had "point[ed] to no evidence indicating that extension of protections to home care workers in the relevant states [that have enacted such provisions as a matter of state law] effected an increase in institutionalization or workforce turnover." *Id.* at 24a. And the Department had "rea-

sonably credited comments suggesting that the new rule would improve the quality of home care services." *Ibid.* The court concluded that the Department had made reasonable "predictive judgments about areas that are within the agency's field of discretion and expertise," warranting "particularly deferential review." *Id.* at 25a (brackets and internal quotation marks omitted).

6. The court of appeals, and then this Court, subsequently denied petitioners' motion to stay issuance of the mandate. 9/18/15 C.A. Order 1; 10/6/15 Order 1 (Roberts, C.J.). After the mandate issued, the district court entered summary judgment for the government. 10/21/15 D. Ct. Order 1.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 19-24) that the amended third-party employment regulation is contrary to the plain text of the FLSA exemptions for workers who provide companionship services and live-in domestic service. But as the court of appeals recognized, Pet. App. 12a-17a, that argument is foreclosed by this Court's decision in *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158 (2007). *Coke* concluded that "the text of the FLSA does *not* expressly answer the third-party-employment question" and that it is not possible to "find any clear answer in the statute's legislative history." *Id.* at 168 (emphasis added). Instead, the Court observed, the question whether workers employed by third parties fall within the exemption constitutes a "statutory gap" that "Con-

gress entrusted the agency to work out." *Id.* at 165. As *Coke* further observed:

> [W]hether, or how, the definition [of companionship services] should apply to workers paid by third parties raises a set of complex questions. Should the FLSA cover *all* companionship workers paid by third parties? Or should the FLSA cover *some* such companionship workers, perhaps those working for some (say, large but not small) private agencies, or those hired by a son or daughter to help an aged or infirm mother living in a distant city? Should it cover *none*? * * * . Satisfactory answers to such questions may well turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses. And it is consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions.

Id. at 167-168. Because this Court has already held that the statute does not specifically address the third-party employer issue, petitioners are incorrect to contend that the statutory text unambiguously requires that the exemptions apply to workers employed by third parties.

Petitioners fail in their attempt (Pet. 21) to dismiss this Court's analysis in *Coke* as "a series of rhetorical questions." In determining whether the Department had permissibly promulgated a regulation specifying that workers employed by third parties fell within the statutory exemption, the *Coke* Court necessarily had to consider whether the statute directly addressed the third-party employer issue. The Court's conclusion

that the FLSA is silent on that issue and that Congress expected the agency to "work out the details" of "whether to include workers paid by third parties" in consultation with affected entities, 551 U.S. at 167, demonstrates that the Department did not contravene the statute by amending the third-party employment regulation to respond to the dramatic transformation of the home care industry after hearing from a wide array of stakeholders in a rulemaking that spanned nearly two years.

Contrary to petitioners' urging (Pet. 22), there is no basis for this Court to overrule *Coke*'s reasoning. "[T]his Court does not overturn its precedents lightly," because stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (citation omitted). The Court has repeatedly explained, moreover, that principles of stare decisis apply with "special force in the area of statutory interpretation," because such decisions implicate "the legislative power" and "Congress remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989); accord, *e.g.*, *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *Bay Mills Indian Cmty.*, 134 S. Ct. at 2036; *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2068 (2011); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008). Petitioners identify no clear error in the *Coke* Court's interpretation of the statute and offer no special justification for this Court to overrule its conclusion that "the text of the FLSA does not

expressly answer the third-party-employment question." 551 U.S. at 168.

Nor are petitioners correct in asserting that *Coke*'s reasoning is inapplicable here. Petitioners deem it significant (Pet. 22-23 & n.15) that the amended third-party employment regulation is not framed as a definition, but that is immaterial because the Department's authority is not limited to defining statutory terms. See Pet. App. 16a. As *Coke* emphasized, the Department additionally has broad authority "to prescribe necessary rules, regulations, and orders with regard to" the 1974 Amendments, *Coke*, 551 U.S. at 165 (quoting 1974 Amendments § 29(b), 88 Stat. 76), pursuant to which it can "fill any gap left, implicitly or explicitly, by Congress," *ibid.* (citation omitted). As *Coke* further held, the third-party employment issue qualifies as one such "statutory gap." *Ibid.*[2]

Petitioners also err in invoking (Pet. 24) the "[c]ongressional reenactment doctrine." Although petitioners cite various FLSA amendments (Pet. 11), none involved the exemptions at issue here, which Congress has not reenacted. See Pet. App. 16a-17a. Nor is it relevant (Pet. 11) that Congress has not enacted legislation to overrule *Coke* by expressly excluding third-party employers from the companionship services exemption. The absence of legislative action may simply reflect Congress's agreement with *Coke* that the Department is best positioned to resolve

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[2] Petitioners' observation (Pet. 23) that the Department may not use its authority to prescribe legislative rules "to override the express statutory provisions of the laws the Department enforces" is of course true. But it is beside the point because, as this Court held in *Coke*, "the text of the FLSA does not expressly answer the third-party-employment question." 551 U.S. at 168.

"complex questions" regarding "whether, or how," the FLSA exemptions "should apply to workers paid by third parties." 551 U.S. at 167; see *id.* at 167-168 ("Satisfactory answers to such questions may well turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses."); *id.* at 165 ("The subject matter of the [prior third-party employer] regulation * * * concerns a matter in respect to which the agency is expert"). Petitioners' argument that the FLSA unambiguously forecloses the Department's amended third-party employment regulation therefore fails.

2. The court of appeals also correctly rejected petitioners' alternative contention (Pet. 25-32) that the third-party employment regulation is based on an unreasonable interpretation of the statute and is arbitrary and capricious. As the court explained, the Department's determination that home care workers employed by third parties should be protected by the FLSA is an "entirely reasonable" response to the dramatic transformation of the home care industry. Pet. App. 18a. The "home care workers of today" are not "the elder sitters envisioned by Congress when enacting the [companionship services] exemption," but instead are "professional caregivers, often with training or certification, who work for agencies that profit from the employees' services." *Id.* at 20a (internal quotation marks omitted); see *id.* at 4a (describing the "marked transformation" in "the provision of residential care"). The amended regulation, the court concluded, is "consistent with Congress's evident intention to 'include within the coverage of the Act all employees whose *vocation* is domestic service.'" *Id.* at

19a (quoting Senate Report 20); see H.R. Rep. No. 913, 93d Cong., 2d Sess. 35-36 (1974) (similar). And that regulatory change, the court further observed, gives employees of home care businesses "the same FLSA protections afforded to their counterparts who provide largely the same services in an institutional setting." Pet. App. 5a.

The court of appeals also found "ample support in the record" for the Department's conclusion that "care recipients would be benefitted, not harmed, by the new regulations." Pet. App. 23a. The final rule included a comprehensive analysis of the regulatory changes and their economic impact. See, *e.g.*, 78 Fed. Reg. at 60,497-60,556. Based on that analysis, the Department determined that the final rule would benefit not only workers, "but also consumers[,] because supporting and stabilizing the direct care workforce will result in better qualified employees, lower turnover, and a higher quality of care." *Id.* at 60,459-60,460.

Petitioners are incorrect to contend (Pet. 25-32) that the amended regulation is unreasonable based on concerns about "maintaining affordability of home care." Petitioners assert (Pet. 26) that affordability was Congress's focus and that this Court in *Coke* "squarely rejected" the argument that Congress may have intended to include within the FLSA's protections professional home care workers whose vocation is domestic service. But as the court of appeals observed, that *Chevron* "step-two argument largely rehashes [petitioners'] step-one submission" that the exemptions unambiguously must apply to third-party employers, and "*Coke* belies that argument." Pet. App. 18a. *Coke* did not reject as inaccurate the legis-

lative history on which the Department relied in the final rule; rather, *Coke* held only that there was no "clear answer in the statute's legislative history" so as to resolve the third-party employer issue at step one of the *Chevron* analysis. 551 U.S. at 168. Petitioners are also wrong to assert (Pet. 18) that the Department believed that the statute "*compel*[*led*] the exclusion of third-party employees from the exemptions" based on legislative history regarding protection of professional home care workers. To the contrary, the Department recognized that "the statutory text and legislative history do not provide an explicit answer to the third party employment question," and it accordingly exercised its "power to fill th[at] gap[]" in the final rule. 78 Fed. Reg. at 60,482 (internal quotation marks omitted).

In any event, petitioners provide no reliable evidence to substantiate their assertion (Pet. 27) that the final rule will harm consumers by making home care unaffordable. Commenters who "rais[ed] concerns about the rule's effects 'did not point to any reliable data' from th[e] states [offering minimum-wage and overtime protections under state law] indicating that extension of [those protections] to home care workers had led either to increased institutionalization or a decline in continuity of care." Pet. App. 23a (quoting 78 Fed. Reg. at 60,483).[3] And as the court of appeals

[3] Notably, the final rule was supported by consumer advocates, including the AARP, which represents older Americans, and the Michigan Olmstead Coalition, which represents persons with disabilities. C.A. Reply Br. Addendum A1-A17 (AARP comment); *id.* at A18-A22 (Michigan Olmstead Coalition comment). Industry experts such as the Paraprofessional Health Institute (PHI), an organization dedicated to improving the delivery of home care, also

noted, the industry's own survey indicated that home care agencies "operating in overtime and non-overtime states already have very similar characteristics," including "a similar percentage of consumers receiving 24-hour care." *Id.* at 24a (quoting 78 Fed. Reg. at 60,503). The court accordingly did not err in holding that the Department had reasonably "conclud[ed] that care recipients would be benefitted, not harmed, by the new regulations." *Id.* at 23a.[4]

3. Petitioners contend (Pet. 26) that the court of appeals' decision creates a circuit conflict "as to Congress' intent in the home care exemptions." That is incorrect. The cases on which petitioners rely upheld the Department's prior third-party employment regulation in decisions that pre-date *Coke*. Petitioners cite no decision that addresses the amended third-party employment regulation. Nor is there any likelihood that any conflict of authority regarding the validity of the amended regulation could arise, given that *Coke*

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supported the final rule. *Id.* at A23-A52 (PHI comment). And many organizations filed amicus briefs in support of the government in the court of appeals. See Pet. App. 1a-2a (noting amicus briefs in support of the government filed by New York and seven other States; PHI and 26 other consumer and policy organizations; women's rights, civil rights, and human rights organizations and scholars; the AFL-CIO and other labor representatives; Members of Congress; the AARP; and the American Association of People with Disabilities).

[4] Petitioners' amici argue that the final rule is unconstitutional as applied to state employers. See Kansas Amicus Br. 22. That argument is not before the Court because petitioners did not raise it. In any event, the FLSA's applicability to state employers is well settled. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Amici's reliance on *Alden* v. *Maine*, 527 U.S. 706 (1999), is misplaced because the final rule did not amend the mechanisms for FLSA enforcement.

held that "'the text of the FLSA does not expressly answer the third-party-employment question,' leaving it to the Department to determine whether the FLSA should apply to 'all,' 'some,' or 'none' of the home care workers paid by third parties." Pet. App. 18a (quoting *Coke*, 551 U.S. at 167). Because the Department reasonably exercised that authority here, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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