[NOT SCHEDULED FOR ORAL ARGUMENT]

No. 15-5018

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

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF OF PARAPROFESSIONAL HEALTHCARE INSTITUTE AND 26 OTHER CONSUMER AND POLICY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Catherine K. Ruckelshaus
Sarah Leberstein
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025
cruckelshaus@nelp.org
sleberstein@nelp.org

Counsel for Amici Curiae

Kate Andrias
University of Michigan Law School
625 South State St.
Ann Arbor, MI 48103
(734) 763-9697
kandrias@umich.edu

Counsel for Amici Curiae

AMICI CURIAE

Paraprofessional Healthcare Institute (PHI)

Caring Across Generations

Center for Medicare Advocacy, Inc.

Community Catalyst

National Consumer Voice for Quality Long-Term Care

Hand in Hand

Cooperative Home Care Associates

Home Care Associates

Center for Eldercare and Advanced Illness

California Calls

American Geriatric Society

American Society on Aging

Council on Social Work Education

Family Values @ Work

Center for Community Change

Coalition on Human Needs

Casa Latina

Congregation B'Nai Jeshurun

National Employment Law Project (NELP)

National Jobs with Justice

Maine People's Resource Center

Naugatuck Valley Project

Ohio Organizing Collaborative

Colorado Jobs With Justice

Missouri Jobs with Justice

New Mexico Direct Caregivers Coalition

TakeAction Minnesota

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *amici curiae* certify that:

A. Parties and *Amici*.

All parties, intervenors, and *amici* heretofore appearing in the district court or this Court are listed in the appellants' brief. Undersigned *amici*, filing this proposed brief, are Paraprofessional Healthcare Institute (PHI); Caring Across Generations; Center for Medicare Advocacy, Inc.; Community Catalyst; National Consumer Voice for Quality Long-Term Care; Hand in Hand; Cooperative Home Care Associates; Home Care Associates; Center for Eldercare and Advanced Illness; California Calls; American Geriatric Society; American Society on Aging; Council on Social Work Education; Family Values @ Work; Center for Community Change; Coalition on Human Needs; Casa Latina; Congregation B'Nai Jeshurun; National Employment Law Project (NELP); National Jobs with Justice; Maine People's Resource Center; Naugatuck Valley Project; Ohio Organizing Collaborative; Colorado Jobs With Justice; Missouri Jobs with Justice; New Mexico Direct Caregivers Coalition; and TakeAction Minnesota.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Appellants United States Department of Labor, et al.

C. Related Cases.

Amici are aware of no related cases other than those set forth in the Brief for Appellants United States Department of Labor, et al.

CERTIFICATE PURSUANT TO CIRCUIT RULE 29

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici curiae* Paraprofessional Healthcare Institute (PHI); Caring Across Generations; Center for Medicare Advocacy, Inc.; Community Catalyst; National Consumer Voice for Quality Long-Term Care; Hand in Hand; Cooperative Home Care Associates; Home Care Associates; Center for Eldercare and Advanced Illness; California Calls; American Geriatric Society; American Society on Aging; Council on Social Work Education; Family Values @ Work; Center for Community Change; Coalition on Human Needs; Casa Latina; Congregation B'Nai Jeshurun; National Employment Law Project (NELP); National Jobs with Justice; Maine People's Resource Center; Naugatuck Valley Project; Ohio Organizing Collaborative; Colorado Jobs With Justice; Missouri Jobs with Justice; New Mexico Direct Caregivers Coalition; and TakeAction Minnesota certify that as of the date of this certification, no other *amicus curiae* brief of which we are aware addresses in depth the combined interests and experiences of home care employers and consumers in the extension of minimum wage and overtime benefits.

Amici are membership organizations comprised of home care consumers, employers, and employees, as well as organizations that specialize in studying and advocating for issues related to the home care industry's consumers and providers. In this brief, they illustrate the fundamental changes in the home care industry that

led to the Department of Labor's Home Care Rule and show how the Rule will improve quality of care without increasing costs or burdening the home care industry. *Amici* have coordinated with other *amici* and joined in a single brief to the extent practicable. This brief is submitted on behalf of 27 organizations with the common goal of advancing the interests of home care consumers and providers; however, because *amici* offer a unique perspective on the impact and importance of the Rule, *amici* did not consider it practical or feasible to further consolidate this brief with any other *amicus* briefs.

Amici derive their authority to file this brief from their motion for leave to file, submitted on February 27 to the D.C. Circuit Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, counsel for *amici curiae* makes the following disclosure:

Paraprofessional Healthcare Institute (PHI); Caring Across Generations; Center for Medicare Advocacy, Inc.; Community Catalyst; National Consumer Voice for Quality Long-Term Care; Hand in Hand; Cooperative Home Care Associates; Home Care Associates; Center for Eldercare and Advanced Illness; California Calls; American Geriatric Society; American Society on Aging; Council on Social Work Education; Family Values @ Work; Center for Community Change; Coalition on Human Needs; Casa Latina; Congregation B'Nai Jeshurun; National Employment Law Project (NELP); National Jobs with Justice; Maine People's Resource Center; Naugatuck Valley Project; Ohio Organizing Collaborative; Colorado Jobs With Justice; Missouri Jobs with Justice; New Mexico Direct Caregivers Coalition; and TakeAction Minnesota are not publicly held corporations and have no parent corporations. No publicly held corporation has 10% or more of the stock of any *amicus* organization.

STATEMENT REGARDING RULE 29(C)(5)

Pursuant to Rule 29(c)(5) of the Federal rules of Appellate Procedure, *amici curiae* certify that:

(A) No party's counsel authored the brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) No person—other than *amici curiae*, their members, and their counsel—contributed money that was intended to fund preparing or submitting the brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

LEGISLATIVE MATERIALS

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

GLOSSARY

DOL: Department of Labor

FLSA: Fair Labor Standards Act

HCAA: Home Care Association of America

PHI: Paraprofessional Healthcare Institute

INTEREST OF *AMICI CURIAE*

Paraprofessional Healthcare Institute (PHI); Caring Across Generations; Center for Medicare Advocacy, Inc.; Community Catalyst; National Consumer Voice for Quality Long-Term Care; Hand in Hand; Cooperative Home Care Associates; Home Care Associates; Center for Eldercare and Advanced Illness; California Calls; American Geriatric Society; American Society on Aging; Council on Social Work Education; Family Values @ Work; Center for Community Change; Coalition on Human Needs; Casa Latina; Congregation B'Nai Jeshurun; National Employment Law Project (NELP); National Jobs with Justice; Maine People's Resource Center; Naugatuck Valley Project; Ohio Organizing Collaborative; Colorado Jobs With Justice; Missouri Jobs with Justice; New Mexico Direct Caregivers Coalition; and TakeAction Minnesota are national, state, and local home care consumer groups, home care employer organizations, and policy experts advocating for service and workforce improvements in the home care industry. *Amici* are committed to developing practices and policies that protect the dignity, respect, and independence of those who receive care and those who provide it.

SUMMARY OF ARGUMENT

Over the last forty years, as more seniors and Americans with disabilities have foregone institutional care, the home care industry has transformed[1]: Once comprised of a relatively small group of "elder-sitters," today, the workforce encompasses over two million workers.[2] Once thought to involve mere fellowship, today, the job of the home care aide is widely recognized to be a vocation, requiring skill and training.[3] Once largely casual and informal, today, the provision of home care services is commercial, regulated, and complex.[4] At the same time, the contemporary home care industry suffers from significant labor shortages and high turnover.[5] These problems—caused in large part by the combination of rising demand and poor job quality—adversely impact the availability, quality, and continuity of care.[6]

The Department of Labor's Home Care Rule ("DOL's rule" or "the Rule"), 29 C.F.R. § 552, appropriately responds to the fundamental changes that have occurred in the industry as well as to the persistent problems that plague it. Extending minimum wages and overtime protections to more home care workers

---

[1] *See generally* Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 Iowa L. Rev. 1835, 1843-50 (2007); PHI comment on NPRM, WHD-2011-0003-9159 (Mar. 21, 2012), at 4.
[2] PHI comment, *supra* note 1, at 4.
[3] *Id.* at 3.
[4] *Id.*
[5] *Id.* at 7. *See also* Part II.A and B, *infra*.
[6] PHI comment, *supra* note 1, at 7.

would improve quality and continuity of care, and can be done without increasing costs to consumers, resulting in cuts to services, or rendering businesses unprofitable.[7] Indeed, the home care industry is profitable and growing in the fifteen states that already extend state minimum wage and overtime protections to some or all home care workers.[8] These states' experiences, along with the experiences of numerous employers and consumers, demonstrate the economic feasibility of providing basic wage protections to home care workers, as well as the advantages to consumers of doing so.[9]

ARGUMENT

I. THE HOME CARE INDUSTRY HAS UNDERGONE A DRAMATIC TRANSFORMATION SINCE THE 1970S, BECOMING SUBSTANTIALLY LARGER, MORE PROFESSIONALIZED, AND COMMERCIAL.

---

[7] *See, e.g.*, PHI, *Michigan Home Care Industry Growth Before and After Extending Labor Protections to Home Care Aides* 1 (Mar. 2013), *available at* http://phinational.org/sites/phinational.org/files/michigan-labor-protections-and-home-care-industry.pdf ("An analysis of the number of home care establishments within Michigan shows the dramatic growth of the industry following the state's implementation of the new minimum wage and overtime rules."). *See also* Part III, *infra*.

[8] CO, HI, IL, ME, MD, MA, MI, MN, MT, NV, NJ, NY, PE, WA, WI. *See* PHI, *Which States Provide Coverage to Home Care Workers* (Oct. 2011), *available at* http://nelp.3cdn.net/6e193991edf8bd0df9_o6m6i28s2.pdf; PHI, *State-by-State Projected Demand for New Direct-Care Workers, 2006-16* (Dec. 2009), *available at* http://www.phinational.org/sites/phinational.org/files/clearinghouse/State%20by%20State%20DCW%20Demand%20Projections%202006-16%20FINAL%20rev.pdf.

[9] *See, e.g.*, PHI comment, *supra* note 1, at 7.

The home care industry of today bears little resemblance to that of 1974.[10] When Congress enacted the 1974 amendments to the Fair Labor Standards Act (FLSA), "individuals with significant care needs were served in institutional settings rather than in their homes and [] communities." 78 Fed. Reg. 60453, 60455. In this context, a narrow exemption for home care workers providing in-home companionship services was sensible. Older individuals and people with disabilities who remained in their homes were relatively independent, requiring minimal care.[11] Home care was provided primarily by neighbors, family members, or untrained employees known as "elder sitters," who provided "fellowship, care," and "protection." 119 Cong. Rec. 24801 (daily ed. July 19, 1973) (statement of Sen. Williams); 29 C.F.R. § 552.6. In essence, home care workers of the 1970s, the "elder sitters" described by Congress, filled in when the family member of an elderly or sick individual or an individual with disabilities was unavailable. *Id.* Their work was considered primarily companionship, providing benefits for the sitter as well as the care recipient.[12] *Id.* Although some professional caregivers existed, home care was neither a typical vocation nor a large-scale commercial enterprise.[13]

---

[10] *See* Smith, *supra* note 1, at 1843-50; PHI comment, *supra* note 1, at 3-7.
[11] PHI comment, *supra* note 1, at 5 (noting that home care recipients are "older, frailer, and more impaired than those previously served at home").
[12] *Id.* at 4.
[13] *Id.*

Since 1974, the home care industry has undergone several fundamental transformations. Chief among these, it has multiplied in size. Several factors explain the industry's expansion. First, the elder population in the United States has grown exponentially, as has the number of people living with disabilities and chronic conditions.[14] In 1970, Americans aged sixty-five and older comprised just 10 percent of the population.[15] In 2010, approximately 40 million Americans—comprising just over 13 percent of the population—were aged sixty-five and older.[16] According to projections, by 2030 that number will approach 72 million, representing approximately 20 percent of the total population.[17]

Second, consumers of long-term care prefer to receive such care in their homes or in other community-based settings, rather than in institutions.[18] AARP reports that a vast majority—89 percent—of Americans aged fifty and older want to remain in their own homes as long as they can.[19] Yet many of these individuals

[14] *Id.* at 3-4.
[15] Linda A. Jacobsen, et al., *America's Aging Population*, Population Bulletin 66, 2011, at 3, *available at* http://www.prb.org/pdf11/aging-in-america.pdf.
[16] Admin. On Aging, U.S. Dep't Of Health & Human Servs., *A Profile Of Older Americans: 2011*, at 2 (2011), *available at* http://www.aoa.gov/aoaroot/aging_statistics/Profile/2011/docs/2011profile.pdf.
[17] *Id.*
[18] *Id.* at 4.
[19] AARP comment on NRPM, WHD-2011-0003-9483 at 3 (Mar. 22, 2012).

live alone, at a substantial distance from their family members, or otherwise lack family networks to provide home-based services.[20]

Third, public policy has encouraged the use of home care in place of institutional care. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court required that services for people with disabilities be provided in the least restrictive setting appropriate, leading states to implement deinstitutionalization plans.[21] Additionally, budgetary considerations under Medicare and Medicaid have resulted in shorter hospital stays and greater use of home and community-based care as alternatives to more costly institutional care.[22]

As more Americans have come to receive services at home, the home care industry has inevitably grown. In 1963, just prior to the enactment of Medicare, only 1,100 home health care establishments existed in the United States; in 2010, there were nearly 24,000 Medicare-certified home health care agencies.[23] Today, the home care and personal assistance workforce comprises over 2 million workers, and the demand for services is expected to fuel the creation of at least another 1.3 million new jobs in the field over the next decade.[24] Indeed, the Bureau of Labor Statistics reports that the home care industry "has the fastest growing

[20] Smith, *supra* note 1, at 1845.
[21] *See* Direct Care Alliance, Inc. comment on NPRM, WHD-2011-0003-8797, at 3 (Mar. 21, 2012).
[22] PHI comment, *supra* note 1, at 5.
[23] *Id*
[24] *Id.*

employment of all industries, one of the largest increases in employment, and one of the fastest growing real outputs."[25]

The expansion of home care has been accompanied by fundamental changes in the industry's structure.[26] What was once a "cottage industry . . . of small mom-and-pop agencies" is now a national marketplace of over 80,000 agencies and franchises, many of which are national franchise chains traded on Wall Street.[27] For-profit entities now account for 68 percent of certified agencies.[28] While some home care workers are still hired by individuals and their families through private arrangements,[29] many more work for private organizations and agencies or are employed jointly by public authorities and individuals through publicly-financed programs.[30] Like the rest of the healthcare industry, most home care services are now regulated by both state and federal authorities,[31] and the funding stream is complex, deriving from a combination of Medicare, Medicaid, other public

[25] Bureau of Labor Statistics, U.S. Dep't of Labor, *Industry Employment and Output Projections to 2022*, Monthly Labor Review (Dec. 2013), http://www.bls.gov/opub/mlr/2013/article/industry-employment-and-output-projections-to-2022.htm.
[26] *See generally* Dorie Seavey with Abby Marquand, *Caring in America* 14-25 (Dec. 2011) (JA 454).
[27] PHI comment, *supra* note 1, at 3-4.
[28] *Id.* at 5.
[29] *Id.* at 5. *See also* Jane Gross, *New Options (and Risks) in Home Care for Elderly*, N.Y. Times, Mar. 1, 2007, at A1.
[30] PHI comment, *supra* note 1, at 5.
[31] *See* Seavey, *supra* note 26, at 26-30.

programs, insurance, and private payments.[32] Also like the rest of the healthcare industry, some portions of the home care workforce are now unionized.[33]

As the industry has transformed, so too have the duties and expectations of home care workers. The job of the home care worker is now a "true vocation that, although poorly paid, is the primary means of support for millions of workers and their families," as well as the primary means of care for millions of clients.[34] Moreover, home care workers now provide a vast array of practical and physical support to consumers, far beyond the originally-contemplated task of "fellowship."[35] Among other duties, they shop for food, prepare meals, and feed consumers; they make beds, do laundry, and clean consumers' homes; they provide personal care services, such as help with toileting, bathing, exercising, and grooming; they might pay bills, run errands, and travel with consumers to doctor's offices and other appointments.[36]

In addition, home care workers provide skilled labor and draw on specific knowledge. Many are certified home health aides who undertook coursework to

---

[32] PHI comment, *supra* note 1, at 5-6.
[33] *See* Seavey, *supra* note 26, at 29.
[34] PHI comment, *supra* note 1, at 3.
[35] *Id.* at 5.
[36] Molly Biklen, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Colum. Hum. Rts. L. Rev. 113, 132 (2003).

obtain their qualifications.[37] Workers insert catheters, administer enemas, turn clients in bed, tube-feed, insert suppositories, check vital signs and functions, and administer medications.[38] Because many publicly-funded home care programs condition consumers' eligibility on the level of care they require—often equal to what the individuals would receive in a nursing home—those receiving services at home are older, frailer, and require more care than consumers in the past.[39] As a result, home care workers often perform the same tasks that workers employed in nursing homes do, but without the close support from and immediate access to health care professionals that their counterparts in hospitals, nursing homes, and assisted living facilities receive[40]—and without the wage and hour protections that their counterparts enjoy.

II. THE CONTEMPORARY HOME CARE INDUSTRY IS PLAGUED BY SIGNIFICANT LABOR SHORTAGES AND HIGH TURNOVER, WHICH STEM FROM LOW JOB QUALITY AND ADVERSELY AFFECT THE DELIVERY OF SERVICES.

Because of the population and policy trends discussed above, the demand for home care services is continuing to grow. Between 2012 and 2022, demand is

[37] *Id*.
[38] *Id.*
[39] PHI comment, *supra* note 1, at 5.
[40] *Id. See also* Biklen, *supra* note 36, at 132-33.

projected to increase by almost 50 percent.[41] Yet the current number of home care workers is insufficient to meet demand,[42] and turnover rates average around 50 percent annually.[43] These factors adversely affect quality of home care services and highlight the need for job quality improvements.

A. INCREASINGLY SEVERE SHORTAGES OF HOME CARE WORKERS AND HIGH TURNOVER RATES INHIBIT THE SYSTEM'S ABILITY TO MEET SERVICE NEEDS AND RESULT IN HIGHER COSTS.

The health care industry faces "a critical shortage" of home care workers.[44] The industry is plagued by high job vacancy rates, shortages of qualified staff, and difficulties recruiting and retaining workers.[45] A 2007 survey of state Medicaid agencies and elder care agencies found that 97 percent of states reported experiencing "serious" or "very serious" shortages in their direct care workforce.[46]

---

[41] Bureau of Labor Statistics, U.S. Dep't of Labor, *Fastest Growing Occupations*, Employment Projections (Feb. 1, 2012), http://www.bls.gov/emp/ep_table_103.htm (using figures for personal care aides, and home health aides).
[42] Institute of Medicine, *Retooling for an Aging America: Building the Healthcare Workforce* 200 (2008).
[43] PHI comment, *supra* note 1, at 7.
[44] Melissa A. Simon et al., *Path Toward Economic Resilience for Family Caregivers: Mitigating Household Deprivation and the Health Care Talent Shortage at the Same Time*, 53 Gerontologist 861, 862 (2013).
[45] *See* Seavey, *supra* note 26, at 68.
[46] PHI & Direct Care Workers' Ass'n of N.C., *The 2007 National Survey of State Initiatives on the Direct-Care Workforce: Key Findings* 2 (2009), *available at* http://phinational.org/sites/phinational.org/files/clearinghouse/PHI-StateSweepReport%20final%2012%209%2009.pdf.

In a separate study, representatives of every Michigan long-term care provider interviewed reported difficulty recruiting and retaining workers.[47] A survey of all long-term care providers in Pennsylvania found that nearly 70 percent of providers had significant problems with either recruitment or retention, and 35 percent reported that these problems were "extreme."[48]

Labor shortages have adverse effects on consumers, who are often unable to obtain home care workers to provide assistance with self-care and everyday tasks. Lateef McLeod, a member of *amicus* Hand in Hand**,** who receives services in his home in order to live independently,[49] noted in his comments in support of the Rule, "It's hard to find qualified [personal care assistants (PCAs)] because this type of work generally doesn't pay well or provide benefits. Moreover, PCAs do not have federal minimum wage and overtime protections, and there are few, if any, job protections. All of this limits the pool of potential employees."[50] Indeed, recent studies indicate that the lack of an adequate workforce is a key barrier to

---

[47] Hollis Turnham with Steven L. Dawson, *Michigan's Care Gap: Our Emerging Direct-Care Workforce Crisis* 19 (Apr. 2003), *available at* http://www.phinational.org/sites/phinational.org/files/clearinghouse/MI%20Care%20Gap%20Publicn.pdf.

[48] *See* Robyn Stone with Joshua M. Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis* 13 (Oct. 2001), *available at* http://aspe.hhs.gov/daltcp/reports/ltcwf.htm.

[49] Lateef McLeod comment on NPRM, WHD-2011-0003-9170 (Mar. 21, 2012).

[50] Lateef McLeod, *A Strong PCA Workforce Is Essential to Making Olmstead a Reality* (July 24, 2013), http://phinational.org/blogs/strong-pca-workforce-essential-making-olmstead-reality.

successfully transitioning individuals from nursing homes back into the community.[51]

Labor shortages also have serious effects on consumers' loved ones: A reduced pool of workers places more pressure on family caregivers, who face significant physical, mental, and emotional challenges in their caregiving roles.[52] Family caregivers face severe economic challenges as well. Research shows that family caregivers who return to full-time employment after caregiving are more likely to earn lower wages, have a "benefit-poor" job, and receive reduced retirement benefits. The lower a family's income, the more significant these obstacles become.[53]

Compounding the problems caused by labor shortages, the industry also suffers from stunningly high turnover rates. Turnover—averaging between 44 and 65 percent a year[54]—places major financial burdens on employers. It increases separation costs, such as those associated with exit interviews and other processing; vacancy costs, such as those associated with temporary staffing; and replacement and training costs associated with new hires. Indeed, studies have shown that each incidence of turnover increases the direct cost of providing

[51] *See* PHI comment, *supra* note 1, at 8.
[52] *See* AARP comment, *supra* note 19, at 3.
[53] *See* Simon et al, *supra* note 44, at 862.
[54] Direct Care Alliance comment, *supra* note 21, at 4.

services by at least $2,500.[55] Turnover also produces service gaps, which can force consumers into less preferable and more costly settings, such as long-term care institutions. Service gaps can also cause individuals to go without care, increasing their risk of adverse events such as falls, or potentially exacerbating health problems. This, in turn, affects federal, state, and local governments, which bear most of the cost of long-term care through Medicaid and Medicare.

High worker turnover also decreases quality of care. When workers leave their jobs, consumers "experience an interruption of services and the burden of getting used to and training [a] new employee" and "may have to accept a period of potential low quality or unsatisfactory care while the new employee gains experience."[56] High turnover rates in health care settings generally have been linked to greater use of physical restraints, catheters, and psychoactive drugs, as well as more contractures, pressure ulcers, and other quality-of-care deficiencies.[57]

---

[55] Dorie Seavey, *The Cost of Front-Line Turnover in Long-Term Care* 11 (2004), *available at* http://www.phinational.org/sites/phinational.org/files/clearinghouse/TOCostReport.pdf.

[56] Lori Simon-Rusinowitz et al., *Expanding the Consumer-Directed Workforce by Attracting and Retaining Unaffiliated Workers*, 11 Care Mgmt. Js. 74, 74 (2010).

[57] *See* Linda Barbarotta, *Direct Care Worker Retention: Strategies for Success* 5 (January 2010), *available at* http://www.leadingage.org/uploadedFiles/Content/About/Center_for_Applied_Research/Publications_and_Products/Direct%20Care%20Workers%20Report%20%20FINAL%20(2).pdf.

B. POOR JOB QUALITY IN THE HOME CARE INDUSTRY IS A MAJOR DRIVER OF THESE LABOR MARKET PROBLEMS.

Despite the great value of the service provided, home care work is low-paid, comes with few benefits, and is characterized by high stress. In 2010, the median hourly wage for home care workers was $9.40, nearly $7.00 less than the national median.[58] Wages for home health aides and personal care aides have stagnated over the past decade: Adjusted for inflation, the median wage has remained virtually unchanged at under $8.00 per hour.[59]

Low wages are compounded by the part-time, episodic nature of home care employment. In 2011, 59 percent of aides reported working part time for at least part of the year.[60] The result is median annual earnings of only $13,689.[61] And because shifts are often short and unpredictable, workers bear the risk of lost hours and income when a consumer refuses services, reduces services, or is moved into a care facility.[62] In 2009 56.2 percent of home care workers lived in households that

[58] PHI comment, *supra* note 1, at 6.
[59] *Id*.
[60] PHI, *Facts 3: America's Direct-Care Workforce* 4 (Nov. 2013), *available at* http://phinational.org/sites/phinational.org/files/phi-facts-3.pdf.
[61] Heidi Shierholz, *Low Wages and Scant Benefits Leave Many In-Home Workers Unable to Make Ends Meet* 18 (Nov. 2013), *available at* http://s1.epi.org/files/2013/bp369-in-home-workers-shierholz.pdf. This figure includes any fringe benefits that workers receive.
[62] Seavey, *supra* note 26, at 60.

relied on at least one public assistance program.[63] And many home care workers rely on publicly funded healthcare, such as Medicaid, either because their employers do not offer health insurance coverage or because they cannot afford the required employee contribution.[64]

Home care workers also experience high levels of job stress[65] and face a significant risk of workplace injury.[66] They have few or no opportunities for job advancement and perceive a general lack of respect from their employers.[67] A New Hampshire study concluded that although the typical home care aide has "significant knowledge and insight concerning the client's condition, he or she is often ignored, treated as invisible by the rest of the health care system."[68]

In short, low pay and poor benefits define the home care industry and lead to significant staff shortages and turnover. Research shows that "[a] major factor in

---

[63] *Id.* at 67.
[64] Health Resources and Services Administration, *Nursing Aides, Home Health Aides, and Related Health Care Occupations—National and Local Workforce Shortages and Associated Data Needs* 10 (Feb. 2004), *available at* http://bhpr.hrsa.gov/healthworkforce/reports/rnhomeaides.pdf.
[65] Seavey, *supra* note 26, at 45.
[66] Brian J. Taylor & Michael Donnelly, *Risks to Home Care Workers: Professional Perspectives*, 8 Health, Risk & Soc'y 239, 245 (2006) (describing the hazards home care workers face, which include "access issues, hygiene and infection, manual handling, aggression and harassment, domestic and farm animals, fleas and safety of home equipment").
[67] Health Resources and Services Administration, *supra* note 64, at ix.
[68] *Id.* at 16.

the deficit of direct-care workers is the poor quality of these types of jobs"[69] and that "[o]ne of the reasons for the high turnover in the direct care workforce is . . . low wages and inadequate benefits."[70] Roy Gedat, a home care agency employer in Maine, noted that "[a]ttracting and retaining skilled and compassionate people is challenging enough. Over the years I've seen too many exemplary workers leave the profession because they just couldn't make it financially. And below minimum wage compensation is just one of the issues challenging the stability of this essential workforce."[71]

III. PROVIDING MINIMUM WAGE AND OVERTIME PROTECTIONS TO HOMECARE WORKERS IMPROVES QUALITY OF SERVICES, AND CAN BE DONE WITHOUT INCREASING COSTS TO CONSUMERS OR RENDERING HOME CARE BUSINESSES UNPROFITABLE.

Extending minimum wage and overtime protections to more home care workers improves quality of care. And it can be done without increasing costs to consumers or rendering businesses unprofitable.[72] Indeed, in the fifteen states that already extend state minimum wage and overtime protections to some or all home

[69] Institute of Medicine, *supra* note 42, at 200.
[70] AARP comment, *supra* note 19, at 4.
[71] PHI, *We can't wait!: Americans Speak Out for Fair Pay for Home Care Workers* 25 (April 2013), *available at* http://phinational.org/sites/phinational.org/files/articles-commentaries/fair-pay-stories.pdf.
[72] *See, e.g.*, PHI, *Michigan Home Care Industry Growth Before and After Extending Labor Protections to Home Care Aides, supra* note 7.
[73] *See, e.g.*, PHI, *Michigan Home Care Industry Growth Before and After Extending Labor Protections to Home Care Aides, supra* note 7.

care workers, the industry is profitable and growing.[73] These states' experiences, along with the experiences of numerous providers and consumers, demonstrate the economic feasibility of providing basic protections to home care workers, as well as the care advantages of doing so.

A. Extending wage protections improves quality of care by reducing turnover, ameliorating labor shortages, and improving job satisfaction.

Just as poor job quality for direct care workers reduces quality of care for direct care consumers, the opposite is also true: Improving workers' wages, benefits, and working conditions enhances consumer care.[74] One study found "a very strong relationship between job satisfaction and quality of patient care."[75] Other studies of the correlation between workers' job satisfaction and the effects on consumers have reached similar conclusions.[76] As economists have observed, "[t]he outcomes of care recipients are deeply intertwined with the fortunes of care workers."[77]

---

[73] CO, HI, IL, ME, MD, MA, MI, MN, MT, NV, NJ, NY, PE, WA, WI. PHI, *State-by-State Projected Demand for New Direct-Care Workers*, *supra* note 8.
[74] Institute of Medicine, *supra* note 42, at 214.
[75] Alex Robertson, et al., *Nurses' Job Satisfaction and the Quality of Care Received by Patients in Psychogeriatric Wards*, 10 Int'l J. Geriatric Psychiatry 575, 575 (1995).
[76] *Id.*
[77] Eileen Appelbaum and Carrie Leana, *Improving Job Quality: Direct Care Workers in the US* 8, Center for Economic and Policy Research (Sept. 2011).

States that have extended minimum wage and overtime protections to home care workers report advantages to consumers, providers, and employees. In 2006, Michigan eliminated its version of the companionship exemption; disability rights advocates, who supported the state's change, "saw minimum wage and overtime protections as essential to protecting the civil rights of people with disabilities as well as the right, moral treatment of valued working people."[78] Advocates have since noted that the changes did not result in workers losing work hours or consumers losing service hours; in fact, the policy has helped the state create a "stronger, more professionalized workforce."[79]

Likewise, New York's recent Medicaid redesign, which included a significant wage increase for Medicaid-funded home care workers, has improved patient care.[80] The law has eased service disruptions due to turnover by eliminating a wage disparity among the state's Medicaid-funded home care programs that had encouraged workers to leave their established consumers for higher-paying

[78] Dohn Hoyle & RoAnne Chaney, *Guest Commentary: It Worked in Michigan; Raise Wages for Home Care Workers across the Nation*, Detroit Free Press (Feb. 24, 2013), http://archive.freep.com/article/20130224/OPINION05/130224064/Guest-commentary-It-worked-in-Michigan-Raise-wages-for-home-care-workers-across-the-nation.

[79] *Id.* For more Michigan experiences, *see* PHI, *We can't wait!: Americans Speak Out for Fair Pay for Home Care Workers*, *supra* note 71, at 52-55.

[80] New York State Home Care Worker Parity Act, Public Health Law § 3614-c.

positions in other programs.[81] Similarly, after San Francisco's In-Home Supportive Services Program adopted a living wage policy, turnover among workers fell by 57 percent.[82] And in Illinois, where payment reforms boosted home care reimbursement rates from $11.06 in 2004 to $16.23 in 2009 and simultaneously raised home care workers' pay, Addus Healthcare, a large multi-state agency, found that turnover plummeted from 54 percent to 26 percent.[83]

Providers' and consumers' testimonials also illustrate the care advantages of extending minimum wage and overtime protections. For example, Karen Kulp's home care agency in Pennsylvania pays minimum wage and overtime. Her agency creates a "care team" of two or three aides for consumers who require longer hours of care. The average length of employment at Kulp's agency is nearly three years, whereas industry-wide, three-quarters of home care workers have been employed for less than 12 months. Kulp reported, "Our clients appreciate the quality and continuity of care we provide as a result of this stability."[84]

---

[81] Jason Helgerson et al., *New York's DSRIP Program: A Model for Reforming the Medicaid Delivery System* (Dec. 11, 2014) (Center for Health Care Strategies webinar) *available at* http://www.chcs.org/media/CHCS-DSRIP-Presentation-Slides.pdf.

[82] Candace Howes, *The Impact of a large wage increase on the workforce stability of IHSS Home Care Workers in San Francisco County* (Nov. 2002) (working paper) (available online at http://laborcenter.berkeley.edu/pdf/2002/Howes.pdf).

[83] Seavey, *supra* note 26, at 71.

[84] *Redefining Companion Care: Jeopardizing Access to Affordable Care for Seniors and Individuals with Disabilities: Hearing before the House Subcommittee on Workforce Protections, Committee on Education and the Workforce* 113th

Phil Garner runs an agency in Tennessee and pays an overtime premium to his workers. He explained, "Even though we are not required to do so, Buffalo River Services has always paid its workers time and a half for working overtime. We also believe that providing these benefits has helped us attract and keep the high-quality staff we need to provide the care that has made us a 'provider of choice' for the Tennessee Department of Intellectual and Developmental Disabilities since 1998. Investing in our employees allows us to stay competitive and attract good candidates who have the aptitude—and, more importantly, the attitude—to be excellent at their jobs."[85]

Agency employers and provider associations from a range of states submitted comments supporting DOL's Rule.[86] So did consumers.[87] *Amicus*

Cong. (Nov. 20, 2013) (statement of Karen Kulp, president of Home Care Associates).

[85] Phil Garner, *Those who work in home care need upgrades in pay,* Knoxville News Sentinel (May 4, 2013, 3:00 AM), http://www.knoxnews.com/opinion/columnists/phil-garner-those-who-work-in-home-care-need-in.

[86] *See, e.g.*, Judy Clinco comment on NPRM, WHD-2011-0003-0075 (Jan. 13, 2012); Roy Gedat comment on NPRM, WHD-2011-0003-0239 (Jan. 24, 2012); Janis Durick comment on NPRM, WHD-2011-0003-0188 (Jan. 18, 2012); Mitchell Mandich comment on NPRM, WHD-2011-0003-0886 (Feb. 9, 2012); Linda Sutlic comment on NRPM, WHD-2011-0003-0189 (Jan. 18, 2012). For more comments from employers, *see DCA Members, Allies Comment on Proposed Rule*, Direct Care Alliance (Feb. 7, 2012), http://blog.directcarealliance.org/2012/02/dca-members-allies-comment-on-proposed-rule/.

[87] *See, e.g.,* National Consumer Voice for Long-Term Care comment on NPRM, WHD-2011-0003-9244 (Mar. 21, 2012); Family Values @ Work comments on NPRM, WHD-2011-0003- 8839 (Mar, 20, 2012) (referencing its national network

National Consumer Voice for Quality Long-Term Care submitted comments on behalf of many additional consumer organizations. The comments included stories from individuals noting that the Rule would "attract more and better qualified workers, helping to ease the chronic recruitment problems in home care," and that it would "decrease the turnover rate."[88]

In addition to voicing support for fair pay for workers, consumers noted that the Rule's wage and hour recordkeeping requirement is manageable and supports the consumer-worker relationship. *Amicus* Hand in Hand member Jessica Lehman is a wheelchair user who submitted comments in support of DOL's Rule. She has always tracked hours and pay, and she stressed that "[i]t is easy to do and necessary for protecting workers and creating sustainable jobs."[89] Similarly, Sascha Bittner, another member of *amicus* Hand in Hand, is an employer with a disability who explained in her comments, "[T]hough the paperwork of recording the hours an attendant works as well as other pertinent information may seem like a hassle, I have done it for years, easily, using my computer, and it means I don't make errors in calculating workers' wages, so it is a win-win for everyone."[90]

---

of 16 state and local coalitions); Lateef McLeod comment, *supra* note 49; Sascha Bittner comment on NPRM, WHD-2011-0003-3775 (Feb. 19, 2012).

[88] National Consumer Voice for Long-Term Care comment, *supra* note 87.

[89] Jessica Lehman comment on NRPM, WHD-2011-0003-6706 (Mar. 21, 2012).

[90] Sascha Bittner comment, *supra* note 87.

B. In states that extend minimum wage and overtime protections to home care workers, the home care industry overall is profitable and growing—and consumers have not experienced diminished quality of services or increased costs.

Improved job quality would undoubtedly ameliorate labor shortages, stabilize the workforce, and enhance quality of care. Opponents of DOL's Rule instead focus on the problem of costs. They argue that employers cannot afford to extend overtime and minimum wage protections without raising costs to consumers or risking the profitability of their businesses. These claims are without merit. In fact, employers who extend minimum wage and overtime protections to home care workers continue to run profitable home care agencies, while delivering better care, sometimes even at lower cost.

Consider the experience of Michigan. The number of home care establishments in the state grew faster in the five years after 2006, when minimum wage and overtime protections were extended to home care workers, than in the five years prior to the change.[91] Likewise, the home care industry is profitable and growing in the other 14 states that already extend state minimum wage and overtime protections to some or all home care workers.[92]

---

[91] PHI, *Michigan Home Care Industry Growth Before and After Extending Labor Protections to Home Care Aides, supra* note 7; PHI, *State-by-State Projected Demand for New Direct-Care Workers*, *supra* note 8.

[92] PHI, *State-by-State Projected Demand for New Direct-Care Workers*, *supra* note 8.

In fact, requiring overtime pay and increasing wage floors can actually decrease overall costs. As noted above, New York's recent Medicaid redesign—designed to simplify the state's Medicaid system and curb skyrocketing costs—included a significant wage increase for Medicaid-funded home care workers.[93] Since the Wage Parity Law went into effect in 2011, spending per Medicaid recipient has decreased.[94]

Opponents of reform, including Plaintiffs-Appellees, claim that extending minimum wage and overtime protections to home care workers will force consumers into nursing homes. The data simply do not support this assertion. Even where minimum wage and overtime protections apply, properly managed home-based services are much more cost-effective than institutional care.[95] And institutionalization rates in states with and without existing minimum wage and overtime coverage are almost exactly the same—approximately 24 percent.[96] Indeed, from 1980 to 2008, Illinois, a state with a unionized home care workforce

---

[93] New York State Home Care Worker Parity Act, Public Health Law § 3614-c.
[94] *See* Helgerson et al., *supra* note 81.
[95] *See, e.g.*, Wendy Fox-Gage & Jenna Walls, *State Studies Find Home and Community-Based Services to be Cost-Effective* (2013), *available at* http://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/state-studies-find-hcbs-cost-effective-spotlight-AARP-ppi-ltc.pdf; AARP comment, *supra* note 19, at 15.
[96] PHI, *Institutionalization Rates in States that Extend Minimum Wage and Overtime Protection to Home Care Workers* (Jan. 2013), *available at* http://phinational.org/sites/phinational.org/files/research-report/institutionalization-data-brief.pdf.

that enjoys higher than average hourly wages and controls on overtime, saw a reduction in institutionalization rates despite an increase in the over-75 population.[97]

Opponents of the Rule also contend that it will cause consumer costs to skyrocket or care to suffer. These concerns are misplaced for several reasons. First, the actual impact of the overtime requirement will be slight, as high-hours cases are exceedingly rare. Less than 10 percent of home care workers nationally report working more than 40 hours a week, and of those, most work only slightly more than 40 hours.[98] In fact, most workers are employed part-time but would rather work full-time.[99]

Second, where workers are currently working more than 40 hours a week on multiple short-hours cases, employers can contain overtime costs by dividing cases

---

[97] Terri Harkin et al., *From $1 to $13 an Hour & Into the Future: The Story of Raising Workforce Standards and Strengthening Home Care Programs in Illinois* (Sept. 12, 2013)(presentation at the National HCBS Conference), *available at* http://nasuad.org/documentation/HCBS_2013/Presentations/9.12%2011.30-12.45%20Kennedy.pdf.

[98] *See* PHI, *Value the Care! Minimum wage and overtime for home care aides* 15 (Feb. 2012), *available at* http://phinational.org/wp-content/uploads/2012/02/phi-value-the-care-06.pdf. Nationally representative surveys show that less than 10 percent of aides report working more than 40 hours a week.

[99] *Id.* at 3.

more evenly among workers. This approach creates more full-time employment for the workers who want it while helping limit fatigue from overwork.[100]

Third, in those relatively few cases where an individual needs many consecutive hours of services or care, establishing long-term relationships among the individuals and multiple aides minimizes costs and improves continuity of care. Consumers who have multiple established caregivers are less likely to experience service disruptions in the inevitable event that a caregiver needs time off for an illness or personal or family emergency. Meanwhile, caregivers who do not routinely work more than 40 hours a week are less likely to suffer fatigue and burnout.[101]

A case study of three agencies—one based in Illinois, one based in New York, and the third operating in 20 states—demonstrates "that . . . it is possible to grow and run successful home care agencies that have reputations for high-quality care and pay overtime."[102] Using modern scheduling methods and staffing models to spread work among as many caregivers as possible without interrupting

---

[100] *See* PHI, *Can Home Care Companies Manage Overtime Hours? Three Successful Models* (2012), *available at* http://www.directcareclearinghouse.org/download/overtime-casestudies-20120209.pdf (profiling modern staffing and scheduling systems put in place by three profiled companies operating across the country).

[101] *See* PHI, *Value the Care!*, *supra* note 98, at 2.

[102] *See* PHI, *Can Home Care Companies Manage Overtime Hours?*, *supra* note 100, at 16.

continuity of care, these agencies have reduced overtime costs while maintaining high-quality service.[103]

Employers' and consumers' testimonials further support the proposition that overtime mandates neither increase costs nor diminish care. For example, Janis Durick runs an agency in Pennsylvania that pays its workers in compliance with minimum wage and overtime requirements. She reported, "It helps that we rarely assign overtime, because we find it's better for clients who need a lot of care to have a team of people covering them rather than just two or three people working lots of extra hours. That way, there are several people who know the client and his or her needs, who can step in for one another if someone has to take care of a sick child or gets sick themselves, or if they just need some time off to avoid burning out."[104] Similarly, Stevie Bass, who employs a team of nine aides to care for her disabled daughter in New Mexico, supports the Rule.[105] She noted that minimum wage and overtime protections signal to workers that they are respected as professionals, which enhances their job satisfaction and makes them more efficient caregivers.[106]

---

[103] *Id*. at 11.
[104] Janis Durick, *Pay home-care aides fairly*, Pittsburgh Post-Gazette (Apr. 10, 2013, 12:00 AM), http://www.post-gazette.com/opinion/Op-Ed/2013/04/10/Pay-home-care-aides-fairly/*stories*/201304100220.
[105] PHI, *We can't wait!*, *supra* note 71, at 5.
[106] *See Id.*

Even assuming, *arguendo*, that extension of minimum wages and overtime requirements result in some cost increases, the industry can afford to extend such benefits. Industry revenue grew at an average rate of 9 percent per year from 2001-2009; total industry revenue topped $84 billion in 2009.[107] Senior care and home care franchises' corporate revenues increased by 11.6 percent per year from 2007-2009.[108] Some of these agencies have unfairly benefitted from the minimum wage and overtime exemption, which acts to keep wages low.[109]

Furthermore, private agencies charge consumers approximately twice the hourly rate they pay to caregivers; in 2009, the average cost of agency-provided personal care services nationwide was $19.82 per hour, while the starting pay for workers was just $9.69 per hour.[110] In 2010, Medicaid paid personal care service agencies, $17.73 per hour, while workers received an average of only $9.40 per hour.[111]

---

[107] PHI comment, *supra* note 1, at 5. *See also* Kelly Kennedy, *Home health care is one of the most profitable franchises*, USA Today (May 7, 2012, 9:41 PM), http://usatoday30.usatoday.com/money/industries/health/story/2012-05-03/home-health-care-a-profitable-franchise/54813562/1.

[108] PHI comment, *supra* note 1, at 5.

[109] For-profit franchises Home Instead and Comfort Keepers, members of HCAA, are two of the three largest franchises, employing over 90,000 home care workers in over 1,200 franchise locations across the country.

[110] PHI, *Comparing the Cost of Personal Care Services and Caregiver Pay* 1 (Mar. 7, 2012), *available at* http://www.directcareclearinghouse.org/download/pcs-rates-and-worker-wages.pdf.

[111] *Id*.

Some for-profit agencies that have publicly opposed DOL's Rule, such as Home Instead and Comfort Keepers, operate in states that already provide minimum wage and overtime protections to workers. Many member organizations within Home Care Association of America (HCAA), including large franchises like Home Instead, operate in covered states. Eight HCAA agencies exist in New York City alone; Ann Arbor, Michigan has five, Newark, New Jersey has three, and Chicago, Illinois and Seattle, Washington each have ten.[112] These agencies cover their operating costs—and presumably even make a profit—despite being subject to minimum wage and overtime requirements. These facts clearly contradict Plaintiffs-Appellees' and others' claims that extending minimum wage and overtime coverage for workers is impossible or will lead to dire circumstances.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the District Court's ruling.

Dated: February 27, 2015

[112] Information gathered from a search of providers on the website of the Home Care Association of America, http://www.hcaoa.org.

Respectfully submitted,

By: /s/ Kate Andrias

Kate Andrias
University of Michigan Law School
625 South State Street
Ann Arbor, MI 48109
(734) 763-9697
kandrias@umich.edu

Catherine K. Ruckelshaus
Sarah Leberstein
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025
cruckelshaus@nelp.org
sleberstein@nelp.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6274 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: February 27, 2015

By: /s/ Kate Andrias

Kate Andrias
University of Michigan Law School
625 South State Street
Ann Arbor, MI 48109
(734) 763-9697
kandrias@umich.edu

Catherine K. Ruckelshaus
Sarah Leberstein
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025
cruckelshaus@nelp.org
sleberstein@nelp.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2015, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 27, 2015

By: /s/ Kate Andrias

Kate Andrias
University of Michigan Law School
625 South State Street
Ann Arbor, MI 48109
(734) 763-9697
kandrias@umich.edu

Counsel for Amici Curiae