No. 06-30856

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILHELMENA COOK,

Plaintiff-Appellant,

v.

DIANA HAYS and OPTIONS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for
the Eastern District of Louisiana

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this Brief as *amicus curiae* in support of Defendants-Appellees. Specifically, the Secretary supports Defendants-Appellees' argument that the Fair Labor Standards Act's ("FLSA" or "Act") "companionship services" exemption from the Act's minimum wage and overtime requirements applies to employees of third-party employers, as provided in the Department of Labor's ("Department") regulation at 29 C.F.R. 552.109(a). This regulation is entitled to controlling deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because it is a legislative

rule that permissibly interprets the FLSA's companionship services exemption at section 13(a)(15), 29 U.S.C. 213(a)(15).

INTEREST OF THE SECRETARY OF LABOR

The Secretary has a substantial interest in defending the regulation at issue because she administers and enforces the FLSA. *See* 29 U.S.C. 204, 216, 217. The Department promulgated 29 C.F.R. 552.109(a) pursuant to the Secretary's expressly delegated authority to "define[] and delimit[] by regulation[]" the terms in section 13(a)(15), which exempts companionship services employees from the FLSA's minimum wage and overtime requirements. *See* 29 U.S.C. 213(a)(15). The Department authoritatively interpreted this regulation in Wage and Hour Advisory Memorandum No. 2005-1, *Application of Section 13(a)(15) to Third Party Employers* (Dec. 1, 2005).[1]

STATEMENT OF THE ISSUE

Whether the FLSA's "companionship services" exemption from the Act's minimum wage and overtime requirements applies to employees employed by third-parties as provided in the Department's legislative rule at 29 C.F.R. 552.109(a).[2]

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[1] A copy of the Department's Advisory Memorandum is included in the addendum to this brief.

[2] The primary issue presented in this appeal is whether Plaintiff performed duties that brought her within the companionship services exemption to the FLSA's minimum wage and overtime requirements, as defined in 29 C.F.R. 552.6. *See* Appellant's Brief at 2. This amicus brief, however, does not address this issue because it is well-settled that the Department's

STATEMENT OF THE CASE

1. Options, Inc. ("Options") is a non-profit corporation based in Hammond, Louisiana that provides home health care services. *See Cook v. Hays*, No. 04-3032, 2006 WL 1581347, at *1 (E.D. La. May 31, 2006).[3] Plaintiff Wilhelmena Cook ("Cook") worked for Options from 1998 to 2003. *Id.* Cook claims that she received overtime pay before July 21, 2000, but not after that time. *Id.*

Cook sued Defendants Diana Hays and Options alleging that they violated the FLSA's overtime requirement by failing to pay her time and one-half of her regular rate of pay for hours she worked in excess of the statutory maximum of forty hours in a workweek. *See Cook v. Hays*, No. 04-3032, 2006 WL 1581347, at *1. Both parties moved for summary judgment. *Id.* The district

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regulation at 29 C.F.R. 552.6 is entitled to controlling *Chevron* deference, *see, e.g.*, *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 129 (2d Cir. 2004) ("*Coke I*"), *vacated on other grounds*, 126 S. Ct. 1189 (Jan. 23, 2006); the "duties" issue, therefore, involves a purely factual dispute. By contrast, the threshold question that this brief addresses, namely, whether the companionship services exemption applies to third-party employers as provided in 29 C.F.R. 552.109(a), presents a legal issue on which the circuit courts are split. *Compare Welding v. Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004) (deferring to 29 C.F.R. 552.109(a)); *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559, 561-62 (10th Cir. 2000) (same), *with Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 51-52 (2d Cir. 2006) ("*Coke II*") (declining to give deference to 29 C.F.R. 552.109(a)), *adhering to Coke I,* 376 F.3d at 132, 133-35, *vacated and remanded by* 126 S. Ct. at 1189, *petition for cert. filed*, No. 06-593 (Oct. 26, 2006).

[3] This paragraph discusses only those facts relevant to the third-party employment issue addressed in this brief.

court denied Cook's motion and granted Options' motion in part on the ground that "the defendants are entitled to the companionship services exemption as a matter of law." *Id.* The court remanded Cook's pendant state claims to state court. *Id.*

Cook moved for reconsideration of the district court's decision. *See Cook v. Hays*, No. 04-3032, Docket No. 28-1. The district court denied the motion. *See* Docket No. 32. Cook filed a timely notice of appeal of this order on August 16, 2006. *See* Docket No. 33.

2. The district court found that "Cook was responsible for preparing meals, assisting her client with baths, transportation, social functions, grocery store and doctor's visits," and that "she spent less than five percent of her time performing housework." *Cook v. Hays*, No. 04-3032, 2006 WL 1581347, at *1. Based on these findings, the court concluded that "Cook is exempt from FLSA overtime provisions because, while employed by Options as a direct care assistant, she provided mainly companionship services within the meaning of 29 U.S.C. § 213(a)(15) and 29 C.F.R. § 552.6." *Id.*

The district court did not directly address whether the companionship services exemption applies to employees of third-party employers, even though Options is clearly a third-party employer and both Cook and Options had briefed this issue in their summary judgment motions. *See* Docket No. 17, Plaintiff's

Motion for Partial Summary Judgment, at 7-16; Docket No. 24, Memorandum in Opposition and Cross-Motion for Summary Judgment, at 14-15. Nonetheless, the court's determination that Cook is exempt from the FLSA's overtime requirement necessarily encompasses the conclusion that the companionship services exemption applies to employees of third-party employers, as provided in 29 C.F.R. 552.109(a). *See Cook v. Hays*, No. 04-3032, 2006 WL 1581347, at *1. On appeal, Cook again has attacked the validity of this regulation, and the Department's Advisory Memorandum interpreting the regulation. *See* Appellant's Brief at 19-23.

SUMMARY OF THE ARGUMENT

The FLSA's companionship services exemption does not expressly address whether it applies to employees employed by third-party employers. *See* 29 U.S.C. 213(a)(15). The Department's regulation at 29 C.F.R. 552.109(a), however, specifically provides that the exemption applies to such employees. This regulation is entitled to *Chevron* deference because it was promulgated pursuant to express congressional delegation and after notice and comment. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229-30 (2001); *Auer v. Robbins*, 519 U.S. 452, 457-58 (1997); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Thus, the regulation must be upheld unless it is arbitrary,

capricious, or manifestly contrary to the statute. *See Chevron*, 467 U.S. at 844; *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 740 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1150 (2006).

Section 552.109(a) is a reasonable interpretation of the statutory companionship services exemption which, by its terms, applies to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15). This language is naturally read to exempt any employee who provides companionship services to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are employed by third-party employers. Furthermore, Congress enacted section 13(a)(15) to ensure that working people would be able to afford companion services, a rationale that applies equally to all companions, irrespective of the identity of their employer. Therefore, this Court should defer to the Department's regulation applying the companionship services exemption to employees employed by third parties.

In addition, the Department's interpretation of its own regulations contained in Wage and Hour Advisory Memorandum No. 2005-1 clarifies that section 552.109(a) is the only regulation that addresses third-party employment. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 7. There is no conflict

between 29 C.F.R. 552.3, which addresses the kind of work that qualifies as domestic service and where it must be performed, and section 552.109(a), which specifically addresses third-party employment.[4] The Department's interpretation of its own regulations is entitled to controlling deference. *See Auer*, 519 U.S. at 461; *Belt v. EmCare, Inc.*, 444 F.3d 403, 415-17 (5th Cir.), *cert. denied*, 127 S. Ct. 349 (2006).

ARGUMENT

THE DEPARTMENT'S REGULATION AT 29 C.F.R. 552.109(a), THE ONLY REGULATION THAT ADDRESSES THIRD-PARTY EMPLOYMENT, IS ENTITLED TO CONTROLLING *CHEVRON* DEFERENCE BECAUSE IT IS A LEGISLATIVE RULE THAT PERMISSIBLY INTERPRETS THE FLSA'S "COMPANIONSHIP SERVICES" EXEMPTION

A. Statutory and Regulatory Provisions

The FLSA generally requires covered employers to pay overtime compensation at a rate of one and one-half times an employee's regular rate of pay for hours of work exceeding 40 hours in a work week. *See* 29 U.S.C. 207(a)(1). This requirement applies to employees employed in domestic service in a household. *See* 29 U.S.C. 207(*l*) ("No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives

[4] Section 552.3, incorporating relevant portions of the legislative history, states that "[a]s used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed." 29 C.F.R. 552.3 (emphasis in original).

compensation for such employment in accordance with subsection (a) of this section."). However, section 13(a)(15) of the FLSA exempts from the FLSA's overtime and minimum wage requirements "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)." 29 U.S.C. 213(a)(15).

The Secretary promulgated regulations, contained in 29 C.F.R. Part 552, pursuant to her expressly delegated authority to "define[] and delimit[]" the terms in section 13(a)(15)'s companionship services exemption. These regulations define "companionship services" as "those services which provide 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." 29 C.F.R. 552.6. The regulations also specifically state that section 13(a)(15)'s "companionship services" exemption applies to employees employed by third-parties:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15).

29 C.F.R. 552.109(a). A separate regulation states that "domestic service employment," as used in section 13(a)(15) of the Act, "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3.[5]

B. The Department's Regulation at 29 C.F.R. 552.109(a) is Entitled to *Chevron* Deference

1. The FLSA's companionship services exemption does not expressly address whether it applies to employees employed by third parties. *See* 29 U.S.C. 213(a)(15). The Department's third-party regulation at 29 C.F.R. 552.109(a) fills this gap. *Chevron* establishes that a reviewing court must defer to an implementing agency's reasonable interpretation of a silent or ambiguous statute under certain conditions. *See Chevron,* 467 U.S. at 843-44; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). Specifically, the *Chevron* framework applies where: (1) Congress expressly delegated authority to the agency to make rules carrying the force of law; and (2) the agency promulgated such rules pursuant to that authority. *See Mead*, 533 U.S. at 226-27. The Supreme Court has recognized that express "congressional authorizations

[5] Part 552 is subdivided into Subpart A, entitled "General Regulations," and Subpart B, entitled "Interpretations." 29 C.F.R. 552.3 and 552.6 are in Subpart A, while 29 C.F.R. 552.109 is in Subpart B. The stated authority for all these provisions is section 13(a)(15).

to engage in the process of rulemaking" are "a very good indicator of delegation meriting *Chevron* treatment." *Id.* at 229. Thus, regulations promulgated pursuant to express congressional authorization and after notice and comment are entitled to *Chevron* deference. *Id.*

The Department's regulation at 29 C.F.R. 552.109(a) clearly satisfies these threshold criteria for applying *Chevron's* framework. Congress expressly delegated to the Secretary the authority to "define[] and delimit[] by regulation" the terms of section 13(a)(15)'s companionship services exemption. 29 U.S.C. 213(a)(15). Moreover, Congress delegated to the Secretary the authority "to prescribe necessary rules, regulations, and orders" for the 1974 amendments to the Fair Labor Standards Act, which enacted the companionship services exemption. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974). These provisions give the Secretary authority to promulgate binding legal rules on the companionship services exemption and domestic service employment that must be analyzed under *Chevron*. *See Auer*, 519 U.S. at 456-58 (applying *Chevron* to regulations promulgated under the Secretary's authority to "define[] and delimit[]" the FLSA's exemption in 29 U.S.C. 213(a)(1) for employees employed in an executive, administrative, or professional capacity); *Brand X*, 125 S. Ct. at 2699 (applying *Chevron* to Federal Communications Commission

order issued pursuant to its authority to "prescribe such rules and regulations as may be necessary . . . to carry out" the Communications Act of 1934).

The Department relied on this legislative rulemaking authority when it promulgated section 552.109(a). *See* 29 C.F.R. Part 552 (citing section 13(a)(15) and section 29(b) of the 1974 FLSA amendments as authority for all the Part 552 regulations, including section 552.109(a)); 39 Fed. Reg. 35,382 (Oct. 1, 1974) (proposing regulations pursuant to this authority). Thus, section 552.109(a) clearly satisfies the first threshold requirement for applying *Chevron's* deferential framework because the regulation was promulgated pursuant to express congressional delegation.

Section 552.109(a) also satisfies the second criterion for *Chevron* review because the Secretary promulgated this regulation after notice and comment. *See* 39 Fed. Reg. at 35,382 (proposed rule); 40 Fed. Reg. 7404 (Feb. 20, 1975) (final rule). Thus, this regulation must be analyzed under *Chevron's* deferential standard. *See Mead*, 533 U.S. at 229-31; *Chevron*, 467 U.S. at 858-59, 865-66.

2. The Second Circuit in *Coke* nonetheless determined that section 552.109(a) is an interpretive rule that must be analyzed under the less deferential standard set out in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because it is contained in Part

552's "Interpretations" subpart. *See Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 51 (2d Cir. 2006) ("*Coke II*"), *petition for cert. filed*, No. 06-593 (Oct. 26, 2006); *see also Buckner v. Florida Habilitation Network, Inc.*, No. 05-cv-422, slip op. at 9-10 (M.D. Fla. Jan. 10, 2006) (following *Coke*), *appeal docketed*, No. 06-11032 (11th Cir. Feb. 10, 2006), *oral argument held*, (Nov. 6, 2006). However, the label "Interpretations" does not indicate that the subpart contains interpretive *rules*.

An agency "interpretation" of a statute can certainly be codified in a legislative rule. *See Brand X*, 125 S. Ct. at 2699 (FCC legislative rule interpreting Communications Act); *Chevron*, 467 U.S. at 840 (rule interpreting term "stationary source" in Clean Air Act). In any event, an agency's label for a rule is not dispositive. *See Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) ("The administrative agency's own label is indicative but not dispositive; we do not classify a rule as interpretive just because the agency says it is."); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) (agency's label is not conclusive).

Indeed, most significantly, the Supreme Court has under similar circumstances applied the *Chevron* framework to another Department FLSA regulation that was issued pursuant to notice-

and-comment rulemaking, despite the fact that it was set out in an "Interpretations" subpart. *See Auer*, 519 U.S. at 457-58 (deference to 29 C.F.R. 541.118(a) (2003)).[6] The Third and Ninth Circuits similarly have applied *Chevron's* framework to regulations contained in Part 552's "Interpretations" subpart. *See Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 181 (3d Cir. 2000) (according *Chevron* deference to 29 C.F.R. 552.101 because, like section 552.3, it is a formal regulation resulting from notice and comment rulemaking); *McCune v. Oregon Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) (upholding 29 C.F.R. 552.106 under the *Chevron* framework because it is a reasonable interpretation of a statute the Secretary is charged with administering).

Thus, the mere fact that section 552.109(a) is contained in a subpart entitled "Interpretations" does not mean it must be analyzed under *Skidmore's* less deferential standard. Indeed, a far more relevant consideration in determining whether a rule is legislative is whether the regulation is "one affecting individual rights and obligations." *Chrysler Corp. v. Brown*,

[6] Section 541.118(a) established a salary basis test for determining when an employee was employed in an executive, administrative, or professional capacity and thereby exempt from the FLSA's minimum wage and overtime requirements. The Department has since amended the Part 541 regulations, and the current regulations are no longer divided into "General" and "Interpretations" subparts. *See* 69 Fed. Reg. 22,122 (Apr. 23, 2004).

441 U.S. 281, 302 (1979) (internal quotation marks omitted). Section 552.109(a) unquestionably affects individual rights and obligations and so is legislative in character.

Finally, the Department recently clarified that it has always considered, and continues to treat, 29 C.F.R. 552.109(a) as an "authoritative and legally binding" legislative rule. Wage and Hour Advisory Memorandum No. 2005-1, at 7. Specifically, the Advisory Memorandum states that "at the time the final rule [enacting 29 C.F.R. 552.109(a)] was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations -- something that could be true only of a legislative rule." *Id.*

C. Section 552.109(a) is a Permissible Construction of the FLSA's Companionship Services Exemption

1. "Because Congress has not 'directly spoken to the precise question at issue,' [a reviewing court] must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" *Auer*, 519 U.S. at 457 (quoting *Chevron*, 467 U.S. at 842-43); *see also Bellum*, 407 F.3d at 740. "In answering this question, [this court] consider[s] only whether the regulation is arbitrary, capricious, or manifestly contrary to the [statute]." *Bellum*, 407 F.3d at 740. A reviewing court "may not substitute [its] own preference for a

reasonable alternative devised by the Secretary of Labor." *Id.* at 740.

Section 552.109(a) clearly satisfies this test. The FLSA's companionship services exemption, on its face, does not limit the exemption to employees employed by the individuals receiving their services. *See* 29 U.S.C. 213(a)(15). Rather, the exemption applies to "any employee employed in domestic service employment to provide companionship services." *Id.* Congress's use of the term "any" is naturally read to include all employees providing such services, regardless of who employs them. *See, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind. . . . Congress did not add any language limiting the breadth of that word, and so we must read [a statute prohibiting certain convictions to run concurrently with 'any' other term of imprisonment] as referring to all term[s] of imprisonment.") (internal quotation marks omitted).

Like the plain language of the statute, the legislative history does not suggest that the companionship services exemption is limited to companions employed by the individual receiving care. In fact, in enacting section 13(a)(15), Congress was concerned that working people would not be able to afford companionship services if they were required to pay FLSA

wages. *See* 119 Cong. Rec. 24,794, 24,797 (1973) (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick); *see also Welding v. Bios Corp.*, 353 F.3d 1214, 1217 (10th Cir. 2004) ("Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.") (quoting *Lott v. Rigby*, 746 F. Supp. 1084, 1087 (N.D. Ga. 1990)). This affordability concern applies regardless whether the companionship services are provided by the direct hiring of an employee or through the use of an agency. Thus, applying the exemption to employees employed by third parties furthers the congressional purpose behind the Act. *Cf. McCune*, 894 F.2d at 1110 (rationale that "many private individuals . . . may . . . be forced to forego the option of receiving [companionship] services in their homes if the cost of the services increases" provides a "sound policy reason[] for applying the exemption to companions as defined by the Secretary [in 29 C.F.R. 552.6]").

This is especially true when one considers the changes that have occurred during the approximately 30 years since section 13(a)(15) was enacted. For example, "[t]he number of for-profit agencies [providing such services] . . . increased from approximately 47 in 1975 to 3,129 in 1999." *Fernandez v. Elder*

Care Option, Inc., Case No. 03-21998, slip op. at 15 (S.D. Fla. July 29, 2005) (citing 66 Fed. Reg. 5481, 5483 (Jan. 19, 2001)), *appeal docketed*, No. 05-16806 (11th Cir. Dec. 5, 2005), *stayed pending outcome in Buckner, No. 06-11032* (11th Cir. March 20, 2006).[7] Given the number of agencies now providing these services, "[i]f the companionship services exemption to the FLSA was narrowed to only those employees hired directly by a family member or head of household, then the exemption would encompass only 2% of employees providing companionship services in private homes." *Id.* at 45-46 (citing 66 Fed. Reg. at 5483). This cannot be what Congress intended when it specifically exempted these employees from the FLSA's minimum wage and overtime requirements, citing the benefit of the FLSA exemption for working Americans needing to pay for these services. *See, e.g.,* 119 Cong. Rec. at 24,797; *id.* at 24,798; *id.* at 24,801.[8]

Indeed, Congress never directly addressed the issue of employer identity during its consideration of the companionship services exemption but, rather, focused on the employee's

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[7] A copy of the *Fernandez* decision is included in the addendum to this brief.

[8] The rule that FLSA exemptions must be narrowly construed and should be withheld unless a person fits plainly and unmistakably within their terms and spirit is a rule of judicial construction that does not "limit[] . . . the Secretary's power to resolve ambiguities in h[er] own regulations." *Auer*, 519 U.S. at 462-63. Indeed, "[a] rule requiring the Secretary to construe h[er] own regulations narrowly would make little sense, since [s]he is free to write the regulations as broadly as [s]he wishes, subject only to the limits imposed by the statute." *Id.* at 463.

activities and where those activities are performed. Both the congressional committee reports and the congressional debates on the provision repeatedly emphasize that the key factors in determining whether an employee qualifies for the companionship services exemption are the nature of the employee's activities and the place where the activities are performed. *See, e.g.*, H.R. Rep. No. 93-913, at 33 (1974) ("The bill exempts . . . employees employed *in the capacity* of companion to an individual who, by reason of older age or infirmity, necessitates a companion.") (emphasis added); 119 Cong. Rec. 24,801 (describing tasks performed by companions) (statements of Sens. Burdick and Williams); S. Rep. No. 93-300, at 22 (1973) ("The domestic service must be performed *in a private home* which is a fixed place of abode of an individual or family.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) (same).

In discussing the FLSA's expanded coverage of "domestic service" employees, the legislative history refers to Social Security Act regulations that address "[d]omestic service in a private home of the employer," 26 C.F.R. 31.3121(a)(7)–1(a)(2), and to a "generally accepted meaning" of the term "domestic service" that "relates to services of a household nature performed by an employee *in or about a private home of the person by whom he or she is employed*." S. Rep. No. 93-300, at 22 (emphasis added); *see also* H.R. Rep. No. 93-913, at 35-36; S.

Rep. No. 93-690, at 20; 119 Cong. Rec. at 24,799 (statement of Sen. Williams). These isolated references do not reveal an intent to impose a limitation based on the identity of the employer for either FLSA coverage of domestic service employees or for the companionship services exemption in 29 U.S.C. 213(a)(15). As the Department has explained in its Advisory Memorandum No. 2005-1, these references were "not intended to address the issue of third-party employment, but rather are an extraneous vestige of the language's origin in the Social Security regulations" that are meant to address the kind of work that generally qualifies as domestic service under the FLSA, and where that work must be performed. Wage and Hour Advisory Memorandum No. 2005-1, at 4; *see also Fernandez*, No. 03-21998, slip op. at 44-45 ("Most of the statements of the Congressmen focus on the nature of companionship services (e.g., 'elder-sitting' or providing companionship to an elderly person through conversation and shared activities) and the location of such services (ensuring affordable care for the elderly within their own homes), rather than the employer.").

In fact, section 7(*l*) of the FLSA suggests that Congress *did* contemplate that domestic service employment could include third-party employment. That section states, "No employer shall employ any employee in domestic service in *one or more households* for a workweek longer than forty hours unless such

employee receives compensation for such employment in accordance with subsection (a) of this section." 29 U.S.C. 207(*l*) (emphasis added). The proscription against a single employer employing an employee in "one or more households" beyond a 40-hour workweek without appropriate compensation most naturally refers to third-party employment because only such an employer is likely to employ a worker in more than one household.

In light of section 13(a)(15)'s text, which applies to "any" employee employed in domestic service employment to provide companionship services, and the clear legislative intent to keep companionship services affordable, the Department permissibly applied the companionship services exemption to third-party care providers in 29 C.F.R. 552.109(a).

2. Every other court that has considered this issue, with the exception of the Second Circuit in *Coke* and the district court in *Buckner*, has accorded *Chevron* deference to 29 C.F.R. 552.109(a) and concluded that the companionship services exemption applies to domestic service employees employed by third-party employers. *See, e.g., Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559, 562 (10th Cir. 2000) (deferring to 29 C.F.R. 552.109(a)); *Welding*, 353 F.3d at 1217 n.3 (following *Johnston*); *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294, 1299 n.2 (N.D. Okla. 1998) (deferring to section 552.109(a)); *Fernandez*, Case No. 03-21998, slip op. at 35-36,

46. The Second Circuit in *Coke* refused to give even *Skidmore* deference to this regulation. *See Coke II*, 462 F.3d at 51. That court based its decision on its determination that section 552.109(a) conflicts with 29 C.F.R. 552.3, which, according to the court, clearly limits the companionship services exemption to employees employed by the person receiving such services. *See id.* at 52. Contrary to the Second Circuit's conclusion, however, section 552.3 contains no such "clear" meaning.

The language in section 552.3 was borrowed, essentially verbatim, from the Act's legislative history. *See* Wage and Hour Advisory Memorandum No. 2005-1 at 4-5. In turn, the legislative history, as discussed above, drew on Social Security regulations addressing "[d]omestic service in a private home of the employer," to define which employees would be covered as "domestic service" employees under the FLSA. *See supra* pp. 18-19. Congress's references to the Social Security regulations were intended to emphasize the nature of the employee's activities and where those activities are performed, not to limit the FLSA coverage of "domestic service" employees or the FLSA's companionship exemption. *See id.* When the Department incorporated this language from the legislative history into section 552.3, it, too, intended to adopt these two requirements regarding the nature and location of domestic service employment, but gave no thought to addressing in that

regulation, and did not impose any limitation on, the identity or status of the employer. For example, the Department "signaled its understanding that the sentence [referring to the private home of the employer] should be read as addressing place of performance but as not speaking to third party employment" by inserting "a parenthetical explaining that . . . a private home can either be fixed or temporary," thereby clearly emphasizing the importance of place of performance, rather than the employer's identity. Wage and Hour Advisory Memorandum No. 2005-1 at 5.

There is no indication that the Department ever considered the potential impact of section 552.3 on the coverage of third-party employees, much less that it actually intended the provision entirely to exclude them. To the contrary, at the time the regulation was promulgated, the Department demonstrated its belief that section 552.3 did not resolve the issue of third-party employment by including a separate section expressly addressing the subject, section 552.109. *See* 40 Fed. Reg. at 7407. If the definition of domestic service employment in section 552.3 had already excluded employees of third parties, the Department's promulgation of section 552.109 would have been entirely unnecessary; further, the Department surely did not

intend, in the same rulemaking, to both exclude and include such third-party employees within the exemption.[9]

Moreover, reading section 552.3 as excluding third-party employment would create an inconsistency with the Department's regulation at 29 C.F.R. 552.101, which elaborates on the definition of domestic service employment set out in section 552.3. Section 552.101 states that "the term [domestic service employment] includes persons who are frequently referred to as 'private household workers.'" 29 C.F.R. 552.101(a). Both the Department and Congress understood the phrase "private household workers" to include employees of third-party employers. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 6 (citing Department reports and legislative history). Because section

[9] The Department deliberately chose to include third-party employees within the companionship services exemption when it promulgated section 552.109(a) after careful consideration of comments it received during the notice-and-comment process. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 2-3. The fact that the final rule took a different position than the proposed rule does not render 29 C.F.R. 552.109(a) procedurally defective under the Administrative Procedure Act ("APA"), 5 U.S.C. 551 *et seq*. The Department's proposal provided notice to interested parties of the subject matter at issue in the rulemaking. Because the Department had a duty to consider comments it received, and modification of proposed rules in light of such comments is at the very "heart of the rulemaking process," the Department did not violate the APA when it promulgated section 552.109(a). *See Penzoil Co. v. Fed. Energy Regulatory Comm'n*, 645 F.2d 360, 371-72 (5th Cir. Aug. 1981) ("Simply because a different rule is adopted does not require a new notice and comment procedure if, as required by [APA section] 553(b)(3), the notice of proposed rulemaking includes the terms or substance of the proposed rule or a description of the subjects and issues involved.").

552.101(a) includes at least some domestic workers employed by third parties within the definition of domestic service employees, it makes no sense to construe section 552.3's language that domestic service be performed "in or about a private home . . . of the [employer]" as excluding them. Wage and Hour Advisory Memorandum No. 2005-1, at 6.

In fact, if section 552.3 were construed as excluding all employees of third-party employers from the definition of domestic service employment, it would have the perverse effect of excluding many domestic service workers from FLSA coverage in the first instance, despite Congress's express intent "to include within the coverage of the Act *all* employees whose vocation is domestic service," with the exception only of casual babysitters and companions for the aged and infirm. S. Rep. No. 93-690, at 20 (emphasis added); *see also* H.R. Conf. Rep. No 93-413, at 27 (1973) (same).[10] Prior to the 1974 amendments that extended the FLSA's protections to domestic service workers, two categories of domestic workers generally were not covered under the Act: those employed by homeowners because there usually was

[10] As the Department explained in its Advisory Memorandum, although section 552.3 states that it defines domestic service employment "[a]s used in section 13(a)(15) of the Act," "the Department in fact intended the provision to supply a general definition of the term as used throughout the Act." Wage and Hour Advisory Memorandum No. 2005-1, at 5 n.1. Thus, section 552.3's definition applies equally to the general coverage of domestic service workers and the companionship services exemption.

no basis for individual coverage, and those employed by third parties that did not meet the test for enterprise coverage. *See* 29 U.S.C. 203(s) (1970) (defining "covered enterprises" as businesses with annual gross sales of at least $250,000 that employed at least two employees in interstate commerce). Congress clearly intended the 1974 amendments generally to cover both these categories of workers, with a few expressly enumerated exceptions, such as companions. *See* S. Rep. No. 93-690, at 20 (expressing Congress's intent to extend coverage to *all* employees whose vocation is domestic service, subject to enumerated exceptions); H.R. Conf. Rep. No 93-413, at 27 (same). But if section 552.3 is construed as excluding third-party employers from the definition of domestic service employment, then those domestic workers who are employed by third-party employers that are not covered enterprises would, to this day, not be covered by the FLSA. That result is contrary to clear congressional intent, and cannot be correct. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 5.

Similarly, construing section 552.3 as excluding third-party employers from the definition of domestic service employment would preclude a family member who hires a companion for a relative needing such services, but living in a separate household, from being able to claim the companionship services

exemption. As discussed above, the legislative history does not suggest that Congress intended such a result.

The Department's reading of its regulations is consistent with well-settled principles of regulatory construction. Courts must read regulations "so as to give effect, if possible, to all of its provisions." *Jay v. Boyd*, 351 U.S. 345, 360 (1956); *see also APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) (“A basic tenet of statutory construction, equally applicable to regulatory construction, is that a text should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.") (internal quotation marks omitted). The Department's interpretation that sections 552.3 and 552.109(a) are complementary, and not contradictory, harmonizes the two provisions and gives effect to each of them. Beyond these rules of construction, the presumption of rationality that attaches to all agency action makes it even more evident that the two regulations were intended to be complementary, with the former generally describing what is meant by covered "domestic service employment,” and the latter describing the scope of the companionship services exemption by clarifying that the exemption includes third-party employment.

3. The Department's statement in its recent Advisory Memorandum that "[t]he regulations address the issue of third-party employment in only one place -- section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption," Wage and Hour Advisory Memorandum No. 2005-1, at 2 -- is itself entitled to controlling deference. *See Auer*, 519 U.S. at 461-63 (agency's interpretation of its own regulations entitled to controlling deference); *Belt*, 444 F.3d at 415-17 (controlling deference to Department's interpretation contained in amicus brief, Wage-Hour opinion letter, and Wage-Hour Field Operations Handbook); *Acs v. Detroit Edison Co.*, 444 F.3d 763, 769-70 (6th Cir. 2006) (controlling deference to Wage-Hour Division opinion letter). Similarly, the explanation offered in this brief, reflecting the Department's full and fair consideration of the meaning of the pertinent regulations and how they fit together, is entitled to controlling deference. *See Auer*, 519 U.S. at 461-62. Thus, this Court should accord controlling *Auer* deference to the Department's position, as expressed in the Advisory Memorandum and this amicus brief, that there is no conflict between the regulations, and that 29 C.F.R. 552.109(a) alone addresses the question of third-party employment.[11]

[11] Any ambiguity created by the Department's previous statements in its notices of proposed rulemaking that sections 552.3 and

CONCLUSION

For the foregoing reasons, this Court should conclude that 29 C.F.R. 552.109(a) is a permissible interpretation of the FLSA's companionship services exemption.

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552.109(a) were inconsistent, *see, e.g.,* 66 Fed. Reg. at 5485, has been resolved by the Department's Advisory Memorandum, which expressly repudiates and withdraws those statements. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 7. Even if the Department had not expressly withdrawn these statements, this Court should give them little weight because they were expressed in proposed amendments to section 552.109 that were never promulgated as a final rule. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound."); *see also Fernandez*, No. 03-21998, slip op. at 46 n.27 (finding, based on *Chevron*, that the proposed changes to section 552.109(a) do not undermine the final rule's authority).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor as *Amicus Curiae*:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,194 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a monospaced typeface with 10.5 characters per inch, using Microsoft Office Word 2003, Courier New font, 12 point type.

Dated: November 16, 2006

/s/ Joanna Hull
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2006, I sent by Federal Express overnight delivery the original and 6 copies, and an electronic copy on a 3½ inch floppy diskette, of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* to the Clerk of the United States Court of Appeals for the Fifth Circuit.

I also certify that two copies of this brief, and an electronic copy on a 3½ inch floppy diskette, have been served on each of the following counsel of record by Federal Express overnight delivery this 16th day of November, 2006:

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