No. 04-1315

In the Supreme Court of the United States

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

v.

EVELYN COKE

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a Fair Labor Standards Act regulation, 29 C.F.R. 552.109(a), issued by the Department of Labor pursuant to delegated rulemaking authority and after notice and comment, was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and was not enforceable.

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

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 wage and, for work hours that exceed 40 hours in a work week, one and one-half times an employee's regular rate of pay. Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, generally extend those requirements to "domestic service" employees, but specifically exempt such employees providing "companionship services" to the elderly or infirm. That exemption applies to:

> 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 in the regulations of the Secretary).

29 U.S.C. 213(a)(15). Congress did not define either "domestic service employment" or "companionship services" in the Act, but instead authorized the Secretary of Labor "to prescribe necessary rules, regulations, and orders" regarding the 1974 Amendments. § 29(b), 88 Stat. 76.

Pursuant to that authority, the Department of Labor (DOL) promulgated regulations exempting domestic service employees who provide companionship services from the minimum wage and overtime requirements of the FLSA. 29 C.F.R. Pt. 552. First adopted in February 1975, those regulations make clear that domestic service employees providing companionship services are exempt from the FLSA's minimum-wage and overtime-pay requirements, even when they are employed by a third-party employer. Section 552.109(a) of the regulations provides:

> Employees who are engaged in providing companionship services, as defined in [29 C.F.R.] § 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) [of the FLSA].

29 C.F.R. 552.109(a).[1]

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[1] "Companionship services" are defined, in relevant part, 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.

The regulations at issue, including Section 552.109(a), were issued after DOL undertook notice-and-comment rulemaking in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. Initially, DOL proposed that employees who provide companionship services and are employed by third parties would fall outside the scope of the companionship exemption, on the ground that some third-party employment was covered by the FLSA before the 1974 Amendments. See 39 Fed. Reg. 35,382, 35,385 (1974).

After receiving and considering comments on the proposed rule, however, DOL decided that third-party employment should be included within the scope of the companionship exemption. See 40 Fed. Reg. 7404, 7405 (1975). DOL acknowledged that its decision constituted a change from the proposed rule, but explained that, under the plain language of the FLSA, the "exemptions

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29 C.F.R. 552.6. The regulations also state that "domestic service employment":

> refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. 552.3; see 29 C.F.R. 552.101 ("The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling."). Sections 552.3 and 552.6 are contained in Subpart A of the regulations, designated "General Regulations," whereas Section 552.109(a)'s third-party exemption is contained in Subpart B, designated "Interpretations."

can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. at 7405. Thus, the final regulation promulgated to implement the 1974 Amendments expressly applied the companionship services exemption to third-party employers.

In 1993, DOL proposed to limit the companionship exemption substantially by requiring that the person receiving companionship services be the employer or joint employer of the domestic service employee. See 58 Fed. Reg. 69,310, 69,312 (1993). Seven comments on the proposed change were received by DOL, none of which was supportive of the change. See 60 Fed. Reg. 46,797-46,798 (1995).

In 1995, DOL reopened and extended the comment period for the 1993 proposed rule, and revised its proposal to allow the companionship services exemption for third-party employers to apply only to employment by a government agency or family member acting on behalf of an incapacitated elderly or infirm person. 60 Fed. Reg. at 46,798. Again, DOL received very few comments on the proposal, and in 2001 the agency acknowledged that the comments reflected confusion about the impact and effect of the proposal. See 66 Fed. Reg. 5481, 5485 (2001). Accordingly, the third-party employer exemption was not limited.

In the 2001 Federal Register notice, DOL again proposed to amend the regulations, this time by revising the definition of "companionship services" to clarify the focus on the element of "fellowship" and to eliminate the third-party exemption contained in Section 552.109(a). 66 Fed. Reg. at 5485; see *id.* at 5488. In the notice of

proposed rulemaking, DOL recognized that "[u]nder the existing regulation, employees who are employed by an employer or agency other than the family or household using the companionship services may still qualify for the exemption." *Id.* at 5485. The agency expressed the view that "the current regulations contain an internal inconsistency" that would be resolved by the proposed change, and also stated that the proposed new rule would not have a significant economic impact. *Id*. at 5485-5486. In 2002, however, after the comment period closed, DOL withdrew the proposed rule because numerous commenters, including the Small Business Administration (SBA) and the Department of Health and Human Services (HHS), challenged DOL's conclusion that the rule would have little economic impact. See 67 Fed. Reg. 16,668 (2002). Thus, although DOL has periodically considered alternative constructions, the regulation at 29 C.F.R. 552.109(a) has remained unchanged since 1975.

2. Petitioners employ approximately 40 home health care aides, who provide companionship services to approximately 30 homebound patients in New York. Pet. 8; Pet. App. 37a-38a, 79a. Respondent is a former employee of the petitioners, who worked as a home health care attendant. Pet. App. 37a-38a. Respondent brought suit against petitioners under, *inter alia*, Sections 206 and 207 of the FLSA, alleging that despite working more than 40 hours a week, she never received overtime payments and that her hourly wage was less than the minimum wage. Pet. App. 37a-42a.

The district court granted petitioners' motion for judgment on the pleadings and dismissed the case, holding that respondent could not state a claim as a matter of law because home health care workers are exempt

from the minimum wage and overtime requirements under the companionship exemption of the FLSA and its implementing regulations. Pet. App. 52a-53a. The court applied the standard set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and held that 29 C.F.R. 552.6 and 552.109(a) were not arbitrary, capricious or manifestly contrary to the FLSA. *Id.* at 44a-52a.

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-30a. As relevant here, the court of appeals rejected DOL's arguments in favor of deference, see Gov't C.A. Br. 12-29, and held that 29 C.F.R. 552.109(a) was not entitled to *Chevron* deference because the agency did not "self-consciously" promulgate the rule in an exercise of congressionally delegated legislative rulemaking authority. Pet. App. 19a-26a. The court acknowledged that the 1974 Amendments expressly delegated authority to DOL to define and delimit the terms of the statute; that the regulation was a long-standing, contemporaneous construction; and that Congress has amended Section 213 of the FLSA seven times since 1974 without expressing disapproval of the agency's interpretation. *Id.* at 20a-21a. In addition, the court recognized that the regulation was the product of notice-and-comment rulemaking, and that all other courts that have considered the issue, including *Johnston* v. *Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2000), cert. denied, 531 U.S. 1072 (2001), have applied *Chevron* deference and upheld the regulation. Pet. App. at 21a. The court concluded, however, that DOL did not intend to use its delegated authority when promulgating 29 C.F.R. 552.109(a) because the regulation is included within Subpart B of Part 552, entitled "Interpretations," and because another regulation at 29

C.F.R. 552.2(c) states that the "definitions required by [29 U.S.C. 213(a)(15)] are contained in § 552.3, § 552.4, § 552.5 and § 552.6." *Id.* at 23a. Relying on *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), the court reasoned that the regulation was therefore "interpretive," as opposed to "legislative," and thus not entitled to *Chevron* deference. Pet. App. at 21a-25a.

The court then concluded that the third party employment regulation at 29 C.F.R. 552.109(a) was unenforceable under the less deferential *Skidmore* standard. In the court's view, the regulation was inconsistent with Congress's likely intent in enacting the 1974 Amendments, inconsistent with Section 552.3's definition of domestic service employment, and the product of inadequate reasoning. Pet. App. 26a-29a.[2]

4. After the court of appeals issued its decision, and after this Court invited the Solicitor General to express the views of the United States on the matter, DOL issued authoritative agency guidance making clear that the promulgation of 29 C.F.R. 552.109(a) was an exercise of DOL's expressly conferred legislative rulemaking authority. See *Application of Section 13(a)(15) to Third Party Employers*, Wage & Hour Advisory Mem. No. 2005-1 (Dec. 1, 2005), App., *infra*, 1a-17a; see also Op. Ltr. FLSA2005-12, 2005 WL 2086801 (Mar. 17, 2005) (indicating that the Wage and Hour Division "has not changed [Section 552.109(a)] or its interpretation thereof as a result" of the Second Circuit's decision in this case). Specifically, the Advisory Memorandum states that "the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding," and that the language

[2] The court of appeals denied a petition for rehearing, but stayed issuance of the mandate. Pet. App. 31a-35a.

of the regulation and its explanatory material "makes it clear that at the time the final rule 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." App., *infra*, 16a-17a. Accordingly, DOL explained, "the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis." *Id.* at 17a. The Advisory Memorandum also explains why Section 552.109(a) represents the best reading of the statutory exemption contained in Section 13(a)(15), and can be reconciled with other regulatory provisions. *Id.* at 2a-16a.

DISCUSSION

The court of appeals held that a longstanding DOL regulation, 29 C.F.R. 552.109(a), promulgated pursuant to the FLSA's express grant of rulemaking authority to the Secretary of Labor, is not entitled to judicial deference and is not enforceable. The primary basis for those rulings was the court's conclusion that, because Section 552.109(a) is contained in a portion of the regulations styled "Subpart B—Interpretations," rather than in "Subpart A—General Regulations," DOL did not intend its promulgation of Section 552.109(a) to be an exercise of the legislative rulemaking authority conferred by Congress. Pet. App. 22a-23a. Instead, the court of appeals concluded, Section 552.109(a) should be viewed merely as an "interpretative" rule not entitled to deference under *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even though the court acknowledged that Section 552.109(a) "'grants

rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do." Pet. App. 22a-23a (quoting *White* v. *Shalala*, 7 F.3d 296, 303 (2d Cir. 1993)).

Those holdings of the court of appeals are inconsistent with this Court's decisions, most notably *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and with the Tenth Circuit's decision in *Johnston* v. *Volunteers of America, Inc.*, 213 F.3d 559, 562 (2000), cert. denied, 531 U.S. 1072 (2001), which expressly held that Section 552.109(a) is entitled to *Chevron* deference. The decision below is also inconsistent with the plain terms of the FLSA, which strongly support the construction adopted by DOL in Section 552.109(a). As the amicus briefs filed in support of the petition attest, moreover, the decision below will have a significant and disruptive impact on the provision of government-funded home care to elderly and disabled individuals.

For those reasons, and because of the important and recurring nature of the questions raised in this case, it would be appropriate for this Court to grant the petition for a writ of certiorari to review the first question presented in the petition. The court of appeals' errors, however, were caused primarily by its mistaken conclusion, based on the structure of the regulations, that DOL did not intend Section 552.109(a) to be an exercise of its delegated legislative rulemaking authority. Because DOL has now made clear—in an authoritative agency guidance issued after the court of appeals' decision—that it has always intended, and still intends, Section 552.109(a) to be an exercise of its expressly delegated legislative authority, see App., *infra*, 1a-17a, the better course would be for this Court to grant the petition for a writ of

certiorari, vacate the judgment below, and remand for further proceedings to allow the court of appeals to reconsider its holdings in light of DOL's authoritative interpretation of its own regulations.

Petitioners also raise a second question presented in the petition: Whether the court of appeals should have permitted further factual development before deciding whether Section 552.109(a) is entitled to *Skidmore* deference. That question is largely case-specific, is not the subject of a conflict among the courts of appeals, and is not implicated under the correct legal principles applicable to this case, which entitle the regulation to *Chevron*, not *Skidmore*, deference. Accordingly, it does not warrant this Court's review.

A. The Court of Appeals' Decision Is Inconsistent With This Court's Precedents, The Text And Purposes Of The FLSA, And The Tenth Circuit's Decision In *Johnston*

1. The court of appeals erred in refusing to give *Chevron* deference to the authoritative interpretation set forth in 29 C.F.R. 552.109(a), and in invalidating that regulation under the minimal level of deference afforded by *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). In *Mead*, this Court "consider[ed] the limits of *Chevron* deference" and held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference" when two conditions are satisfied: (1) that "Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) that "the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-227. Section 552.109(a) satisfies both of those conditions.

Congress delegated to the Secretary of Labor the authority to "define[] and delimit[] by regulation" the terms of the companionship exemption to the FLSA's minimum wage and overtime requirements. 29 U.S.C. 213(a)(15). Regulations issued under that authority are entitled to *Chevron* deference, just as regulations promulgated under the Secretary's similar 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 were held to be entitled to *Chevron* deference by this Court in *Auer*, 519 U.S. at 457-458. Congress also delegated to the Secretary the authority "to prescribe necessary rules, regulations, and orders" regarding the 1974 Amendments, which expanded the FLSA's coverage to include persons in domestic service and added 29 U.S.C. 213(a)(15). 1974 Amendments, § 29(b), 88 Stat. 76. That provision confers additional authority to promulgate binding legal rules. See, *e.g.*, *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). DOL expressly relied on both sources of authority when it promulgated the proposed and final regulations that included Section 552.109(a). See 40 Fed. Reg. 7404, 7405 (1975); 39 Fed. Reg. 35,382 (1974). Accordingly, Section 552.109(a) is entitled to the same *Chevron* deference that the court below properly gave to the related "companionship services" regulation, 29 C.F.R. 552.6. See Pet. App. 13a-19a.

The court of appeals reasoned (Pet. App. 22a-23a) that the placement of Section 552.109(a) in a subpart of the regulations entitled "Interpretations" renders *Chevron* inapplicable, because it reveals that DOL "did not intend to use the legislative power delegated in § 213(a)(15) when it promulgated § 552.109(a)." Pet.

App. 23a. That reasoning conflicts with this Court's decision in *Auer*. In that case, the Court afforded *Chevron* deference to a DOL regulation that is indistinguishable for *Chevron* purposes from Section 552.109(a). The regulation at issue in *Auer* (like the regulation at issue here) was promulgated by DOL pursuant to rulemaking authority conferred by the FLSA, was the product of notice-and-comment procedures, and was set out in a portion of the regulations styled "Subpart B—Interpretations," rather than in "Subpart A—General Regulations." See 519 U.S. at 456-458; 29 C.F.R. 541.118(a) (1996).[3] The Second Circuit's refusal to give *Chevron* deference to Section 552.109(a) is therefore directly at odds with *Auer*.

More generally, the court of appeals' reliance on the "Interpretations" label is inconsistent with the fundamental principle that "the framework of deference set forth in *Chevron* does apply to an agency *interpretation* contained in a regulation." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (emphasis added). The mere fact that a regulation "interprets" a statutory provision provides no basis for deeming it a non-binding "interpretative" rule, particularly when, as here, the agency has express statutory authority to promulgate the regulation and employs notice-and-comment rulemaking procedures in doing so. A far more relevant "touchstone" is whether the regulation is "one 'affecting individual rights and obligations.'" *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). And as the court of appeals acknowledged, Section 552.109(a) unquestion-

[3] DOL has since amended the Part 541 regulations, and the current regulations are not divided into "General Regulations" and "Interpretations" subparts. See 69 Fed. Reg. 22,122, 22,126 (2004) (codified at 29 C.F.R. Pt. 541).

ably falls into that category. See Pet. App. 22a ("[T]he rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do.") (citation omitted).[4]

2. The court of appeals' decision also ignores the language of the FLSA to which DOL's construction gives full effect. The companionship exemption applies to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15). 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.'") (citation omitted). Presumably, if Congress had wanted to limit the exemption to employees who were employed by a particular employer or industry, it would have said so expressly, as it has done with other FLSA exemptions. See, *e.g.*, 29 U.S.C. 213(a)(3) (exemption for "any em-

[4] Respondent argues (Br. in Opp. 26-27) that if Section 552.109(a) is not interpretive, it is invalid because the Department did not comply with the APA's notice-and-comment requirements because DOL deviated in the final rule from the approach initially proposed. That argument is not properly before the Court because it was untimely raised, Pet. App. 43a n.3, and the court of appeals did not decide the issue, *id*. at 24a. The argument is also meritless. The APA requires an agency's notice of proposed rulemaking to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). The Department's notice set forth the terms of the proposed Part 552 (39 Fed. Reg. at 35,383-38,385), including a proposed provision directed specifically to the subject of third-party employment (*id.* at 35,385), and thereby complied with 5 U.S.C. 553(b)(3).

ployee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. 213(b)(3) ("any employee of a carrier by air"). Instead, the statutory language focuses on *employee activities* rather than the identity of the employer, and uses broadly inclusive language to capture all such activities.

Contrary to the court of appeals' conclusion (Pet. App. 26a-27a), applying the companionship exemption to employees of third parties is also fully consistent with Congress's purposes. As the district court recognized, the companionship services exemption is intended "to allow those in need of such services to find such assistance at a price they can afford." *Id.* at 52a. In particular, legislators were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. See 119 Cong. Rec. 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). That cost concern applies whether the companionship services are "provided by the direct hiring of an employee or through the use of an agency." Pet. App. 52a. Applying the exemption to all employees who provide companionship services is, therefore, fully consistent with congressional purposes.[5]

[5] The court of appeals speculated (Pet. App. 26a-27a) that Congress would not have wanted to exempt the employees of third parties because, in the court's view, those employees were covered by the FLSA before the 1974 Amendments, which added the companionship exemption and generally were intended to expand coverage rather than to eliminate it. Contrary to the court of appeals' understanding, however, not all employees providing companionship services who worked for a

3. In addition, the Second Circuit's invalidation of 29 C.F.R. 552.109(a) conflicts with the Tenth Circuit's decision in *Johnston* and, if left undisturbed, will have a substantial impact on the home care industry. In *Johnston*, the Tenth Circuit applied *Chevron* and upheld the regulation, despite employee arguments that the regulation was "an interpretation which does not have the effect of law" and was limited by 29 C.F.R. 552.3. 213 F.3d at 561. That result conflicts with the decision below, which refused to give *Chevron* deference to 29 C.F.R. 552.109(a) and invalidated the regulation. Despite respondent's description of the ruling as "*dicta*" (Br. in Opp. 8), the *Johnston* court characterized its own decision as a holding, 213 F.3d at 562. It is also irrelevant that the court issued its decision before *Mead* was decided, see Br. in Opp. 8; Pet. App. 21a-22a. Nothing in *Mead* eliminates *Chevron* deference for agency regulations issued under express rulemaking authority like that involved here, see *Mead*, 533 U.S. at 230 n.12, and the Tenth Circuit has adhered to *Johnston* after *Mead* was decided, see *Welding* v. *Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004).

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third party were covered by the FLSA before 1974. Rather, the Act applied only "if the third party employer is a covered enterprise meeting the tests of sections 3(r) and 3(s)(1) of the Act." 39 Fed. Reg. at 35,385; see 29 U.S.C. 203(s)(1)(A)(ii) (enterprise coverage currently requires $500,000 in sales or revenue); 29 U.S.C. 203(s)(1) (1970) (at time of 1974 FLSA amendments, $250,000 was required). There is no reason to assume that when Congress extended FLSA coverage to domestic employment in 1974 it intended to deny the companionship exemption to newly covered third-party providers. Instead, as the Department explained in promulgating 29 C.F.R. 552.109(a), construing the exemption to cover all employees who provide companionship services "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. at 7405.

The court of appeals' invalidation of Section 552.109(a) will have a substantial impact on the home care industry and could cause serious disruption in the care that frail elderly and disabled individuals currently receive. New York City, for example, estimates that the court of appeals' decision will add $279 million a year to its costs of providing personal care services to 50,000 low income frail elderly and disabled individuals through 60,000 personal care attendants, and that it is unclear whether state and federal funding will be available to cover those increased costs. City of New York et al. Amici Br. 2, 5-8. Other home care providers similarly argue that they have limited resources and that the court's decision will increase their costs of labor beyond the point at which they have the ability to pay for them. Home Care Ass'n of New York State, Inc. (HCA) Amicus Br. 2, 15-19; Continuing Care Leadership Coalition, Inc. (CCLC) Amicus Br. 2, 9-10; National Ass'n of Home Care & Hospice Inc. Amicus Br. 2-4; Home Care Council of New York City, Inc. Amicus Br. 6-9. The federal government, which pays much of the cost of providing home care services through Medicare and Medicaid, 66 Fed. Reg. 5483 (2001), may also be adversely affected by the court's decision. All this could lead to less care and reduced continuity in care for the elderly and the infirm, and ultimately to more institutionalization, see CCLC Amici Br. 7; HCA Amicus Br. 8-9, a result contrary to federal government policy, see Exec. Order 13,217, 3 C.F.R. 774 (2002) (individuals with disabilities should be placed in community settings whenever possible);

Olmstead v. *L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999).[6]

B. The Court Should Grant The Petition, Vacate The Decision Below, And Remand To Permit The Court Of Appeals To Reconsider Its Decision In Light Of DOL's Recent Guidance Making Clear That Section 552.109(a) Is An Exercise Of Legislative Rulemaking Authority

DOL recently issued authoritative agency guidance that makes clear that DOL has always intended, and still intends, Section 552.109(a) to be an exercise of its expressly delegated legislative rulemaking authority. *Application of Section 13(a)(15) to Third Party Employers*, Wage & Hour Advisory Mem. No. 2005-1 (Dec. 1, 2005), App., *infra*, 1a-17a; see Op. Ltr. FLSA2005-12, 2005 WL 2086801 (Mar. 17, 2005) (indicating that the Wage and Hour Division "has not changed [Section 552.109(a)] or its interpretation thereof as a result" of the decision below). The Advisory Memorandum states that "the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding," and that the language of the regulation and its explanatory material "makes it clear that at the time the final rule 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."

[6] Respondent mistakenly relies on the Department's statement in January 2001 that proposed revisions to 29 C.F.R. 552.109(a) would not have a significant economic or budgetary impact on affected entities. Br. in Opp. 3 n.1; see 66 Fed. Reg. at 5486. The Department did not make the proposed revisions because numerous commenters, including multiple government agencies, "seriously called into question [that] conclusion." 67 Fed. Reg. 16,668 (2002).

App. *infra*, 16a-17a. DOL has therefore "always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis." *Id*. at 17a.

The Advisory Memorandum also sets forth the reasoning underlying DOL's conclusion that Section 552.109(a) represents the best reading of the statutory exemption contained in 29 U.S.C. 213(a)(15), and explains how the language contained in Section 552.3 and 552.101 of the regulations, which the court of appeals viewed as inconsistent with the third-party exemption of Section 552.109(a) (see Pet. App. 27a-28a), can be harmonized with Section 552.109. App., *infra*, 2a-16a.[7]

The Advisory Memorandum represents DOL's controlling interpretation of its own regulations, and is therefore entitled to a high degree of deference. An agency interpretation of its own regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson* v. *United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *Auer*, 519 U.S. at 462; *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

As indicated above, the principal basis for the court of appeals' holding that Section 552.109(a) is not entitled to *Chevron* deference is its mistaken conclusion that

[7] The Advisory Memorandum explains that DOL views the definitions of "domestic service employment" in Sections 552.3 and 552.101 as pertaining to the types of employment and services covered by the exemption, and not as imposing a limitation based on the identity of the employer. App., *infra*, 5a-9a. "The references in those provisions to domestic service employment needing to be performed in the home of the employer are 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." *Id*. at 9a.

"DOL did not intend to use the legislative power delegated in § 213(a)(15) when it promulgated § 552.109(a)." Pet. App. 23a. In the court's view, "§ 552.109(a) does not qualify for *Chevron* deference because, by DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." *Ibid.* The Advisory Memorandum now makes clear that this central premise of the court of appeals' decision is erroneous—that DOL "has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis." App., *infra*, 17a. Accordingly, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings to allow the court of appeals to reconsider its holdings in light of DOL's authoritative construction of its own regulations.[8]

C. The Second Question Presented By The Petition Does Not Warrant Further Review

With regard to the second question presented in the petition, petitioners argue that, even if Section 552.109(a) does not receive *Chevron* deference, the court should have allowed full development of a factual record before deciding that the regulation was not entitled to *Skidmore* deference. Pet. i, 13, 23-26. Petitioners have not cited any cases holding that a court can or must look

[8] Although the court of appeals should have deferred to DOL's construction of its regulations as set forth in the agency's amicus brief submitted in the court of appeals, see *Auer*, 519 U.S. at 462; Gov't C.A. Br. 12-15, the Advisory Memorandum represents both a more formal and a more complete explanation of the agency's interpretation of its regulations. An order from this Court granting the petition, vacating the decision, and remanding for reconsideration is therefore appropriate.

beyond the agency's rationale for its rule before engaging in such review. There is, accordingly, no conflict among the courts of appeals on that question. Nor does the case-specific question whether the factual record in this case was adequate to resolve the question of *Skidmore* deference otherwise warrant this Court's review. Indeed, the question of the appropriate factual basis for *Skidmore* deference should not even be reached in this case because, under a proper understanding of the law, the regulation is entitled to deference under *Chevron*, not *Skidmore*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of DOL's authoritative construction of its own regulations as set forth in the Advisory Memorandum. In the alternative, the petition for a writ of certiorari should be granted, limited to the first question presented in the petition.

Respectfully submitted.

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DECEMBER 2005

APPENDIX

December 1, 2005

WAGE AND HOUR ADVISORY MEMORANDUM
No. 2005-1

MEMORANDUM FOR:	REGIONAL ADMINISTRATORS DISTRICT DIRECTORS
FROM:	ALFRED B. ROBINSON, JR. Deputy Administrator
SUBJECT:	Application of Section 13(a)(15) to Third Party Employers

Policy and Interpretation for Applying the Section 13(a)(15) Exemption

The purpose of this memorandum is to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in *Coke* v. *Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). As indicated in Opinion Letter FLSA 2005-12, the Division continues to adhere to its regulation, set out at 29 C.F.R. § 552.109(a), exempting companions who are employed by third parties from the minimum wage and overtime requirements of the FLSA. Regional Administrators and District Directors are instructed to continue to apply the exemption in states outside the Second Circuit.

Rationale for Applying the Exemption

The following explains and justifies the Division's policy to continue to apply the section 13(a)(15) exemption in all jurisdictions except those that comprise the Second Circuit Court of Appeals.

The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee's activities and the place of their performance, without regard to the identity of the employer. Section 13(a)(15) exempts "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). 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 instead employed by third party employers.

The Department's regulations explicitly state that the companionship exemption applies to companions employed by third party employers. The Department promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its additional authority to issue regulations to implement the 1974 FLSA amendments. 40 Fed. Reg. 7404 (1975); see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (authority to issue implementing regulations). Section 552.109(a) of Part 522 *[sic]* provides:

> 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 requirements by virtue of section 13(a)(15).

In promulgating 29 C.F.R. § 552.109(a), the Department explained that applying the exemption to employees of third parties "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975). The Department continues to agree with that assessment because the statutory phrase "any employee" indicates that the exemption is naturally read to apply based on the activities of the employee, not identity of the employer. See, *e.g.*, 29 C.F.R. § 780.303 (exemption in 29 U.S.C. § 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); 29 C.F.R. § 780.403 (exemption in 29 U.S.C. § 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities").

Section 552.109(a) is also consistent with the policy objectives that Congress was pursuing in creating the companionship exemption. Soon after the regulations were promulgated, the Department explained that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. Op. Ltr. WH-368, 1975 WL 40991 (DOL Nov. 25, 1975). In particular, legisla-

tors were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. See 119 Cong. Rec. 24,797 (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). That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party.

In *Coke* v. *Long Island*, *supra*, the Second Circuit ruled that section 552.109(a) of the Department's regulations is inconsistent with congressional intent and with section 552.3 of the regulations. The Department disagrees. As explained above, Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment. Thus, it is unsurprising that the text of the statute focuses exclusively on the nature of the activities that companions perform and does not even hint that the source of a companion's employment is a relevant factor. Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions. See, *e.g.*, 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air").

Moreover, the congressional committee reports that discuss section 13(a)(15) repeatedly emphasize that the key factors in determining whether an employee quali-

fies for the companionship exemption are the nature of the employee's activities, *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 age or necessity, necessitates a companion.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) ("It is not, however, the Committee's intent to include within the term 'domestic service' *such activities as* casual babysitting and acting as a companion.") (emphasis added); 119 Cong. Rec. 24,801 (1973) (describing tasks performed by companions) (statements of Sens. Burdick and Williams); H.R. Conf. Rep. No. 93-413, at 27 (1973) (explaining that the kinds of services that are performed by trained personnel such as nurses do not fall within the exemption), and the place that the activities are performed. *See, e.g.*, 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"); S. Rep. No. 93-690, *supra*, at 20 (same); 119 Cong. Rec. at 24,799 ("A dwelling used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.") (statement of Sen. Williams).

The Department's regulations are not only consistent with congressional intent, but they are also internally consistent. The 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. The Department intentionally chose to include third party employees within the exemption after careful deliberation. When the regulations were first proposed, the Department drafted section

552.109 to exclude companions employed by third party employers from the exemption. 39 Fed. Reg. 35,382, 35,385 (1974). After reviewing the comments it received, however, the Department reconsidered its position. When the regulations were issued in final form, the Department adopted the present language of section 552.109(a), which expressly includes companions employed by third party employers within the exemption. The Department explained that "[o]n further consideration, [it had] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975).

The Department's January 19, 2001 NPRM and the Second Circuit's decision in *Coke* v. *Long Island* identified a conflict between section 552.109(a)'s pronouncement that the companionship exemption extends to third party employers and section 552.3's definition of "domestic service employment." *See* 66 Fed. Reg. at 5485; *Coke* v. *Long Island*, 376 F.3d at 133-34. The Department has reviewed section 552.3 and another regulation, 29 C.F.R. 552.101(a), which also addresses the concept of "domestic service employment." The regulations' definition of "domestic service employment" is relevant to determining the scope of the companionship exemption because the text of section 13(a)(15) exempts only those companions who are "employed *in domestic service employment* to provide companionship services." Thus, the statute seems to contemplate that to qualify for the exemption, an employee must *both* "provide companionship services" *and* be "employed in domestic service employment." If the definition of "domestic service

employment" in sections 552.3 and 552.101(a) is properly read as excluding all third party employees, then those provisions can fairly be said to be significantly in tension with section 552.109(a), which expressly includes companions employed by third party employers.

The Department does not believe, however, that sections 552.3 and 552.101(a), when properly read in context, speak to the issue of third party employment. Neither provision explicitly mentions the subject. And unlike section 552.109(a), there is no indication that the Department ever considered the potential impact of the provisions on the coverage of third party employees, much less that it actually intended the provisions to entirely exclude them. To the contrary, at the time the regulations were promulgated the Department seems to have believed that sections 552.3 and 552.101(a) did not resolve the issue of third party employment, since it included a separate section—section 552.109—in both the NPRM and the final rule to expressly address the subject.

Admittedly, there are phrases in sections 552.3 and 552.101(a) that could potentially be read to exclude third party employees from the definition of "domestic service employment." Section 552.3 provides:

> As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes baby-

> sitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

And section 552.101(a) explains:

> The definition of *domestic service employment* contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from the "generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

The statement in section 552.3 that domestic service employment is "performed by an employee in or about the private home . . . *of the person by whom he or she is employed*," and the statement in section 552.101(a) that domestic service employment "must be performed in or about the private home *of the employer*," could be read to exclude companions who are employed by third party employers from the scope of the exemption. As explained above, however, there is no reason to believe that the Department intended the provisions to have that effect. Because there are available readings of the various regulations that allow them to be internally reconciled, the Department believes that they can and should be read in harmony. *See generally* 73 CJS Public Admin. Law and Proc. § 211 (2005) ("The court should

read a regulation as an entirety, and should harmonize the various parts and provisions of the entire regulation and give them effect, if possible.").

Sections 552.3 and 552.101 are best read as describing the kinds of work that constitute domestic service employment and establishing that such work must be performed in a private home, rather than in a place of business. The references in those provisions to domestic service employment needing to be performed in the home of the employer are 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. *See* S. Rep. No. 93-690, *supra*, at 20. *See also* 20 C.F.R. § 404.1057 (social security regulation describing "[d]omestic service in the employer's home"); 26 C.F.R. § 31.3121(a)(7)-1(a)(2) (social security tax regulation describing "[d]omestic service in a private home of the employer").

Because the Department borrowed the language of sections 552.3 and 552.101 from the congressional committee reports underlying the 1974 amendments to the FLSA without discussion or elaboration, the legislative history must be consulted to determine their meaning. Significantly, while the legislation was being drafted, Congress repeatedly referred to and discussed in detail its view that work must be performed in a private home to qualify as "domestic service employment." For example, the 1974 amendments extending FLSA coverage to domestic workers did so by referring to employees "employed in domestic service *in a household*." P.L. 93-259, § 7(b)(1), 88 Stat. 55, 62 (1974) (emphasis added). The committee reports, in turn, described the newly covered workers using a variety of phrases emphasizing the importance of the employment bring performed in a pri-

vate home: "domestic service employees in *private households*," S. Rep. No. 93-300, *supra*, at 20 (emphasis added); "domestic service *in and about a private home*," *id.* at 22 (emphasis added); "domestic service employees *employed in households*," H.R. Rep. No. 93-232, *supra*, at 31 (emphasis added); "*household* domestic employees," S. Rep. No. 93-758, *supra*, at 27 (emphasis added); "employee in domestic service *in a household*," *id.* (emphasis added); "domestic service workers," H.R. Rep. No. 93-913, *supra*, at 11; and "*private household* workers." S. Rep. No. 93-690, *supra*, at 19 (emphasis added). Indeed, the reports contain a detailed discussion of Congress's intention to require that covered domestic service be performed in a private home:

> The domestic service must be performed in a private home which is a fixed place of abode of an individual family. A separate and distinct dwelling maintained by an individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.

S. Rep. No. 93-300, *supra*, at 22. See also S. Rep. No. 93-690, *supra*, at 20 (same); H.R. Rep. No. 93-913, *supra*, at 33 (same). This passage is particularly significant because it supplies content and meaning to the sentence immediately preceding it—specifically, the previously referenced sentence that draws upon the language of the Social Security regulations to define "domestic service employment" and states that its generally accepted meaning 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." The fact that the sentence is immediately followed by a descriptive passage elaborating on the sentence's requirement that domestic service employment must be performed in a private home, but making no mention at all of the issue of third party employment, makes it clear that the sole purpose of the sentence is to specify the place where domestic service employment must be performed.

The sentence from the committee report is incorporated virtually verbatim into section 552.3, with the only modification being the addition of a brief parenthetical specifying that a private home can be fixed or temporary. In the view of the Department, when the sentence was imported into the regulations from the committee report, it carried with it the meaning ascribed to it by Congress. The Department signaled its understanding that the sentence should be read as addressing place of performance but as not speaking to third party employment in two distinct ways. First, the one change the Department made to the sentence was the insertion of a parenthetical explaining that, with respect to the place of performance, a private home can either be fixed or temporary. The insertion of the parenthetical shows that the Department was primarily concerned with clarifying the operative effect of the regulation on the place of performance requirement. Second, the Department drafted a separate regulatory provision specifically to address the issue of third party employment. This would have been entirely unnecessary if the definition of domestic service employment excluded third party employment—particularly at the NPRM stage, when the meaning of the two provisions would have been aligned. In sum, all signs indicate that neither Congress nor the

Department intended the sentence that first appeared in the committee report and was then incorporated into section 552.3 to be construed as excluding employees who are employed by third party employers from the definition of domestic service employment.

In fact, if the sentence in question 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 workers from the coverage of the FLSA—despite Congress' express intent "to include within the coverage of the Act *all* employees whose vocation is domestic service," excepting only casual babysitters and companions for the aged and infirm. *See* S. Rep. No. 93-690, *supra*, at 20 (emphasis added); see also H.R. Conf. Rep. No. 93-413, at 27 (1973); S. Conf. Rep. No. 93-358, at 27 (1973). Prior to the enactment of the 1974 amendments, the only domestic workers that were covered by the FLSA were those employed by "covered enterprises," which are currently defined by the FLSA as businesses with annual gross sales of at least $500,000 that employ at least two employees in interstate commerce. *See* 29 U.S.C. § 203(s); see also 29 U.S.C. § 203(s) (1970) ($250,000 threshold applicable at time of 1974 amendments). Two categories of domestic workers generally were not covered prior to the amendments: those employed by homeowners because there usually was no basis for individual coverage and those employed by third party employers that did not meet the test for enterprise coverage. There can be no question that Congress intended for the 1974 amendments generally to cover both of these categories, with only a few expressly enumerated exceptions. Yet if the sentence in the committee report is construed as excluding all 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 very day not be covered by the FLSA.[1] That result is contrary to Congress' express intent, and cannot be correct.

Sections 552.3 and 552.101(a) should also not be read as addressing the issue of third party employment because doing so would render them inconsistent with themselves. Section 552.101, which elaborates on the definition of domestic service employment provided by section 552.3, specifies that "private household workers" are included within the definition of domestic service employees. The term "private household workers" has long been understood by both Congress and the Department to include the employees of third party employers. During the time Congress was considering the 1974 amendments to the FLSA, the Department submitted reports defining the term as:

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[1] Unlike the sentence in the committee report, section 552.3 of the regulations purports to define domestic service employment only "[a]s used in section 13(a)(15) of the Act." As mentioned previously, however, since the Department copied the sentence from the committee report virtually verbatim into the regulations, there is no reason to believe that the Department intended for it to have a different meaning than the one that was attached to it by Congress. Indeed, there is good reason to believe that despite section 552.3's purported limitation of the definition to the companionship exemption, the Department in fact intended the provision to supply a general definition of the term as used throughout the Act. First, there is no other provision in the regulations that supplies an alternative definition of domestic service employment. Second, the examples that the regulation provides of workers that qualify as domestic service employees—including gardeners, handymen, janitors, grooms, and valets—have little or nothing to do with the provision of companionship services, but instead fall within the broader category of domestic workers generally. *See* 29 C.F.R. 552.3.

> [A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence.

See Department's 1973 Report to Congress on Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act at 27; 1974 Report at 31-32. The second prong of the definition unambiguously includes domestic workers who are employed by third party employers. It is not surprising that the Department incorporated private household workers into the regulations' definition of domestic service employment, since Congress referred to the Department's reports on several occasions, *see* H.R. Rep. No. 92-232, *supra*, at 31; H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19-20; 119 Cong. Rec. 24,796 (statement of Sen. Dominick), and repeatedly used the phrase "private household workers" interchangeably with the term "domestic service employees." *See* H.R. Rep. No. 93-233, *supra*, at 31 (using the term "domestic service employees" and "private household workers" in a single paragraph to describe the same set of employees); S. Rep. No. 93-300, *supra*, at 21-22 (describing the same set of employees in successive paragraphs using the interchangeable terms "private household workers," "domestics," "household workers," and "domestic workers"); H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19. In fact, the Department's definition of "private household worker" was quoted in full during the floor debate in the Senate on the amendments to the FLSA. *See* 119 Cong. Rec. at 24,796 (statement of Sen.

Dominick). Since section 552.101(a) clearly states that at least some domestic workers employed by third party employers are included within the definition of domestic service employees, it makes no sense to construe the ambiguous language requiring that domestic service "be performed in or about the private home of the employer" as designed to exclude them.

The governing rules of legal interpretation require the Department to adopt a reading of the regulations that harmonizes them and renders them internally consistent as a whole. *See Jay* v. *Boyd*, 351 U.S. 345, 360 (1956) (Court must read regulations "so as to give effect, if possible, to all of its provisions"); *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") (citations and internal quotations omitted); *Miller* v. *AT&T Corp.*, 250 F.3d 820, 832 (4th Cir. 2001) ("Whenever possible, this court must reconcile apparently conflicting provisions"). If sections 552.3 and 552.101(a) were read to exclude third party employees from the definition of domestic service employment, it would not only create a conflict with section 552.109(a), but it would also be inconsistent with section 552.101(a)'s inclusion of "private household workers" within the definition of domestic service employment and with Congress's express intent "to include within the coverage of the Act all employees whose vocation is domestic service." *See* S. Rep. No. 93-690, *supra*, at 20; H.R. Conf. Rep. No. 93-413, *supra*, at 27; S. Conf. Rep. No. 93-358, *supra*, at 27. By contrast, when sec-

tions 552.3 and 552.101(a) are read as requiring that domestic service employment be performed in private homes, but as not addressing the issue of third party employment, the regulations are fully harmonized and rendered internally consistent. Consequently, the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment. Read in that context, I find no inconsistency between sections 552.3 and 552.109(a). All prior statements by the Department to the contrary, including the Department's January 19, 2001 NPRM, *see* 66 Fed. Reg. at 5485, are hereby repudiated and withdrawn.

The Department is aware that the Second Circuit suggested in *Coke* v. *Long Island Health Care, Ltd.*, 376 F.3d at 131-33, that the Department's regulations governing third party employment were intended to be advisory interpretations only, and that they therefore do not have the force and effect of law. That is not the case; the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding. When the Department promulgated the final regulations in February 1975, it noted that as originally proposed, section 552.109(a) "would not have *allowed* the [FLSA] section 13(a)(15) or the [FLSA] section 13(b)(21) exemption for employees who, although providing companionship services, are employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. 7404-05 (emphasis added). The Department stated in the final rule that it had changed its mind, "conclud[ing] that these exemptions *can be available* to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Id.* at 7405 (emphasis added). The highlighted language makes it clear that at

the time the final rule 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. Accordingly, the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis.